The Application of the Goods and Services Tax to Real Property Transactions

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PRÉCIS

Nous vivons avec la taxe sur les produits et services (TPS) depuis maintenant quatre ans. Bien que la taxe et le processus de transition aient fait l'objet de critiques partagées, un certain nombre de complexités et d'anomalies dans la législation sur la TPS sont devenues apparentes lorsqu'on a tenté d'appliquer ses dispositions aux opérations privées et commerciales. Le secteur immobilier ressort comme l'un des domaines ayant présenté des difficultés d'interprétation particulières. Cette situation peut être attribuée principalement aux objectifs de politique particuliers sous-tendant les dispositions de la TPS s'appliquant à l'immobilier et aux dispositions complexes prévues pour l'application de la politique. Dans le domaine de l'immobilier résidentiel, la politique générale comporte par exemple l'imposition unique de la TPS lors de la construction d'une «nouvelle» habitation et la réduction du taux de taxe réel sur les résidences principales de particuliers au moyen d'une série de remboursements. À l'égard de l'immobilier non résidentiel, les règles diffèrent grandement de celles qui s'appliquent aux opérations autres qu'immobilières, avec comme résultat que de nombreuses opérations, entreprises dans des circonstances non commerciales par des personnes qui ne sont pas autrement touchées par le régime de la TPS, sont assujetties à la taxe. Cette situation entraîne souvent des coûts de taxe non prévus et des obligations de conformité, pour une des parties ou les deux.

L'auteur examine certaines des règles qui régissent les opérations immobilières courantes et les points qui doivent être généralement pris en compte pour s'assurer de l'application appropriée de la TPS. Il aborde ensuite les obligations respectives du vendeur et de l'acquéreur dans les opérations immobilières assujetties à la TPS, et met l'accent sur l'obligation de l'acquéreur de payer la TPS, la responsabilité du vendeur de percevoir et de verser la TPS, et les circonstances pouvant éliminer ces obligations ou résulter en un changement de la responsabilité.

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Enfin, l'auteur examine les dispositions de la TPS en vertu desquelles des opérations immobilières particulières sont fréquemment exonérées, ainsi que les règles régissant les fournitures combinées d'immeubles et de biens meubles, les immeubles résidentiels bâtis par le propriétaire, les forclusions et actes de renonciation, les arrhes, les renonciations et les retenues de garantie, les coentreprises et certains remboursements.

ABSTRACT

The goods and services tax (GST) has been with us for four years, and although both the tax and the transitional process have received mixed reviews, a number of complexities and anomalies in the GST legislation have become apparent in the effort to apply its provisions to both private and commercial transactions. The real estate sector stands out as one area in which particular interpretive difficulties have arisen; this may be attributed primarily to the unique policy objectives that underlie the GST provisions concerning real estate and the complex legislative provisions designed to give effect to the policy. In the area of residential real estate, for example, general policy intentions include the imposition of GST on a one-time basis as "new" housing is constructed and the reduction of the effective tax rate on principal residences of individuals through a series of rebates. With respect to non-residential real estate, the rules differ significantly from those that apply to non-real-estate matters, with the result that many transactions undertaken in non-commercial circumstances by persons who otherwise have no involvement with the GST system are subject to the tax. This often results in unanticipated tax costs and compliance obligations for one or both of the parties.

The author reviews some of the rules that govern common real estate transactions and the issues that typically must be considered in order to ensure that the application of the GST is properly addressed. He then discusses the respective obligations of vendor and purchaser in GST-taxable conveyances of real property, with particular emphasis on the purchaser's obligation to pay GST, the vendor's responsibility to collect and remit the tax, and the events that may eliminate these obligations or result in a shifting of liability. Finally, the author examines the GST provisions that frequently exempt specific types of real estate conveyances, as well as the rules that govern combined supplies of real and personal property, owner-built residential properties, foreclosures and quit claims, deposits, forfeitures and holdbacks, joint ventures, and certain rebates.

INTRODUCTION

The goods and services tax (GST) has been with us for four years,[1] and although we have had an opportunity to adjust to the new realities presented

[1] Notwithstanding the current speculation concerning the possible replacement of the GST, there appears to be a widespread expectation that a sales or consumption tax in the nature of the GST will be with us for a long time to come.

by the tax, it is far from clear that tax practitioners, businesses, individual consumers, and even those responsible for administering the tax have fully come to grips with its complexities. In part, this may be attributed to the ambiguities that will always emerge when a nation adopts a new taxation regime; however, much of the continuing confusion arises from the complexity of the legislation itself, particularly in those areas where unique rules apply to specific sectors, such as real estate transactions.

It is fair to characterize the GST as a complex tax. Extensive and cumbersome change-of-use rules, self-supply rules, exemptions, and transitional rules can make it difficult to determine whether a particular transaction or event is taxable. Even after four years of experience with the tax, this problem is compounded by a dearth of case law and administrative guidance.[2] In addition, the legislation casts vendors (and other suppliers of taxable goods and services) in the role of tax collector, and imposes on them the ultimate responsibility for correctly analyzing, interpreting, and applying the Act. Consequently, the vendor (and ultimately his or her tax advisers) will have to decide whether a particular transaction is exempt from GST, or whether it will trigger a deemed sale that results in the imposition of a tax burden on the client. The purpose of this article is to provide an overview of the issues frequently confronted by practitioners who must advise their clients on the application of the GST to real estate transactions. To ensure an understanding of the concepts that underlie the GST, the article begins with a general overview of how the tax is applied and the terminology that is used in the Act.

OVERVIEW OF THE GST

General

The GST was implemented by the passage of Bill C-62,[3] which contained extensive amendments to the Excise Tax Act[4] and consequential amendments to other federal statutes. Essentially, the GST is imposed by part IX of the Act. Bill C-62 enacted a new part VIII of the Act, which set out certain transitional measures, including the federal sales tax inventory

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[2] Revenue Canada has issued an extensive series of GST memoranda addressing various aspects of the tax, including *GST Memorandum* 300-4-1, "Real Property," March 8, 1991, which outlines the real property transactions that are exempt from GST, and *GST Memorandum* 300-6-5, "Real Property," January 2, 1991, which explains the timing of liability for GST in respect of certain real property transactions. However, these and other memoranda typically do little more than summarize the legislative provisions of the Act, often using the terminology that appears in the Act itself, and generally adding little commentary concerning Revenue Canada's interpretation of those provisions. Consequently, it is often difficult to glean from the GST memoranda any meaningful insight into Revenue Canada's administrative policies.

[3] An Act To Amend the Excise Tax Act, the Criminal Code, the Customs Act, the Customs Tariff, the Excise Act, the Income Tax Act, the Statistics Act, and the Tax Court of Canada Act; enacted as SC 1990, c. 45.

[4] RSC 1985, c. E-15, as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act.

rebate and a federal sales tax rebate for new housing,[5] and schedules V, VI, and VII, which provide for exempt supplies, zero-rated supplies, and non-taxable importations, respectively. Each of these concepts is examined below.

The GST is a broadly based consumption tax. Many transactions that were previously exempt from consumption or sales taxes now attract GST; the most notable example is services of virtually every type. The GST also applies to many real property transactions, and represents a significant cost to taxpayers who are unable to recover the tax and an administrative or cash flow burden to persons who are able to avoid or recover the tax through available tax credits[6] or rollovers.[7]

The GST is a value-added tax. In general terms, the object of the legislation is to impose the full burden of the tax on the final consumer of goods or services. This is accomplished through refundable tax credits ("input tax credits"), which may be claimed by intermediate parties who acquire material or service inputs in order to produce a taxable product or service.[8] For example, a manufacturer who pays GST on components that were purchased to manufacture a product for resale will, with limited exceptions, be entitled to receive a refund of the tax paid. The manufacturer, in turn, charges GST on the sale of the product to its customer. If the purchaser of the product is the ultimate consumer, he will not be entitled to an input tax credit and consequently will bear the full burden of the tax. However, if the purchaser acquires the product for resale or for use in providing a product or service that is subject to GST, he too will be entitled to an input tax credit. Generally, the only person who will not be entitled to such a credit is the ultimate consumer of the goods or services in question (in other words, the person who does not purchase the goods or services for use in providing a further taxable good or service).

Imposition of GST

The GST is imposed by subsection 165(l), which requires every recipient of a taxable supply made in Canada to pay to Her Majesty in right of Canada a tax in respect of the supply equal to 7 percent of the value of the consideration for the supply. Thus, the tax will apply if a "taxable

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[5] Two rebates provided for in the Act apply to qualifying new home purchases. One such rebate (the federal sales tax rebate) is provided for in section 121, the other (the new housing rebate) in section 254. A third rebate, provided for in section 257, permits recovery (in specified circumstances) of GST paid on the acquisition of real property by persons who are not registered for GST purposes. Each of these rebates is examined in this article.

[6] The tax credits referred to are "input tax credits," which are discussed further below.

[7] For example, in circumstances where real property is conveyed as part of a sale of all or substantially all of the assets of a business, subsection 167(1.1) will permit the vendor and purchaser to jointly elect to have the transaction occur on a non-taxable basis. As a consequence, the transfer of the property (including the real property) will not be subject to GST, provided that the purchaser is GST-registered.

[8] The rules governing eligibility for input tax credits are set out in sections 169 and 170 of the Act.

supply" is made in Canada.[9] It is generally a question of fact whether a particular supply was made in Canada, although certain provisions in the Act deem a supply to have been made inside or outside Canada, depending on the circumstances.[10] A supply of real property situated in Canada is deemed to be a supply made in Canada.[11]

The other prerequisite to the application of GST is the presence of a "taxable supply." That term is defined as "a supply that is made in the course of a commercial activity."[12] To analyze the application of GST to a particular transaction, it is necessary to understand the scope of the terms "supply" and "commercial activity" as defined in the Act.

Supply

A supply is broadly defined as the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift, or disposition.[13] Thus, a supply of property will be made in most cases where title to or possession of goods is transferred or delivered. A supply includes relatively obvious transactions, such as the granting of legal title to property or the transfer of a possessory interest pursuant to a lease or licence. It may also include transfers or conveyances that may not be immediately recognized as supplies, such as the distribution of partnership property to partners on the dissolution of a partnership,[14] or the distribution of property to shareholders on the winding up of a corporation.[15] The definition of "supply" is subject to sections 133 and 134 of the Act. Section 133 states that the entering into an agreement to supply property or a service is deemed to be a supply of the property or service made at the time the agreement is made, and the subsequent provision of the property or service pursuant to the agreement is deemed to be part of the same supply. Section 134 states that a transfer of property or of an interest in property for the purpose of securing payment of a debt

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[9] To ensure that GST cannot be avoided by acquiring taxable supplies outside of Canada and subsequently importing the goods or services, divisions III and IV of part IX of the Act were enacted. Division III imposes GST on the value of goods imported into Canada. Division IV taxes importations of intangible property and services, and (in limited circumstances), goods. Neither of these divisions will apply to supplies of real property.

[10] Sections 142 to 144.

[11] Paragraph 142(l)(d).

[12] Subsection 123(1).

[13] Ibid.

[14] This is confirmed by Revenue Canada in two items appearing in its Question and Answer Database. In particular, the reader is referred to Q10239 (July 1991) and Q11720 (November 1991). See Revenue Canada, Question and Answer Database [database online].

[15] With respect to a corporate winding up, it should be noted that section 272 of the Act provides that the transfer of property to a corporate shareholder as a result of the winding up of a subsidiary is deemed not to be a supply, provided that the parent owned not less than 90 percent of the issued shares of each class of the capital stock of the subsidiary immediately prior to the winding up. In circumstances where the conditions of section 272 are not met, however, the distribution of the property will be considered a supply.

is deemed not to be a supply, and the subsequent release or reconveyance of the property or interest by the secured party to the debtor is also deemed not to be a supply. Section 133 ensures that in cases where a payment or partial payment is tendered on the signing of the agreement but before the conveyance of the property, GST is payable in respect of the prepayment at that time.[16] Section 134 simply ensures that GST is not payable as a consequence of the giving or releasing of security.

It is clear from the definition of "supply" that for a transaction to constitute a supply, there must be a provision of property or a service. The definition of "property" is extremely broad, and includes any property (whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal), a right or interest of any kind, a share, and a chose in action. The definition does not include money.[17] A "service" means anything other than property, money, or anything supplied to an employer by an employee in the course of or in relation to the office or employment of the employee.[18] Additionally, the term "real property" is specifically defined in subsection 123(1) of the Act to include

> (a) in respect of property in the Province of Quebec, immovable property and every lease thereof,
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> (b) in respect of property in any other place in Canada, messuages, lands and tenements of every nature and description and every estate or interest in real property, whether legal or equitable, and
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> (c) a mobile home, a floating home and any leasehold or proprietary interest therein.

Consequently, the transfer or conveyance of any legal or equitable estate or interest in land will constitute a supply of real property. As is noted below, the definitions of "real property" and "commercial activity" together lead to the result that a wide variety of transactions involving land will be subject to GST.

Commercial Activity

For a supply of property or a service to attract GST, the supply must be made in the course of a "commercial activity," which is defined in subsection 123(1):

> "[C]ommercial activity" of a person means
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> (a) a business carried on by the person (other than a business carried on by an individual or a partnership, all of the members of which are individuals, without a reasonable expectation of profit), except to the extent to which the business involves the making of exempt supplies by the person,

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[16] In effect, section 133 precludes the argument that GST cannot be payable because no supply has yet been made. It should be noted, however, that this section will not require payment of GST if the amount paid at the time the agreement is executed is merely a deposit, since the tax is not payable in respect of a deposit until the deposit is applied as consideration for the supply. The rules relating to deposits are examined further below.

[17] Ibid.

[18] Ibid.

> (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in by an individual or partnership, all of the members of which are individuals, without a reasonable expectation of profit), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
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> (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply.

In general terms, a person is not considered to be engaged in a commercial activity unless that person is either carrying on a business[19] or engaged in an adventure or concern in the nature of trade. Even these activities, if carried on by individuals or qualifying partnerships, will not be a commercial activity in the absence of a reasonable expectation of profit. However, supplies of real property are afforded special treatment in the Act; any such supply (other than supplies that are specifically exempt from GST) constitutes a commercial activity, and therefore triggers a GST liability (subject to limited exceptions noted below). Paragraph (c) of the definition of "commercial activity" encompasses not merely sales of real property, but any non-exempt supply, including leases, licences, and any other transfer of an interest in real property.

As a result of the definition of commercial activity, many private transactions between individuals will not be taxable. For example, the sale by an individual of a used car will not typically attract GST, unless the individual was in the business of trading in used cars. However, owing to paragraph (c) of the definition of "commercial activity," many private transactions between individuals involving real property will be subject to GST, because any activity involving a supply of real property falls within the definition of "commercial activity" unless the transaction is specifically exempted.

Liability for and Collection of GST

Liability for GST

Pursuant to subsection 165(1) of the Act, the *recipient* of a taxable supply made in Canada is liable for the GST that is payable in respect of the supply. Because the entitlement to claim any available input tax credits or rebates (and thereby reduce or eliminate the tax burden resulting from a taxable acquisition of property) is typically restricted to the recipient of the supply, it is important to correctly identify the recipient. The word "recipient" is defined in subsection 123(1) as follows:

> "[R]ecipient" of a supply of property or a service means

[19] Although the definition of "business" in the Act is similar to the definition of that word in the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended, it should be noted that the definition for GST purposes includes "any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement." Consequently, many rental activities that may be considered to produce property income for income tax purposes will be viewed as business activities for GST purposes.

> (a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
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> (b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and
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> (c) where no consideration is payable for the supply,
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> (i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,
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> (ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and
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> (iii) in the case of a supply of a service, the person to whom the service is rendered,
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> and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply.

Clearly, in cases involving an agreement to sell real property,[20] the recipient of the supply is the person who is liable for the payment of the purchase price pursuant to the agreement. This may lead to problems in circumstances where the conveyance of legal title is granted on closing to a transferee other than the purchaser named in the agreement, particularly if the former person is GST-registered and the latter person is not. Specifically, it may be argued that

1) the recipient of the sale (the person liable to pay GST) is the purchaser named in the agreement rather than the grantee, and consequently the grantee is not eligible to claim an input tax credit with respect to the sale; and

2) the purchaser named in the agreement has effectively assigned to the grantee the purchaser's interest in the property arising from the agreement, which assignment may (depending on the surrounding circumstances) constitute a GST-taxable supply. This specific scenario is examined in greater detail later in the article.

Notwithstanding the foregoing rule, in some circumstances the person who makes a taxable supply can become liable for the GST that arises from that supply. These situations, which typically occur when the supplier fails to discharge his obligation to collect the tax, are examined below.

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[20] Note that the definition of "recipient" does not require the agreement to be in writing; consequently, the possibility exists that a person may be a "recipient" by virtue of an unwritten agreement. This scenario may be somewhat problematic in the context of a real property transaction, as several Canadian jurisdictions have statutory provisions which render such unwritten agreements either void or unenforceable (in Ontario, for example, the Statute of Frauds, RSO 1990, c. S-19). However, because these provisions typically render such agreements unenforceable (rather than void or voidable), it is arguable that a purchaser pursuant to an unwritten agreement of purchase and sale is liable to pay the purchase price pursuant to an agreement that is valid, albeit unenforceable.

Collection of GST

With limited exceptions,[21] every person who makes a taxable supply is required to collect GST as an agent of the Crown in right of Canada,[22] and is deemed to hold the tax in trust for the Crown.[23] Every GST-registered person is required to file a GST return for each reporting period of that person,[24] and to remit to the receiver general that person's "net tax" (in general terms, GST collectible by that person during the period, less input tax credits claimed) relating to that period.[25] A non-registrant is required to file a return for any month in which net tax is remittable by that person,[26] and is required to remit the net tax not later than the due date of the return (the last day of the immediately following month).[27] It should be noted that the net tax is calculated with reference to the tax that became *collectible* by the person, not merely to the GST that was actually collected. Consequently, a supplier who fails to collect and remit GST is potentially liable for the amount of the uncollected or unremitted tax.

Zero-Rated and Exempt Supplies

Zero-Rated Supplies

A zero-rated supply is a taxable supply that is notionally taxed, but at a rate of 0 percent.[28] Thus, although it is not correct to say that zero-rated supplies are tax-exempt (in fact, as will be seen below, the classification of a supply as zero-rated is preferable to an exempt classification for both the supplier and the recipient), no tax liability will arise from the making of zero-rated supplies. Additionally, any person who makes zero-rated

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[21] One exception, which is examined later in this article, arises in circumstances involving the purchase of real property by a GST registrant (other than purchases of a residential complex by an individual), or where real property is sold by a non-resident vendor. A second exception to the requirement that a person making a taxable supply must collect GST arises in certain cases where the supplier qualifies as a "small supplier" and is not a GST registrant. Pursuant to section 148 of the Act, a person generally qualifies as a small supplier if total annual revenues from GST-taxable sales attributable to that person and all associated persons does not exceed $30,000. A person who qualifies as a small supplier is not required to register for GST purposes, although he may voluntarily apply for registration. If the person chooses not to register, any consideration for a taxable supply that becomes due (or is paid before it becomes due) to the person when the person is not registered is not subject to GST, *other than consideration for supplies of real property by way of sale*. In other words, unregistered small-supplier status effectively relieves from GST any supplies made by the person, other than sales of real property. Of course, as a non-registrant the small supplier will be ineligible for input tax credits.

[22] Subsection 221(1).

[23] Subsection 222(1).

[24] Subsection 238(1). A registrant's reporting period may be the fiscal year, fiscal quarter, or fiscal month of the person, depending upon the magnitude of GST-taxable revenues earned by the person.

[25] Subsection 228(2).

[26] Subsection 238(2).

[27] Subsection 228(2).

[28] Subsection 165(2).

supplies is still entitled to claim input tax credits for all GST paid in respect of purchases made in the course of making the zero-rated supply.

Categories of supplies that qualify as zero-rated are listed in schedule VI. None of these categories typically encompasses supplies of real property.

Exempt Supplies

Supplies that qualify for GST-exempt status are listed in schedule V; part I of that schedule deals specifically with exempt supplies of real property.[29] Exempt supplies are excluded from the definition of commercial activity. Consequently, an exempt supply does not attract GST because such a supply is not made in the course of a commercial activity and therefore cannot constitute a taxable supply. Additionally, persons who make exempt supplies are not permitted to claim input tax credits in respect of GST incurred by them in the course of making such supplies. The ineligibility for input tax credits arises because such credits are claimable by a registrant in respect of tax paid on the purchase of property or services only to the extent that the property or service is acquired for use in the registrant's commercial activities.[30] Because the making of an exempt supply does not qualify as a commercial activity, persons who make such supplies are denied input tax credits in respect of those activities, and are essentially treated as the ultimate consumer of taxable supplies received by them for that purpose.

Supplies of real property that are GST-exempt are examined in greater detail later in the article.

APPLICATION OF GST TO REAL PROPERTY GENERALLY

Taxable Supplies of Real Property

GST is generally payable in respect of any supply made in the course of a commercial activity. In the real property context, a commercial activity will be present in any case involving the non-exempt supply of real property, which includes messuages, lands, and tenements of every nature and description, as well as every legal or equitable estate or interest in real property. When the broad definition of the word "supply" is taken into consideration, it becomes apparent that unless a specific exemption is provided for in schedule V, the following transactions involve the making of a taxable supply:

- any sale, transfer, gift, or other disposition of real property;
- any barter or exchange of real property;
- any lease or rental of real property, or provision of a licence to use real property;

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[29] Additionally, part VI of schedule V enumerates a series of supplies that are exempt when made by public service bodies, and section 25 deals specifically with real property transactions engaged in by such bodies.

[30] Subsection 169(1).

• any conveyance or granting of an estate or interest in real property;

• any distribution of real property to partners as a consequence of the dissolution of a partnership;

• the settlement of real property on an inter vivos trust[31] and the distribution of real property by a trust to beneficiaries of the trust;[32] and

• any distribution of real property to shareholders as a consequence of the winding up of a corporation, unless the transfer is deemed not to be a supply by virtue of section 272 of the Act.[33]

The following events do not constitute a supply of real property:

• the acquisition of real property resulting from the statutory amalgamation of two or more corporations;[34]

• the distribution of real property to a qualifying shareholder as a consequence of the winding up of a subsidiary;[35] and

• the increase of a joint tenant's ownership interest in real property arising from the death of another joint tenant.[36]

Conveyances of Real Property

The foregoing rules support the conclusion that any conveyance of an estate in fee simple (essentially, complete ownership) of real property will be subject to GST unless a specific exemption applies. Additionally, because entering into an agreement of purchase and sale creates an

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[31] Pursuant to section 268 of the Act, the settlement of property on an inter vivos trust is deemed to be a supply by way of sale made by the settlor as supplier and the trust as recipient, and the consideration for this supply is deemed to be equal to the settlor's proceeds of disposition pursuant to the Income Tax Act. It should be noted, however, that Revenue Canada has taken the position that no GST is exigible in circumstances where real property is settled on a "bare trust." This position is outlined in greater detail in Revenue Canada's *GST Technical Information Bulletin* B-068, "Bare Trusts," January 20, 1993. Essentially, Revenue Canada takes the position that in situations involving a bare trust (a relationship that exists, in the department's view, when the trustee's sole duty is to deal with the property in accordance with the directions of the beneficial owner, with no discretion to be exercised by the trustee), the legal title that is settled upon the trust has no value. Consequently, although a supply occurs, the value of the supply is nil.

[32] Pursuant to section 269, the distribution is deemed to be a supply made by the trust for consideration equal to the amount determined under the Income Tax Act to be the proceeds of disposition of the property.

[33] In general terms, this would require that the shareholder receiving the property be a corporation that owns not less than 90 percent of the issued shares of each class of the capital stock of the corporation being wound up.

[34] Section 271.

[35] Section 272.

[36] Revenue Canada has taken the position that the resulting acquisition of a greater interest in the property by the surviving joint tenant(s) does not constitute a supply, since the death of the joint tenant results in the extinguishment of that person's interest in the property rather than the transmission of the interest to the surviving joint tenants. The reader is referred to Revenue Canada's Question and Answer Database, supra footnote 14, at Q13753, November 1993.

equitable interest in the property in favour of the purchaser, it is submitted that the assignment by the purchaser of its interest in the agreement to another person before closing constitutes the supply of an equitable interest in the property, and therefore a taxable supply (absent an exempting provision).[37] This conclusion is of particular concern in cases where a prospective purchaser enters into an agreement of purchase and sale, and before closing instructs the vendor that the transfer instrument should name a different entity as the grantee. This situation occasionally arises where the named purchaser is an unregistered individual or holding corporation, and a decision is made to acquire ownership through a registered corporation in order to ensure the availability of input tax credits and the application of the purchaser-remittance provisions of subsection 221(2).[38] However, the named purchaser remains liable for the purchase price pursuant to the agreement of purchase and sale; therefore, that person continues to be the recipient of the supply and is liable for the GST that arises in respect of the sale. If the named purchaser is not GST-registered, it will not be entitled to claim an input tax credit in respect of the GST payable on the purchase of the land. Additionally, because the purchaser-remittance procedure of subsection 221(2) applies only if the recipient is a registrant, the vendor will be exposed to liability for failing to collect the GST payable in respect of the sale.

Finally, although section 257 does provide for a GST rebate, which may be claimed by a non-registrant who incurs GST on the acquisition of real property and subsequently makes a taxable sale of the same land, the amount of the rebate cannot exceed the GST generated by the subsequent resale of the property. If the named purchaser assigns its interest in the land to another person for no consideration,[39] the GST arising from that assignment will be nil, and the amount of the rebate will be similarly restricted.

Leases of Real Property

Subject to certain exemptions relating to residential properties, the granting of a leasehold interest in real property is subject to GST. The tax will be calculated with reference to the rent payable by the tenant, and it is

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[37] This position is accepted by Revenue Canada; see the answer to Q15077 and Q15131, June 1994, on the Question and Answer Database, ibid.

[38] Subsection 221(2) is examined later in this article. At this point, it is sufficient to note that the provision generally permits a vendor to sell taxable real property to a GST-registered purchaser without collecting GST, as the purchaser is required to self-assess GST on the purchase. If the purchaser is entitled to claim a full input tax credit on the transaction, it may offset the credit against the self-assessment, thereby obviating the need to remit GST. The cash flow advantages of this procedure are readily apparent.

[39] Although non-arm's-length supplies that occur at less than fair market value may be deemed by section 155 to take place at fair market value, that section does not apply if the recipient is GST-registered and acquires the property for use exclusively in commercial activities. If the named purchaser assigns his interest in the property to a related corporation that is registered for GST purposes and that acquires the property for use in a commercial activity, section 155 will not apply.

important to note that the tax will apply to any amounts billed to the tenant as rent, including the tenant's proportionate share of common area costs and other operating expenses. In the case of costs that are GST-exempt when billed to the landlord (real property taxes being the most notable example), the rebilling of those costs by the landlord to the tenant as additional rent makes it necessary to charge GST in respect of those costs. This is a particularly important issue for tenants that face restrictions in their eligibility for input tax credits;[40] the additional GST that becomes payable represents an absolute cost, not merely a cash flow issue. Although some efforts have been made to avoid this problem (notably by entering into agreements with municipalities whereby the taxes are billed directly to the tenant rather than the landlord), Revenue Canada has not accepted this approach, and consequently the problem remains unresolved.

Specific issues relating to lease transactions are beyond the scope of this article.

Options, Easements, and Rights of First Refusal

It seems clear that the granting of an option to purchase real property will usually constitute a taxable supply, since an option is an interest in real property. A similar conclusion applies in respect of the granting of an easement or right of way over real property. However, this will generally be of little relevance to an unregistered person who grants options or easements in respect of non-commercial property. Section 166 relieves from GST any taxable supplies (other than sales of real property) made by an unregistered small supplier; therefore, the granting by an unregistered person of an easement or option in respect of real property will typically not result in a GST liability.[41]

Exempt Supplies of Real Property

The principal exemptions relating to supplies of real property are set out in part I of schedule V. Additionally, part VI of schedule V (and in particular section 25) sets out exemptions that may be applicable in

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[40] For example, financial institutions such as banks, trust companies, and insurance companies, which frequently pay high rent.

[41] This conclusion can be challenged by arguing that the supply of an interest in real property arising from the granting of an option or easement constitutes a "supply of real property by way of sale." Such an argument is not entirely untenable, because a sale is defined for GST purposes to include "any transfer of ownership of the property," and the definition of real property includes "every . . . interest in real property." It can be therefore said that the interest in real property represented by an option or easement itself constitutes real property, and that the granting of that interest qualifies as a sale. If one applied this argument to the Act as a whole, however, few supplies of property would *not* constitute a "sale." Indeed, this analysis would effectively eliminate the distinction between supplies by way of lease and supplies by way of sale. It is submitted that the better view would be to argue that references in the Act to supplies "by way of sale" of real property are intended to describe conveyances by a vendor of all of his interest in the property, as distinguished from grants of a partial interest in the property.

circumstances involving supplies of real property made by public service bodies (non-profit organizations, charities, municipalities, school authorities, hospital authorities, public colleges, or universities).

The principal exemptions include the following:

• sales of residential structures by a person other than the original builder, by an individual who constructed the building and occupied it principally as a place of residence, or by a builder who has, subsequent to the construction of the structure, leased the building or a unit therein to an individual person for use as a place of residence;[42]

• sales of non-residential personal-use real property (such as vacant land or recreational property) by individuals or certain qualifying trusts;[43]

• residential leases for a period of at least one month;[44]

• residential leases of any duration where the rent charged does not exceed $20 for each day of occupancy;[45]

• certain transfers of farmland;[46]

• a supply of land by way of lease, licence, or similar arrangement for a period of at least one month to the owner or lessee of a residential unit that is to be affixed to the land for use as a place of residence, or to a person who is acquiring possession of the land for the purpose of constructing a residential complex on it in the course of a commercial activity;[47]

• a supply of a site in a residential trailer park by way of lease, licence, or similar arrangement for a period of at least one month to the owner or lessee of a mobile home, travel trailer, motor home, or similar vehicle or trailer;[48] and

• certain supplies by way of sale or by way of lease, licence, or similar arrangement of parking spaces related to residential complexes.[49]

Some of these exemptions (notably those relating to sales of residential complexes and personal-use property) are examined in greater detail later in the article.

Special rules and considerations are applicable in respect of such issues as self-supplies of property, deemed dispositions arising on changes of use, forfeitures of deposits, and the release of holdbacks. Each of these issues is examined later in the article.

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[42] Sections 2 to 5 of part I of schedule V.

[43] Section 9 of part I of schedule V.

[44] Paragraph 6(a) of part I of schedule V.

[45] Paragraph 6(b) of part I of schedule V.

[46] Sections 10 to 12 of part I of schedule V.

[47] Paragraph 7(a) of part I of schedule V.

[48] Paragraph 7(b) of part I of schedule V.

[49] Sections 8 and 8.1 of part I of schedule V.

Timing of GST Liability

The general rule concerning the timing of GST liability is that GST is payable by the recipient of the taxable supply on the earlier of

1) the day on which the consideration for the supply is actually paid, and

2) the day on which the consideration for the supply becomes due.[50]

It should be noted, however, that special rules apply in cases involving supplies of real property by way of sale and supplies of property (including real property) by way of lease, licence, or similar arrangement. In the case of a sale of real property (other than a condominium unit), GST is payable on the earlier of

1) the day on which ownership of the property is transferred to the recipient, and

2) the day on which possession of the property is transferred to the recipient under the agreement of purchase and sale.[51]

In the case of a sale of a condominium unit, GST is payable on the earlier of

1) the day on which ownership of the unit is transferred to the recipient, and

2) the day that is 60 days after the day on which the condominium complex is registered as a condominium.[52]

Consequently, in some cases GST may be payable in respect of the purchase of residential real property before closing, and hence before the purchase price is payable in full.

In the case of a lease of real property, the consideration (or any part thereof) is deemed to become due on the day on which the recipient is required, under the terms of the written lease, to make the payment; the GST arising in respect of that particular lease payment is due at the same time.[53]

Calculation of GST Liability

Pursuant to subsection 165(1), GST is calculated as 7 percent of the consideration payable for a taxable supply. With respect to taxable supplies of real property, a few issues require examination:

- What is the impact (if any) of land transfer taxes on the calculation of GST payable in respect of a real property transfer?

- In cases where all or a portion of the purchase price is paid otherwise than by way of a delivery of money on closing (for example, by the assumption of a mortgage or other obligation), how is GST calculated?

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[50] Subsection 168(1).

[51] Paragraph 168(5)(b).

[52] Paragraph 168(5)(a).

[53] Subsection 152(2).

• Do adjustments typically made at the time of closing have any impact on the amount of GST that is payable?

• In circumstances where the GST new housing rebate is assigned by the purchaser to the vendor on closing, will that assignment have a bearing on the amount of GST that is ultimately payable?

Land Transfer Taxes

One significant question is whether land transfer tax that is payable as a result of the conveyance is included as part of the consideration on which the amount of GST is based. Section 154 of the Act provides that, for GST purposes, the consideration for a supply includes any tax, duty, or fee (other than GST or a prescribed tax, duty, or fee) imposed under an act of Parliament or of the legislature of a province on the recipient or the supplier of the supply in respect of the supply, production, importation, consumption, or use of the property or service supplied that is payable by the recipient or the supplier. Thus, other taxes that are payable in respect of the supply are included in the consideration, unless they are prescribed by regulation not to be included in the consideration.

The Taxes, Duties and Fees (GST) Regulations[54] prescribe the taxes not taken into consideration in computing the GST that arises in respect of a taxable supply. The regulations name, among other taxes, levies imposed pursuant to:

• the Land Transfer Tax Act (Ontario);

• the Land Transfer Duties Act (Quebec);

• An Act To Authorize Municipalities To Collect Duties on Transfers of Immoveables (Quebec);

• The City of Sydney Act (Nova Scotia);

• the Halifax County Deed Transfer Tax Act (Nova Scotia);

• the Halifax City Charter (Nova Scotia);

• the Dartmouth City Charter (Nova Scotia);

• the Bedford By-Laws Act (Nova Scotia);

• the Deed Transfer Tax Act (Nova Scotia);

• the Real Property Transfer Tax Act (New Brunswick);

• part III of The Revenue Act (Manitoba);

• the Property Purchase Tax Act (British Columbia);

• The Land Titles Act (Saskatchewan);

• the Land Titles Act (Alberta); and

• The St. John's Assessment Act (Newfoundland).

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[54] PC 1990-2743, SOR/91-34 (1991), vol. 125, no. 2 *Canada Gazette Part II* 137-42.

Any land transfer taxes arising pursuant to any of these statutes will not be included for the purpose of calculating GST.[55]

Non-Cash Consideration

GST is calculated with reference to "the value of the consideration" given by the recipient for the taxable supply. Although the word "consideration" is defined in subsection 123(1), that definition is of little assistance; it merely says that "'consideration' includes any amount that is payable for a supply by operation of law." Nevertheless, when the common law meaning of "consideration" is taken into account,[56] it becomes clear that anything of value given by the purchaser to the vendor in exchange for the conveyance of the property should be included as "consideration" for the purpose of calculating GST. For example, an agreement by the purchaser to assume an existing mortgage constitutes the giving of consideration equal to the face amount of the mortgage.[57] Similarly, the purchaser's giving to the vendor other property in a barter transaction amounts to the giving of consideration equal to the fair market value of the property so given.[58]

Adjustments on Closing

Most standard form agreements of purchase and sale provide for an adjustment of the purchase price on closing to take into account such matters as prepaid real property taxes (or taxes that are in arrears), heating oil remaining in the tanks, and rental income that is either prepaid at the time

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[55] One issue that should be carefully considered in cases where real property is sold for a GST-included price is whether land transfer tax should be calculated on the entire "price," or merely on the consideration fraction (100/107 of the price), on the basis that the remaining 7/107 (the tax fraction) represents a tax paid by the purchaser, and not "consideration" given to the vendor in exchange for the property. This issue must be determined with reference to the governing land transfer tax legislation. However, in cases where the applicable legislation requires land transfer tax to be calculated on the consideration for the sale and does not include an extended definition of "consideration" that encompasses other taxes payable on the sale, it is submitted that the land transfer tax should be based on the consideration portion of the GST-included price.

[56] "The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. *Some right, interest, profit or benefit accruing to one party*, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." *Black's Law Dictionary*, 5th ed. (emphasis added).

[57] Pursuant to paragraph 153(1)(a) of the Act, the value of consideration that is expressed in money (such as the amount outstanding on a mortgage) is the amount of the money so expressed.

[58] Pursuant to paragraph 153(1)(b), where consideration that is neither money nor expressed in money is given, the value is deemed to be equal to the fair market value of the consideration so given. One exception to this rule is provided for in subsection 153(3), which states that where two registrants engage in a barter transaction involving inventory of the same class or kind, and each acquires the property for use exclusively in commercial activities, the value of the consideration given by each is deemed to be nil. This rule will have limited application in real property transactions.

of closing or that has accrued to the time of closing and has yet to be paid. Adjustments that result in a net credit to the purchaser should not have an impact on the amount of GST to be collected on closing: to the extent that the amount to be delivered by the purchaser to the vendor is reduced as a consequence of an adjustment (for example, if real property taxes are in arrears or the vendor has collected rent that as of the closing date has yet to accrue), the adjustment merely represents a method of payment of the purchase price by the purchaser to the vendor.[59] The purchase price remains unchanged, and the amount of GST payable as a result of the transaction (assuming that the sale is subject to GST) does not increase.

If the adjustments result in a net increase in the purchase price, there may be changes in the amount of GST that is collectible (assuming that the transaction itself is taxable),[60] although the amounts are unlikely to be significant. For example, if an adjustment to reflect prepaid taxes necessitates a positive adjustment, it is arguable that the amount of the adjustment represents an increase in the purchase price due to a supply that is incidental to the supply of the real property.[61] Consequently, the entire tranaction will be characterized (from a GST perspective) by the status of the sale, and GST will therefore apply to the entire purchase price (including the adjustment).

Assignment of New Housing Rebate

Section 254 provides for a partial rebate of the GST payable by the purchaser of qualifying new homes, provided that certain conditions are satisfied. The purchaser is entitled to assign his rebate to the builder as a means of financing part of the purchase price, and in such cases the builder will forward the rebate application to Revenue Canada and eventually will receive the rebate.

As noted above, GST is payable at a rate of 7 percent of the consideration paid for the taxable supply. In cases where the purchaser assigns his

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[59] For example, in a case where the real property taxes are in arrears to the extent of $100, instead of delivering $100 to the vendor on closing, the purchaser will assume liability for the arrears. The form of consideration given by the purchaser has changed, but the amount has not.

[60] If the transaction is GST-exempt, it is submitted that section 138 extends the exempt treatment to any increase in sale price arising from a typical adjustment. Section 138 deals with incidental supplies, and is examined further below. At this point, it is sufficient to observe that, pursuant to section 138, if any particular property is supplied together with other property for a single consideration, and it is reasonable to regard the supply of the other property as incidental to the supply of the particular property, the other property will be deemed to form part of the particular property, with the result that the GST status of the particular property will extend to the other property as well. For example, if fuel oil is supplied along with a GST-exempt residential complex, and the purchase price is increased to reflect the value of the full oil tank, the supply of the fuel oil should be considered merely incidental to the supply of the complex, and should therefore be exempt.

[61] Hence, section 138 would once again apply.

GST new housing rebate to the builder at the time of closing, the consideration paid by the purchaser increases by the amount of the rebate so assigned, and the GST payable on the purchase also increases. However, because the rebate is calculated with reference to the amount of GST that arises from the purchase, the assignment of the rebate will affect the amount of the rebate itself. For qualifying new homes with a cost of not more than $350,000, the rebate is 36 percent of the GST payable as a result of the purchase.

Consider, for example, a new house with a cost of $300,000 (exclusive of GST). Assuming that there is no assignment of the rebate, the GST on the purchase will be $21,000 and the rebate will be $7,560. If the rebate is assigned to the builder, however, the total consideration will be $300,000 plus the rebate. The GST arising from the sale is therefore represented by the equation

$$GST = (\$21{,}000) + (.07 \times \text{rebate})$$

If this equation is inserted into the formula for determining the amount of the rebate, the result is

$$\text{Rebate} = (.36 \times \$21{,}000) + (.07 \times .36 \times \text{rebate})$$

$$\text{Rebate} = \$7{,}560 + (.0252 \times \text{rebate})$$

$$\text{Rebate} - .0252\ \text{rebate} = \$7{,}560$$

$$.9748\ \text{rebate} = \$7{,}560$$

$$\text{Rebate} = \$7{,}755.44$$

Thus, the rebate is $7,755.44, the total consideration for the purchase is $307,755.44, and the GST arising from the sale is $21,542.88, not $21,000.

Transitional Rules

The various transitional rules are set out in division IX of part IX; the transitional rules that apply in respect of real property are set out in section 336. Four years have elapsed since the implementation of the GST, and the transitional rules are less relevant to practitioners. However, in anticipation of Revenue Canada's audits and assessments relating to the period surrounding the implementation of the tax, the application of transitional rules merits a brief discussion.

The general rule is that the GST applies only to sales of real property where both ownership *and* possession of the property are transferred to the purchaser after December 31, 1990. As a result, if title is transferred on or before December 31, 1990, or if the purchaser goes into possession of the property *under the agreement for that supply* on or before December 31, 1990, no GST will arise in respect of the transaction. It is important to note that for the second part of the transitional rule to apply, the purchaser must be in possession of the property "under the agreement for that supply" (that is, the agreement of purchase and sale). Consequently, a purchaser who was permitted to take possession of the property before 1991 even though the agreement did not expressly provide for that right is not entitled to take advantage of the transitional rule.

Agreements Before October 14, 1989

Subsections 336(2) to (4) set out additional transitional rules that are applicable only in cases where an agreement was entered into before October 14, 1989; these rules should be examined by anyone involved in a closing that arises pursuant to such an agreement.

LIABILITY FOR AND COLLECTION OF GST

The GST is a consumption tax, and is imposed on the consumer or "recipient" of a taxable supply.[62] In the context of a taxable supply of real property by way of sale, the purchaser named in the agreement of purchase and sale is, in general terms, ultimately liable for the tax; however, there are several ways in which a vendor can be exposed to liability for GST arising on a sale of real property. Parties to a sale of real property should be aware of their liabilities, and the ways in which those liabilities can be deliberately or inadvertently shifted from one party to another.

Obligation of Purchaser To Pay GST

GST is imposed by subsection 165(l) on the recipient of a taxable supply. Assuming (as is normally the case) that the purchaser pays the purchase price, the purchaser is the recipient and consequently is liable for the tax. The purchaser normally pays the GST at the time of closing to the vendor, who in most cases is required to collect the tax as an agent of the Crown in right of Canada.

Enforcement Against Purchaser

The Act includes various enforcement provisions that can be brought to bear against a purchaser who fails to pay or remit GST. Pursuant to subsection 313(1), all taxes, interest, penalties, costs, and other amounts payable under part IX are debts due to Her Majesty in right of Canada, and the Crown may maintain an action against a party who fails to pay or remit such an amount. Thus, the Crown may sue either a purchaser who has failed to pay the tax or a vendor who has failed to collect GST from the purchaser and remit the tax to the receiver general for Canada.

As an alternative, in cases where a vendor has not collected GST from the purchaser but has nevertheless remitted to the receiver general from his own funds the amount of tax payable, section 224 permits the vendor to bring an action against the purchaser to recover the tax. The circumstances in which such an action may be brought by the vendor are examined below.

Discharge of Purchaser's Obligations

The vendor is generally required to collect GST as an agent of the Crown, and the purchaser's obligations pursuant to the Act are discharged when

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[62] The definition of "recipient" is reviewed above; a person who is contractually liable to pay the consideration for a supply is considered to be the "recipient" of that supply.

the tax is paid to the vendor or the vendor's agent (typically his solicitor). Because the Act simply requires the purchaser to pay the tax to the vendor and imposes no additional obligation to ensure that the tax is remitted by the vendor to the receiver general, it is submitted that the purchaser is not required to take additional steps to ensure that the tax is ultimately remitted. For example, there is no need for the purchaser to seek from the vendor an undertaking or similar commitment to remit the tax in accordance with the vendor's statutory obligations.

The purchaser may discharge his obligations pursuant to the Act in a limited number of ways other than through the payment of GST to the vendor. For example, in certain circumstances the purchaser may remit GST directly to the receiver general. Additionally, in some cases the purchaser may seek from the vendor a written statement or certificate confirming that the transaction is GST-exempt, with the result that any GST that is subsequently determined to have been payable in respect of the transaction will be borne by the vendor. Finally, a failure by certain vendors to adhere to statutory requirements concerning disclosure of GST may jeopardize their right to bring an action against the purchaser pursuant to section 224 for any GST payable on the transaction; in that case the vendor may be unable to recover the tax from the purchaser, but must still remit the GST. Each of these issues is examined below.

Obligation of the Vendor To Collect GST

Collection of GST

It has been occasionally suggested that the "principal" or "primary" liability for GST lies with the purchaser. Such a view is dangerously misleading, and vendors should take care not to derive a false sense of security from it. Although it is true that the legislation is intended to impose the tax on recipients of taxable supplies, I am unaware of any policy statement or official suggestion that Revenue Canada will look first to the purchaser for the tax in the case of non-payment by the purchaser to the vendor. Certainly, the Act does not require that the department attempt unsuccessfully to collect from the purchaser before prevailing upon the vendor to pay the tax; and at least in the case of GST-registered vendors, it may be expected that Revenue Canada will prevail upon the vendor to remit GST, whether or not it has been collected.

The vendor's obligation to collect GST is imposed by subsection 221(l), which provides that every person who makes a taxable supply is required to act as agent of the Crown in right of Canada to collect the GST payable by the recipient in respect of the supply. Thus, the vendor collects the tax as the agent of the Crown, is deemed to hold the tax in trust for the Crown, and is required to remit the tax to the receiver general on or before the day on which his return is required to be filed for the reporting period in which the transaction occurred.[63]

[63] Subsection 228(2).

Pursuant to subsection 313(1), the Crown may bring an action to recover any taxes or net taxes payable to the Crown pursuant to the GST legislation. In calculating the amount of tax to be remitted to the receiver general during a reporting period, a vendor must take into consideration all amounts of tax that became collectible, not simply the taxes that were actually collected. Thus, the vendor must remit taxes that were collectible pursuant to subsection 221(1), even if the tax was not actually collected. The Crown can enforce payment of that amount by the vendor.

Special Rules for Certain Exempt Supplies

Schedule V to the Act designates certain supplies as exempt, with the result that no GST is payable in respect of such transactions. Part I of schedule V itemizes exempt real property transactions; a more detailed analysis of these provisions is set out below. At this point it is important to note that section 194 establishes particular rules that are applicable in respect of some exempt property transactions, and that may have the effect of shifting GST liability in respect of such supplies from the purchaser to the vendor.

Section 194 reads as follows:

> **194. Incorrect statement—**For the purposes of this Part, where a supplier makes a taxable supply by way of sale of real property and incorrectly states or certifies in writing to the recipient of the supply that the supply is an exempt supply described in any of sections 2 to 5.3, 8 and 9 of Part I of Schedule V, except where the recipient knows or ought to know that the supply is not an exempt supply,
>
> (a) the tax payable in respect of the supply shall be deemed to be equal to the tax fraction of the consideration for the supply; and
>
> (b) the supplier shall be deemed to have collected, and the recipient shall be deemed to have paid, that tax on the earlier of the day ownership of the property was transferred to the recipient and the day possession of the property was transferred to the recipient under the agreement for the supply.

The "tax fraction" referred to in paragraph 194(a) is equivalent to 7/107, and is the formula used to break a GST-included price into its tax and non-tax components. Thus, the net effect of section 194 in applicable transactions where a satisfactory written statement or a certificate has been provided to the purchaser is effectively to deem the purchaser to have discharged his obligation to pay GST to the vendor if it is ultimately determined that the transaction was not exempt. An overview of the exempt transactions to which section 194 applies and sample certificates that may be used by a purchaser to obtain the protection of section 194 are set out below.

Liability Transferred to Vendor

A certificate given by the vendor that falls within the scope of section 194 amounts to a guarantee that the purchaser will not be required to absorb any GST burden arising from the transaction. This may be critical in the case of a sale of undeveloped land, as it will frequently be difficult

to determine with certainty whether Revenue Canada will subsequently find the transaction taxable.[64]

The effect of section 194 should cause one to consider carefully whether the vendor should provide any certificate to the purchaser on closing. In making this decision, the parties should bear in mind that the GST is essentially a purchaser's tax, and in the absence of any circumstances that shift the burden of that tax from the purchaser to the vendor, the purchaser will continue to be ultimately liable for the tax. The provision of a certificate under section 194 is one such burden-shifting event, and the vendor should decide whether he is prepared to accept that burden.

It is submitted that, unless the agreement of purchase and sale explicitly states that the transaction is GST-exempt and requires the vendor to deliver a suitable certificate on closing, the vendor is under no legal obligation to provide such a certificate and would be ill advised to do so. This does not mean that the vendor should collect GST at the time of closing; in fact, if both parties are of the understanding that the transaction is exempt, the vendor will not do so. However, if it is subsequently determined that the transaction was taxable, Revenue Canada may, at its option, attempt to collect the tax from either the vendor or the purchaser. If Revenue Canada prevails upon the vendor, and the vendor has not provided a certificate as to the exempt status of the transaction, the vendor will be entitled to recover the tax from the purchaser.[65] However, if the vendor has provided a certificate at the time of closing, the vendor will be prevented by section 194 from recovering the tax from the purchaser.[66]

Thus, unless the agreement of purchase and sale specifically calls for such a certificate, it is unwise for the vendor to provide one to the purchaser at the time of closing. Furthermore, the vendor's solicitor should take care to avoid the inclusion in any correspondence with the purchaser's solicitor of a statement that may satisfy the requirements of section 194.[67]

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[64] The applicability of this exemption will depend on (among other factors) whether the vendor used the property as capital property in a business or sold the property in the course of a business. These concepts are rather broad for the purposes of the Act and are largely questions of fact; therefore, making such a determination will often be difficult.

[65] Subject to the issue (examined below) of whether the vendor, if GST-registered, has complied with the disclosure provisions of subsection 223(1).

[66] In circumstances where a vendor has incorrectly provided a certificate to the purchaser pursuant to section 194, it is important to remember that the tax that is remittable in respect of the supply will be the tax fraction (7/107) of the sale price, rather than 7 percent of the sale price. Since Revenue Canada may not be aware of the existence of a section 194 certificate, it may assess the vendor for 7 percent of the sale price; in that case the assessment should be objected to so as to reduce the tax to the tax fraction (approximately 6.54 percent). In a transaction involving a sale for $250,000, this would reduce the tax owing by $1,144.86.

[67] Section 194 applies if the supplier "incorrectly states or certifies in writing" that the supply is exempt. A solicitor is generally viewed as the agent of his client in respect of

(The footnote is continued on the next page.)

Registration of Written Statement

Another question that frequently arises with respect to section 194 in jurisdictions that are subject to a registry system (as distinguished from a land titles system) is whether the written statement should be incorporated into the deed or transfer instrument (perhaps in a matrimonial property affidavit, or as a separate affidavit or statutory declaration) and registered with the deed. If no certificate is registered by the Department of National Revenue, the GST does not create a lien or encumbrance on real property; there is therefore no advantage to registering the statement with the deed, other than to create a permanent record in case the files of the purchaser's solicitor are destroyed. The fact that the GST does not constitute a deemed encumbrance on real property means that a subsequent purchaser will not have to review the statement to satisfy himself that the previous transaction did not result in the creation of an interest in the property in favour of the Crown in right of Canada. Furthermore, the examination of a certificate by a subsequent purchaser will not assist him in determining whether his transaction is taxable; any number of events may have occurred since the previous sale that would subject his purchase to GST.[68] Consequently, it is not necessary to incorporate the certificate into the deed or transfer instrument and record it with the deed.

Direct Remittance by Purchaser

Subsection 221(2) provides for the remittance of GST in respect of a real property conveyance directly by the purchaser to the receiver general if

1) the vendor is a non-resident person (or is resident in Canada by reason only of subsection 132(2), which deems a non-resident to be a resident in respect of, but only in respect of, activities of that person carried on through a permanent establishment in Canada);

2) the purchaser is a GST registrant and the transaction is not a supply of a residential complex made to an individual; *or*

3) the purchaser is a prescribed recipient.[69]

If any of these conditions exist, the purchaser must remit any GST arising on the transaction directly to the receiver general.

Subsection 228(4) outlines the procedure to be followed by the purchaser who self-remits. Essentially, the purchaser is required to file a

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[67] Continued . . .
any act that may reasonably be expected to arise in connection with his retainer; therefore, a written statement by the vendor's solicitor concerning the GST status of the transaction in correspondence with the purchaser's solicitor might be construed as a statement which satisfies the requirements of section 194.

[68] For example, the vendor might have changed his use of the property after he purchased it, thereby triggering a deemed supply, or might have undertaken a substantial renovation of the property, thereby making the subsequent sale taxable.

[69] No categories of recipients have been prescribed by regulation for the purposes of paragraph 221(2)(c).

prescribed form[70] and remit the tax to the receiver general. If the purchaser is a registrant, the form and the GST are to be filed and remitted no later than the day on which the purchaser's return for the reporting period in which the tax became payable is required to be filed. Assuming that the purchaser is entitled to claim an input tax credit in respect of the GST,[71] he is also entitled to claim the input tax credit at that time; consequently, no net GST will be remittable in respect of the transaction. Thus, the ability to self-remit by registrant purchasers is usually beneficial, because it eliminates the cash flow problems than can arise from a taxable purchase of real property.

In circumstances where a non-registrant purchaser is entitled to self-remit (for example, in cases involving purchases from a non-resident vendor), the return must be filed and the tax remitted on or before the last day of the month following the month in which the tax became payable.[72]

Evidence of Purchaser's Registration Status

A vendor who chooses not to collect GST will typically wish to see some evidence confirming that the purchaser is a registrant. The emerging practice appears to call for the vendor's obtaining from the purchaser (or from an officer or director in the case of a corporate purchaser) a statutory declaration confirming the purchaser's status as a GST registrant.[73] However, there is a critical distinction between certificates obtained pursuant to section 194 and a certificate or affidavit obtained as proof of the registration status of the purchaser for the purposes of subsection 221(2). Specifically, a purchaser who relies on a certificate provided by a vendor pursuant to section 194 is exonerated from any further liability under the Act, and any GST liability that arises from the transaction is transferred to the vendor. The same cannot be said in respect of evidence provided by the purchaser to the vendor concerning the application of subsection 221(2). The vendor is relieved of his obligation to collect GST if the purchaser is a registrant, but not if he proceeds upon the reasonable but mistaken belief that the purchaser is a registrant. Thus, a vendor who declines to collect GST as a result of a mistaken belief that the purchaser is a GST registrant will remain liable for the tax if the purchaser fails to remit

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[70] Form GST 60, "Goods and Services Tax Return for Acquisition of Real Property."

[71] Subsection 169(1) permits the recipient to claim an input tax credit to the extent that the property was purchased for consumption, use, or supply in the course of commercial activities carried on by the purchaser.

[72] Paragraph 228(4)(b).

[73] A sample statutory declaration is reproduced in appendix A to this article. As is noted below, however, it is critical that a vendor who intends to permit the purchaser to self-remit obtain the best possible evidence that the purchaser's professed status as a registrant is valid. Accordingly, if time permits, the vendor should attempt to obtain directly from Revenue Canada written confirmation of the purchaser's registration status, dated as of or as close as possible to the closing date. The purchaser can request the issuance of such a letter, or can provide Revenue Canada with a written authorization to disclose the information directly to the vendor.

GST in accordance with the Act. The vendor should ensure that he is certain of the purchaser's registration status.

The Act is unclear about what will occur if a vendor insists on collecting GST even if the purchaser is a GST registrant. This issue may become relevant for two reasons. First, a vendor assumes some risk when he declines to collect GST from a person who claims to be a GST registrant. Second, if the vendor is also a registrant, it is usually to the vendor's advantage to collect GST at the time of closing, and to use the amount collected to pay any GST arising on purchases made by the vendor in the course of his business.

Subsection 221(2) provides that a vendor is "not required" to collect GST arising on a sale of property that satisfies the criteria of any of paragraphs (a) to (c) of the subsection. However, the subsection does not expressly provide that the vendor *shall not* collect the tax,[74] nor does it say that the purchaser cannot pay the tax to the vendor as the Crown's agent. The purchaser-remittance provision outlined in subsection 228(4), by contrast, states that the purchaser "shall pay the tax to the Receiver General" in circumstances in which subsection 221(2) applies. There is some confusion as to whether a vendor who questions the veracity of the purchaser's claim to be a GST registrant may insist on collecting GST on closing. It is submitted that since subsection 221(2) does not prevent the vendor from collecting the tax, a vendor who insists on collecting GST in those circumstances will be collecting the tax as the Crown's agent pursuant to subsection 221(1), with the result that the purchaser will have discharged his obligations. Unfortunately, and as is examined in greater detail below, it appears that Revenue Canada may not share this view.

"Paramountcy" of Purchaser-Remittance Provision

One issue that may prove to be of considerable importance is the manner in which the apparent conflict between the exemption certificate provisions of section 194 and the purchaser-remittance provisions of subsections 221(2) and 228(4) is resolved. Revenue Canada's position to date is that the purchaser-remittance requirements take precedence over a GST exemption certificate, although there is some reason to question the validity of this view.[75]

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[74] Indeed, Revenue Canada appears to have implicitly accepted the view that the vendor may, in some circumstances, collect GST from a registered purchaser. Specifically, in response to question Q02297, dated April 1991, in the Question and Answer Databate, supra footnote 14, it is noted that "*Where the purchaser can demonstrate to the vendor that the conditions of subsection 221(2) apply*, no tax should be collected by the vendor" (emphasis added). It is suggested in this response that if the purchaser cannot satisfy the vendor to this effect, the vendor would be justified in insisting that the tax be paid on closing.

[75] Although I have been unable to locate public policy statements to this effect, in at least one case with which I am familiar Revenue Canada took the position that a purchaser who was eligible to self-remit pursuant to subsections 221(2) and 228(4) is not entitled to the benefit of a certificate provided by the vendor pursuant to section 194.

The potential difficulty arises from the interaction of the certification provisions of section 194 with the purchaser-remittance provisions of subsections 221(2) and 228(4). If the vendor erroneously certifies pursuant to section 194 that the transaction was exempt, the purchaser will be deemed to have paid and the vendor will be deemed to have collected GST (presumably as the Crown's agent) in respect of the transaction.

Section 194 and subsection 221(2) come into apparent conflict with subsection 228(4) in cases that are eligible for purchaser remittance (that is, when the vendor is a non-resident or the purchaser is registered and the sale is not one of a residential complex to an individual). In either situation the vendor is "not required" to collect the tax. Furthermore, subsection 228(4) provides that when tax is payable in respect of a supply made "in circumstances in which subsection 221(2) applies," the purchaser "shall pay the tax to the Receiver General." When subsection 228(4) is read in isolation it appears to require the purchaser to remit GST directly to the receiver general in every situation in which subsection 221(2) applies. Furthermore, Revenue Canada appears to have taken the position that the purchaser must remit directly even if the vendor has certified pursuant to section 194 that the transaction was exempt. This interpretation is particularly onerous in cases where a purchaser acquires real property from a non-resident vendor and the vendor provides a section 194 certificate based largely upon information that is exclusively in the vendor's possession. Because such a transaction qualifies for purchaser remittance, Revenue Canada has expressed the view that if the transaction was taxable the purchaser may not rely on the certificate, and Revenue Canada will require the purchaser to remit GST after closing. Of course, it may be very difficult to recover the additional tax burden from the non-resident vendor.

Although Revenue Canada's position appears to be supported by a literal reading of subsections 221(2) and 228(4), it makes no attempt to accommodate the apparent conflict with section 194. In particular, section 194 is not expressly restricted in its application to certificates given by residents of Canada, and a certificate given by a non-resident vendor in accordance with section 194 will, "[f]or the purposes of this Part,"[76] deem the purchaser to have paid GST to the vendor. Furthermore, since subsection 221(2) merely states that the non-resident vendor "is not required" to collect the tax,[77] subsection 221(1) should deem the non-resident vendor to have collected GST as an agent of the Crown. In effect, Revenue Canada's position requires the taxpayer to pay GST twice, and it is submitted that the conflict can be resolved only if the reference in subsection 228(4) to "circumstances in which subsection 221(2) applies" is interpreted as a reference to circumstances in which the vendor is not required to collect the tax *and in fact does not collect the tax or is not*

[76] That is, for the purposes of the GST provisions of the Act.

[77] In other words, the subsection does not expressly prohibit the vendor from collecting GST.

deemed to have collected the tax. According to this interpretation, when the vendor collects GST (or is deemed by section 194 to have collected GST) notwithstanding the fact that subsection 221(2) did not require the vendor to collect the tax, the mandated self-remittance by the purchaser pursuant to subsection 228(4) will not apply.

At present, indications are that Revenue Canada will not accept the foregoing compromise, and will continue to insist that GST be remitted directly by the purchaser in cases where subsection 221(2) applies, even if a GST certificate has been provided by the vendor on closing. Ultimately this issue may have to be resolved by the courts; until then, any purchaser involved with a transaction described in subsection 221(2) (and in particular persons acquiring apparently exempt properties from non-resident vendors) should take great care to determine the GST status of the transaction before closing.

Action by Vendor To Collect GST

Section 224 gives a vendor the right to bring an action against a purchaser to collect GST that is payable but is yet to be paid by the purchaser to the vendor. Each of the following conditions precedent must be satisfied before the action can be maintained by a vendor under the section:

1) the supplier has made a taxable supply to the recipient;

2) the supplier is required to collect GST from the recipient in respect of the supply;

3) the supplier has complied with subsection 223(1) in respect of the supply;

4) the supplier has accounted for or remitted the tax payable by the recipient in respect of the supply to the receiver general; and

5) the supplier has not collected the tax from the recipient.

Points 1, 2, 4, and 5 are self-explanatory; however, the requirement of compliance with subsection 223(1) merits further examination.

Subsection 223(1) sets out certain GST disclosure obligations in respect of taxable supplies made by registrants. Essentially, the registrant supplier is required to indicate to the recipient, in a prescribed manner or in an invoice, receipt, or written agreement

1) the consideration paid or payable by the recipient for the supply and the tax payable in respect of the supply in a manner that clearly indicates that amount of the tax, or

2) that the amount paid or payable by the recipient for the supply includes the tax payable in respect of the supply.

The prescribed manner of disclosure is set out in the Disclosure of Goods and Services Tax Regulations.[78] Because none of the disclosure techniques

[78] PC 1990-2747, SOR/91-38 (1991), vol. 125, no. 2 *Canada Gazette Part II* 165-67. These regulations require the supplier to give clear visible notice to the recipient of a
(The footnote is continued on the next page.)

prescribed by the regulations applies to a typical real property transaction, the required disclosure in the case of a taxable supply of real property by way of sale by a registrant vendor will generally be

1) by a statement in the agreement of purchase and sale disclosing the tax or stating that GST is included in the purchase price, and/or

2) by the issuance of a statement of adjustments on closing that discloses the purchase price and the GST paid by the purchaser.[79]

The relationship between section 224 and subsection 223(1) may be critical with respect to the vendor's ability to bring an action against a purchaser for GST that is not paid on closing.[80] Subsection 223(1) does not specify the time at which disclosure must be made. Although it may be argued that the subsequent issuance by the vendor to the purchaser of an invoice or receipt disclosing the GST component of the sale may represent sufficient adherence to subsection 223(1), it is submitted that this does not satisfy the apparent policy objective of the subsection, which is to ensure that the GST component is visible to the purchaser. Consequently, it is doubtful that this tactic constitutes sufficient compliance with the subsection, and it is therefore advisable to address the GST issue in the agreement of purchase and sale itself in such a way as to comply with subsection 223(1). This will increase the probability that GST will be appropriately dealt with at the time of closing, and will assist a registrant vendor who for some reason fails to collect GST on closing to recover the tax from the purchaser in the courts, if necessary.

EXEMPT SUPPLIES OF REAL PROPERTY

Introduction to Schedule V, Part I

General

The principal exemptions relating to real property are set out in part I of schedule V to the Act.[81] Part I consists of 22 sections, 20 of which create exemptions that are applicable in specified circumstances.

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[78] Continued . . .
taxable supply at the place where the supply is made; they also prescribe methods of disclosure in cases involving the supply of telephone services through a coin-operated telephone or of a metered parking space.

[79] This alternative assumes that such a statement of adjustments would constitute an "invoice" or a "receipt" as contemplated by subsection 223(1). The word "receipt" is not defined in the Act, but "invoice" is defined in subsection 123(1) to include "a statement of account, a bill and any other similar record, regardless of its form or characteristics, and a cash register slip or receipt." It is submitted that a reasonable argument can be made that a statement of adjustments constitutes a record similar to a statement of account between the vendor and the purchaser.

[80] Subsection 223(1) does not apply to a non-registrant vendor, so compliance with that subsection is not a prerequisite to such a vendor's bringing an action against a purchaser for unpaid GST pursuant to section 224.

[81] Additional exemptions are set out in section 25 of part VI of schedule V; these may apply in cases involving supplies of real property by public service bodies (charities, non-profit organizations, municipalities, school authorities, hospital authorities, public colleges, and universities). These exemptions are not examined in this article.

The most notable exemptions pertain to sales of residential housing (including houses, condominium units, and apartment buildings) by persons other than the builder or by persons who constructed the building and subsequently either used it or made it available for the use of others as a place of residence.[82] Other exemptions pertain to certain sales of undeveloped real property and some sales of farmland. Additionally, long-term residential rents and low-cost, short-term residential rents (typically rooming houses) are eligible for exemptions, as are leases of land for the purpose of maintaining a mobile home or other residential unit as a residence. The discussion that follows will concentrate on exemptions applicable to supplies by way of sale of residential housing and personal-use real property.

Definitions

To analyze the detailed exempting provisions set out in part I of schedule V, it is necessary to have a working familiarity with several terms that have specific meanings for the purposes of the Act.[83] This review will be useful for two reasons. First, it will help the reader to understand the scope of each exemption reviewed below. Second, the precise definitions should be foremost in the practitioner's mind when determining whether an exemption applies and/or drafting a suitable affidavit, statutory declaration, or certificate for use pursuant to section 194.

Residential Complex and Residential Unit

The term "residential complex" is defined in subsection 123(1), and has a lengthy, complex, and broad meaning intended to encompass every type of residence or lodging, including common areas and land subjacent or immediately contiguous to the building that is reasonably necessary for the use and enjoyment of the building as a place of residence for individuals. The term encompasses structures that contain more than one residential unit (apartment buildings and condominium buildings) as well as structures that contain one residential unit (detached or semi-detached houses).

The part of the definition of "residential complex" relating to subjacent and contiguous land is similar to that found in the definition of "principal residence" set out in paragraph 54(g) of the Income Tax Act. Accordingly, the existing income tax case law and interpretation bulletins[84] may be of

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[82] These residential property exemptions are most commonly referred to as exemptions for sales of "used" housing. Although it is true that the vast majority of properties that qualify for these exemptions will have been "used," it is conceivable that a property may have been "used" yet still be subject to GST when sold. Accordingly, when determining whether a particular transaction is GST-exempt pursuant to one of the residential-complex exemptions, reference should be made to the specific terms of the exempting provision.

[83] Each of the terms examined below is defined in subsection 123(1), with the exception of the word "improvement," which is defined in section 1 of part I of schedule V.

[84] Notably *Interpretation Bulletin* IT-12OR3, "Principal Residence," February 16, 1984.

assistance in determining whether the land surrounding a residential complex will be considered part of that residential complex. It should be noted, however, that the land immediately contiguous to a residential complex will not necessarily enjoy the same exempt status as the building itself if it exceeds the area reasonably necessary for enjoyment of the residence as a place of residence.[85] In cases where excess land is being conveyed together with a residential complex, the Act will deem two separate supplies of real property, and the application of GST to each conveyance will have to be evaluated individually.[86]

The latter part of the definition of "residential complex" carves out a building or a part of a building that is a hotel, motel, inn, boarding house, lodging house, or similar premises (together with the land and appurtenances attributable to that part of the building) where all or substantially all of the supplies of units in that part of the building by way of lease, licence, or similar arrangement are (or are expected to be) for periods of less than 60 days. The effect is to deny residential complex status to that portion of an otherwise residential structure which is used for short-term leasing arrangements. Resort condominium properties, for example, which are leased on a daily or weekly basis to vacationers, are frequently affected by this provision. Although it may occasionally be difficult to determine whether "all or substantially all of the supplies of residential units in the building [or the relevant part thereof] are, or are expected to be, for periods of less than sixty days,"[87] it is clear that such a finding will deprive that part of the building of its status as a residential complex. This in turn will render inapplicable the exemption that would otherwise apply in respect of leases of units in that part of the building, thereby obligating the owner of the unit to collect GST in respect of short-term rental arrangements.[88]

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[85] As is the case with respect to the definition of "principal residence" for income tax purposes, the determination whether the immediately contiguous land is reasonably necessary for the use and enjoyment of the property as a place of residence will be made on an objective basis, and not simply with reference to the subjective desires of the vendor or the purchaser.

[86] Subsection 136(2).

[87] It may be difficult to ascertain what "part" of the building may have lost its residential status (for example, if each unit is owned by a different person, is the test to be applied on a unit-by-unit basis?). Additionally, when determining whether all or substantially all leases are of a short duration, with reference to what period of time should this analysis be conducted? That is, should one review the leasing arrangements during the past year, the past six months, or some longer or shorter period of time, or should the determination be made on a prospective basis?

[88] This conclusion arises because paragraph 6(a) of part I of schedule V requires that, for a residential lease of one month or longer to be GST-exempt, the subject of the lease be a residential complex or a residential unit in a residential complex. Because the part of the building in which the unit is located ceases to be a residential complex, this requirement cannot be met, and the lease will be subject to GST. It should also be noted that the conversion of the property from a residential complex to a non-residential property and the consequent transformation of the use from exempt to commercial activities may trigger

(The footnote is continued on the next page.)

It is important to note that a residential complex must contain at least one "residential unit," a term that is defined as follows:

> "[R]esidential unit" means
>
> (a) a detached house, semi-detached house, rowhouse unit, condominium unit, mobile home, floating home or apartment,
>
> (b) a suite or room in a hotel, a motel, an inn, a boarding house, a lodging house or a residence for students, elderly persons, infirm persons or other individuals, or
>
> (c) any other similar premises,
>
> or that part thereof that
>
> (d) is occupied by an individual as a place of residence or lodging,
>
> (e) is supplied by way of lease, licence or similar arrangement for the occupancy thereof as a place of residence or lodging for individuals,
>
> (f) is vacant, but was last occupied or supplied as a place of residence or lodging for individuals, or
>
> (g) has never been used or occupied for any purpose, but is intended to be used as a place of residence or lodging for individuals.

Accordingly, for a unit to satisfy the definition of a "residential unit" it must be

- occupied by an individual as a place of residence or lodging;
- supplied by way of lease, licence, or similar arrangement for occupancy as a place of residence or lodging;
- if vacant, last occupied as a place of residence or lodging; or
- if never used or occupied for any purpose, intended to be used as a place of residence or lodging.

If, immediately prior to the time of sale, a building was used for a purpose other than occupation by an individual as a place of residence or lodging, or is vacant but was last used for a purpose other than as a place of residence or lodging, the building will not qualify as a residential complex, even if the building was originally constructed as and continues to be suitable for use as a dwelling house.[89] In such a case, the purchaser's

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[88] Continued . . .
the application of the change-of-use provisions in section 206 of the Act, which will result in the owner's being deemed to have paid GST in respect of the acquisition of the property, thereby creating an input tax credit opportunity. Similarly, a change of use from short-term to long-term rental situations can cause the property to regain its residential status, thereby creating a GST liability.

[89] An interpretation issue arises from the phrase "*or* that part thereof that," which appears after paragraph (c) of the definition, and in particular from the use of the word "or." Specifically, it might be argued that a living area will qualify as a residential unit if it falls within one of paragraphs (a) to (c) *or* one of paragraphs (d) to (g). This interpretation would, for example, support an argument that a detached house (which falls within paragraph (a) of the definition) will qualify as a residential unit even if it is presently used solely for business purposes, as it is necessary only that it satisfy the requirements of
(The footnote is continued on the next page.)

intended use of the property is irrelevant. The one exception to this conclusion arises from paragraph (c) of the definition of "residential complex," which essentially ensures that a single-family residence that is occupied by the owner and his or her family as a place of residence will not lose its status as a residential complex merely because the owner uses a portion of the complex for business purposes, as long as the complex is used *primarily* as a place of residence.

Single-Unit Residential Complex

A single-unit residential complex is a residential complex that does not contain more than one residential unit; the term does not include a residential condominium unit. Thus, a single-unit residential complex generally is a detached or semi-detached house.

Multiple-Unit Residential Complex

A multiple-unit residential complex is a residential complex that contains more than one residential unit, but does not include a condominium complex. A multiple-unit residential complex includes an apartment building.

Residential Condominium Unit

A residential condominium unit is a residential complex that is, or is intended to be, a bounded space in a building designated or described as a separate unit on a registered condominium plan, and includes any interest in land pertaining to ownership of the unit.

Condominium Complex

A condominium complex is a residential complex that contains more than one residential condominium unit.

Substantial Renovation

The term "substantial renovation" is defined in subsection 123(1) as the renovation or alteration of a building to such an extent that all or substantially all of the building that existed immediately before the renovation or alteration was begun, other than the foundation, external walls, interior supporting walls, floors, roof, and staircases, has been removed or replaced where, after completion of the renovation or alteration, the building is, or forms part of, a residential complex.

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[89] Continued . . .
paragraph (a), and not one of paragraphs (d) to (g). It is submitted, however, that this interpretation is not appropriate, as paragraphs (d) to (g) are clearly intended to limit the scope of the definition, and the interpretation suggested above would essentially render paragraphs (d) to (g) meaningless. Additionally, the explanatory notes relating to the definition state that "[a] residential unit is a house, mobile home, apartment, suite, hotel room or similar premises *used or intended for use as a place of residence or lodging for individuals*" (emphasis added). Clearly, the Department of Finance is of the view that paragraphs (d) to (g) limit the application of paragraphs (a) to (c). See Canada, Department of Finance, *Goods and Services Tax: Explanatory Notes to Bill C-62 as Passed by the House of Commons on April 10, 1990* (Ottawa: the department, May 1990), 29.

Builder

The word "builder" is also defined in considerable detail in subsection 123(1). The identification of a "builder" of a residential complex is important, because a supply by a builder will typically create a GST liability in respect of residential real property. In general terms, a builder is a person who constructs or substantially renovates a residential complex or engages another person to construct or substantially renovate a residential complex. The definition also encompasses a person who constructs or engages another person to construct an addition to a multiple-unit residential complex and a person who acquires an interest in a residential complex at the time when construction or substantial renovations are being carried out. Paragraph (d) of the definition states that a person will be considered to be a builder of a residential complex if the person acquires an interest in the complex before it is occupied by an individual as a place of residence or lodging for the primary purpose of resale to any purchaser or leasing to individuals for personal use. Pursuant to this paragraph, many persons who would not ordinarily consider themselves "builders" of such complexes may nevertheless be regarded as such for GST purposes.

The definition of "builder" specifically excludes an individual[90] who engages in the activities described above otherwise than in the course of a business or an adventure or concern in the nature of trade, and a person whose only interest in the complex at the time of construction or substantial renovation is a right to purchase the complex or an interest in the complex from a builder thereof.

Sale

A sale includes any transfer of the ownership of property and a transfer of the possession of property under an agreement to transfer ownership of the property.

Improvement

An improvement is defined as any property or service supplied to a person for the purpose of improving real property to the extent that the consideration paid for the property or service will be included in determining the adjusted cost base of the property under the Income Tax Act.

Specific Exempt Categories

Preliminary Comments

In this section I will examine in greater detail the circumstances required to render a sale of real property exempt pursuant to section 2, 3, 4, 5, or 9 of part I of schedule V. Each of these exemptions falls within the scope

[90] Pursuant to the definition in subsection 123(1), for GST purposes an "individual" is a natural person. The meaning of this word is different for income tax purposes; the word "individual" is defined in subsection 248(1) of the Income Tax Act as "a person other than a corporation."

of section 194. (Sample certificates for use in respect of certain exemptions are reproduced in appendixes B and C.)

Facts Justifying Exemption

Section 194 provides little guidance as to what a written statement or certificate should contain in order to satisfy the section's requirement. Section 194 will apply where the vendor "incorrectly states or certifies in writing to the recipient of the supply that the supply is an exempt supply described in any of sections 2 to 5.3, 8 and 9 of Part I of Schedule V."

It is submitted that the certificate should set out the facts that qualify the transaction as an exempt supply, together with a concluding statement that the supply is exempt. In the absence of a suitably detailed certificate that provides the necessary background information, one might question whether the purchaser has informed himself as to the GST status of the transaction; it might be argued that the purchaser ought to have known (by making proper inquiries and requesting a detailed certificate) that the supply was taxable. Such an argument, if successful, could render a certificate valueless to the purchaser. Although it is unclear whether section 194 requires that the certificate refer specifically to the section pursuant to which the sale is exempt, it is advisable to incorporate this information into the certificate. Appendixes B and C have been drafted in accordance with these guidelines.

Definition of Terms

Several of the terms used in part I of schedule V have particular definitions for the purposes of the Act, and the best way to ensure that the certificates are comprehensive is to incorporate the same definitions into the certificates themselves. In view of the length of some definitions, the most convenient way to do this is to incorporate the applicable definitions by reference, as has been done in appendixes B and C. The difficulty with this approach, of course, is that the vendor's tax advisers will have to provide a satisfactory explanation of the meaning of the certificate (including the definitions) to the client; this will present few problems with respect to the simpler definitions, but the client may have difficulty in understanding some of the lengthy definitions, such as "residential complex."

Sales by a Non-Builder

Section 2 of part I of schedule V is the principal exempting provision in the case of sales of used residential properties. That section exempts

> [a] supply by way of sale of a residential complex or an interest therein made by a person who is not a builder of the complex or, where the complex is a multiple unit residential complex, an addition thereto, unless the person claimed an input tax credit in respect of the last acquisition by the person of the complex, or in respect of the acquisition or importation by the person, after the complex was last acquired by the person, of an improvement to the complex.

A sale is exempt pursuant to section 2 if it involves the sale of a residential complex or an interest in a residential complex by a vendor who is not the builder of the complex or (if the complex is a multiple-unit residential complex) the builder of an addition to the complex. The exemption will be denied if the vendor has claimed an input tax credit in respect of the last acquisition by the vendor of the residential complex, or in respect of the making of an improvement to the complex.[91] Generally, this will be the case only if the vendor acquired the complex for use in commercial activities rather than as a place of residence. Additionally, the reference to the "last acquisition" of the complex by the vendor is intended to reflect the fact that under the change-of-use rules, which deem a person to have sold a residential complex to himself if certain changes of use occur, an owner of a residential complex may be deemed to have acquired the complex on more than one occasion.

A sample certificate to be provided by the vendor on closing in respect of a sale to which section 2 applies is reproduced in appendix B.

Sales by Individual Builders

Section 3 of part I of schedule V exempts a supply by way of sale of a residential complex (or an interest in a residential complex) by a person who qualifies as the builder of the complex (or, in the case of a multiple-unit residential complex, the builder of an addition to the complex) if each of the following conditions is satisfied:

1) the builder is an individual;

2) the complex is used, at any time after the substantial completion of the construction or substantial renovation of the complex, primarily as a place of residence of the builder, an individual related to the builder,[92] or a former spouse of the builder; and

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[91] A question may arise as to whether the exemption will be denied in circumstances where the vendor improperly claimed an input tax credit when the property was acquired. For example, an owner that acquired the residential complex for the purpose of granting GST-exempt residential leases to individuals, and that would therefore not be entitled to claim an input tax credit in respect of GST incurred on the acquisition of the complex, may be GST-registered in connection with other business ventures and may have improperly claimed an input tax credit in connection with the complex. In these circumstances, it might be argued that the owner has claimed an input tax credit (albeit improperly), thereby rendering the resale of the complex taxable. Clearly, this position is contrary to the policy intent of the Act as reflected in the expanatory notes to section 2 of part I of schedule V, which cite, as an example of a case in which input tax credits would have been claimed, a vendor that acquired the residential complex for use in commercial activities (*Explanatory Notes to Bill C-62*, supra footnote 89, at 206). Furthermore, because section 169 of the act creates input tax credits only to the extent that property or services are acquired for use in a commercial activity, it may be argued that in cases where the vendor's use of the property does not create eligibility for input tax credits, no input tax credits ever existed in favour of the vendor, and the vendor therefore could not have claimed these credits.

[92] Pursuant to subsection 126(3) of the Act, a determination as to whether persons are related is made with reference to the rules set out in the Income Tax Act, and in particular subsections 251(2) to (6) thereof.

3) the complex is not used, between the time of its construction or substantial renovation by the builder and the time of its sale, primarily for any purpose other than as a place of residence as described in point 2 above.

Even if these conditions are satisfied, however, the exemption will be denied if the builder has claimed an input tax credit in respect of his last acquisition of the real property or in respect of the acquisition or importation of an improvement to the property. In general terms, section 3 exempts a sale of residential property that was constructed and occupied by the vendor (or a related person) as a place of residence. Although section 3 technically applies to any residential complex (including a multiple-unit residential complex), the requirement that the vendor or a related person must have used the complex "primarily as a place of residence" will, in practical terms, restrict the application of section 3 to transactions involving single-unit residential complexes, since it seems unlikely that an apartment building will often be used primarily as a place of residence of one particular individual or persons related to that individual.

It should also be noted that it is not necessary that the complex be occupied by the vendor as a residence immediately prior to the time of sale. All that is necessary is that the complex be occupied "at any time" after its construction or substantial renovation by the individual as a place of residence, and that it not be used primarily for any other purpose between the time of construction or substantial renovation and the time that the builder goes into occupation. If the builder subsequently vacates the complex and converts it to commercial use, the converted portion will cease to qualify as a residential unit and will lose its character as a residential complex, thereby rendering a resale taxable. If, however, the builder vacates the complex prior to sale and the complex remains unused until the time of sale, it will retain its status as a residential complex. Thus, a complex that is vacant immediately prior to sale will continue to qualify for the exemption, as long as it was not diverted to commercial use during the interim.

Sales of Single-Unit Residential Complexes or Condominium Units by a Builder

Section 4 of part I of schedule V is restricted in its application to sales of single-unit residential complexes or residential condominium units (or an interest therein) by the builder thereof. It is not necessary that the builder be an individual person. In general terms, this exemption arises for one of two possible reasons:

1) the last supply whereby the builder acquired ownership of the unit or complex constituted an exempt supply by way of sale (this would be the case, for example, if the builder made a taxable sale of the unit or complex and subsequently reacquired the unit or complex on a GST-exempt basis); or

2) after having constructed or substantially renovated the unit or complex, the builder was deemed, pursuant to one of subsection 191(1), (2),

or (3) to have acquired the unit or complex in a GST-taxable sale (and was therefore required to account for GST on the fair market value of the property).[93]

However, the exemption is denied if the builder has recovered the GST paid in respect of its last acquisition of the property or an improvement to the property. Additionally, in accordance with the general policy that substantially renovated properties are subject to GST, the exemption will be denied if, subsequent to the last acquisition of the property by the builder, the property is substantially renovated.

Sales of Multiple-Unit Residential Complexes by the Builder Thereof

Section 5 of part I of schedule V is applicable to sales of multiple-unit residential complexes (or a sale of an interest therein) by the builder of the complex. The section 5 exemption is similar to that provided by section 4 relating to single-unit residential complexes and residential condominium units, although section 5 is concerned with multiple-unit residential complexes (typically, apartment buildings and similar structures) and additions thereto. In particular, the sale of a multiple-unit residential complex by the builder will be exempt if the builder last acquired ownership of the complex by way of an exempt sale[94] or if, after construction or substantial renovation of the complex, the builder was deemed under subsection 191(3) to have acquired the complex in a taxable sale.[95] Parallel rules are imposed in respect of a sale of an addition to the multiple-unit residential complex.[96] Once again, however, the

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[93] Section 191, which is examined later in this article, establishes certain self-supply rules that are intended to ensure that builders who construct residential properties for GST-exempt rental purposes are required to account for GST on the fair market value of the property (rather than simply on the taxable property and services acquired to construct the property). This is done by deeming the builder to have purchased the property from itself at fair market value (thereby triggering GST on that value) when the complex (or, in the case of a multiple-unit residential complex, a unit in the complex) is leased to an individual for use as a place of residence. In these circumstances, the builder is generally permitted to claim input tax credits in respect of the GST incurred when constructing the complex, and a subsequent sale of the property will typically be GST-exempt.

[94] As is noted above in respect of section 4, this will typically be the case if the builder sold the complex and subsequently reacquired ownership in a non-taxable sale.

[95] Subsection 191(3) is examined in greater detail later in this article. At this point it is sufficient to note that the subsection will deem the builder of a multiple-unit residential complex to have acquired the complex in a taxable sale for a deemed sale price equal to the fair market value of the complex (thereby requiring the builder to remit GST calculated on that value) at the time of the first occasion following construction or substantial renovation when possession of a residential unit in the complex is given to an individual for occupancy as a place of residence pursuant to a lease, licence, or similar arrangement.

[96] Situations may arise in which the sale of a multiple-unit residential complex will generally qualify for the paragraph 5(a) exemption, but a new addition that was constructed by the builder remains unoccupied and therefore does not qualify for the exemption conferred by paragraph 5(b). In these circumstances, subsection 136(3) will deem the sale

(The footnote is continued on the next page.)

exemption will be denied if, after the last acquisition of the complex by the builder, the builder substantially renovated the complex. Similarly, the exemption will be denied if the builder has claimed an input tax credit in respect of the last acquisiton of the complex or improvement or in respect of a subsequent improvement to the complex or addition.

Sales of Personal-Use Real Property

Section 9 of part I of schedule V creates an exemption that applies to certain transactions involving the sale of real property by a vendor who is an individual or a qualifying trust. Specifically, section 9 applies to

> [a] supply of real property made by way of sale by an individual or a trust, all of the beneficiaries (other than contingent beneficiaries) of which are individuals and all of the contingent beneficiaries of which, if any, are individuals or charities, other than
>
> (a) a supply of real property that is, immediately before the time ownership or possession of the property is transferred to the recipient of the supply under the agreement for the supply, capital property used primarily in a business of the individual or trust;
>
> (b) a supply of real property made
>
> (i) in the course of a business of the individual or trust, or
>
> (ii) where the individual or trust has filed an election with the Minister in prescribed form and manner and containing prescribed information, in the course of an adventure or concern in the nature of trade of the individual or trust;
>
> (c) a supply deemed under section 206 or 207 of the Act to have been made; or
>
> (d) a supply of a residential complex.

Thus, section 9 essentially provides an exemption for sales of personal-use real property (other than residential property) by an individual or a qualifying trust. It should be noted that, pursuant to paragraph 9(a), the exemption will be denied if the property is used as capital property in a business of the vendor. For the exemption to be denied on this basis, however, the property must be so used "immediately" before a transfer of ownership or possession, and must have been used "primarily" in a business of the vendor. Consequently, property that was formerly used as capital property in a business of the vendor but that is no longer so used will not be denied the exemption for this reason alone.[97] Additionally, the

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[96] Continued . . .
of the addition and the sale of the remainder of the building to be separate supplies, neither of which is incidental to the other. The GST status of each supply will be evaluated separately, with the sale of the new addition being taxable and the sale of the remainder of the building being exempt. In such cases an allocation of the sale price between the two portions of the building will be required.

[97] It should be noted, however, that in circumstances where a GST-registered individual acquires real property for use as capital property in commercial activities and not primarily
(The footnote is continued on the next page.)

requirement that the property be used primarily in a business of the vendor supports the view that if the property was used only to a limited extent for such a purpose, the exemption will be applicable.[98]

Pursuant to subparagraph 9(b)(i), the exemption will be denied if the sale takes place "in the course of a business of" the supplier. Generally, this will require a determination whether the supplier is carrying on the business of selling real property, which in turn will depend on a variety of criteria usually applied when determining whether a person is carrying on a business. For example, it will be necessary to consider the frequency with which such transactions are undertaken.

Finally, it is important to bear in mind that if the supply is made in the course of an adventure or concern in the nature of trade, the vendor is permitted to elect unilaterally to render the supply taxable.[99] Section 9 does not specify when the election must be filed, and it is theoretically possible that the vendor could file the election on (and possibly even after) the day of closing, with the result that, if the purchaser has not obtained a suitable certificate from the vendor, the purchaser may be liable for the tax. Accordingly, it is prudent to obtain a confirmation that the vendor will not make this election.

A sample certificate to be provided by the vendor on closing in respect of a sale to which section 9 applies is reproduced in appendix C.

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[97] Continued . . .
for personal use and enjoyment, and subsequently begins to use the property exclusively for other purposes, or primarily for personal use and enjoyment, the individual will be deemed (pursuant to subsection 207(1)) to have made and received a taxable sale of the property, and will therefore be required to account for GST in respect of the deemed supply. The purpose of this provision is to recover input tax credits previously claimed by the registrant; the tax arising from the deemed supply will be related to the extent that the property was previously used in commercial activities. It is interesting to note that according to the explanatory notes that accompany subsection 207(1) (*Explanatory Notes to Bill C-62*, supra footnote 89, at 93), that provision applies where an individual registrant "*ceases to use real property in commercial activities* or begins to use the property primarily for the individual's . . . personal use" (emphasis added). The Department of Finance seems to be of the view that a mere cessation of use in commercial activities (as distinguished from the commencement of use for another purpose) will be sufficient to trigger subsection 207(1).

[98] A determination as to whether the property has been used "primarily" as capital property in a business may be problematic. In particular, the Act does not specify whether the determination should be made with reference to the area of the property that has been so used, the percentage of use over any given period of time, or some combination of the two. For example, if a small portion of the property has been used continuously in a business, it may be argued that, although that portion was used primarily for business purposes, the entire property was not so used. Ultimately, each determination must be made on the facts of the particular case.

[99] It is often advantageous for the vendor to make such an election if he is not GST-registered and has paid GST in respect of the acquisition of the property or the making of improvements thereto, because the election will entitle him to claim a rebate pursuant to section 257. This rebate is examined later in this article.

SPECIAL RULES AND TRANSACTIONS

Combined Supplies of Real Property

Residential Complex and Other Real Property

Generally, where a particular type of property or service is supplied together with any other property or service for a single consideration, and it is reasonable to view the supply of one property or service as incidental to the other property or service, section 138 will deem the incidental property or service to form a part of the dominant property or service. For instance, a supply of personal property (such as appliances) may be deemed to be part of a supply of real property (such as an apartment building) if the supply of the appliances can be reasonably regarded as being incidental to the supply of the apartment building.

In the absence of any other rules, section 138 can have the effect of granting exempt status to otherwise taxable supplies of real property merely by virtue of the fact that the property is conveyed as part of and is incidental to an exempt transaction. In an attempt to address this issue, subsection 136(2) provides as follows:

> (2) **Combined supply of real property—**For the purposes of this Part, where a supply of real property includes the provision of
>
> (a) a residential complex or land, a building or part of a building that forms or is reasonably expected to form part of a residential complex, and
>
> (b) other real property that is not part, and is not reasonably expected to form part, of a residential complex,
>
> the property referred to in paragraph (a) and the property referred to in paragraph (b) shall each be deemed to be a separate property and the provision of the property referred to in paragraph (a) shall be deemed to be a separate supply from the provision of the property referred to in paragraph (b), and neither supply is incidental to the other.

Thus, as long as the other real property is neither a part of nor expected to become a part of the residential complex, the Act will deem two separate supplies of real property to have been made.

The definition of "residential complex" encompasses that portion of the land subjacent or immediately contiguous to the building that is attributable to the residential complex and that is reasonably necessary for its use and enjoyment as a place of residence for individuals. By virtue of subsection 136(2), any sale of a residential complex that includes contiguous land that exceeds the area reasonably necessary for such use and enjoyment will be deemed to constitute two separate supplies: a sale of a residential complex, and a sale of land that does not form part of the residential complex. The GST implications of each supply must be evaluated independently.

The Act does not specify any rules for allocating the purchase price between the residential and non-residential portions of the property. An allocation on the basis of geographic area may often be inappropriate, because in most cases the residential portion, which includes a structure,

will have a higher value per unit of area than undeveloped land. An appraisal of the two separate portions of property is presumably the most accurate way to determine their respective values.[100]

Supply of Multiple-Unit Residential Complex

Subsection 136(3) provides that where the owner of a multiple-unit residential complex builds an addition to the complex (for example, a new wing) and subsequently conveys the property before the new portion is occupied as a residence,[101] the sale of the previously existing portion of the building will continue to qualify for an exemption pursuant to section 5 of part I of schedule V, assuming that the exemption would apply but for the construction of the addition. Pursuant to subsection 136(3), however, the new addition will be deemed to be a separate taxable supply. Once again, the subsection does not provide for the allocation of purchase price between the new and old portions of the building; however, the Department of Finance has suggested that tax will be calculated with reference to the fair market value of the addition.[102]

Combined Supply of Real and Personal Property

Subject to the applicable test, section 138 will deem combined supplies to form one supply if the various types of property or services are supplied for a single consideration. However, this rule will not apply if the agreement of purchase and sale allocates the purchase price among various types of assets, such as personal and real property. It appears that when such an allocation is made, the sale of any real property to which a portion of the purchase price is specifically allocated will be treated as a separate supply. Thus, if the real property qualifies for an exemption, the exemption will continue to be available even if the other assets conveyed are not eligible for such an exemption. In a transfer of business assets that do not qualify for a joint election, the separate allocation of a part of the purchase price to any real property that is conveyed will at least permit the purchaser to self-remit any GST arising in respect of that part of the transaction pursuant to subsection 221(2), provided that the other requirements of the purchaser-remittance provisions are satisfied.[103]

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[100] If each portion of the property is separately assessed for real property tax purposes, it may be acceptable to rely on these assessed values in lieu of a formal appraisal.

[101] On its occupation as a place of residence, a deemed disposition occurs pursuant to subsection 191(4), thereby requiring the builder to account for and remit GST calculated with reference to the fair market value of the addition.

[102] *Explanatory Notes to Bill C-62*, supra footnote 89, at 36.

[103] Additionally, it should be noted that any price allocation will be subject to subsection 153(2), which provides as follows:

> (2) **Combined consideration—**For the purposes of this Part, where
>
> (a) consideration is paid for a supply and other consideration is paid for one or more other supplies or matters, and

(The footnote is continued on the next page.)

Self-Supplies and Substantial Renovations

As has already been noted, residential rents are GST-exempt, and GST incurred by a person in the course of supplying residential units for rent cannot be recovered through input tax credits. As a result, the purchase by a landlord of a residential complex for rental purposes will result in a tax cost that cannot be recovered through input tax credits. To maintain a level playing field, and to ensure that residential landlords do not minimize their GST costs by constructing their own rental units, the Act includes certain self-supply and substantial-renovation rules that impose GST on the full value of self-supplied residential complexes.[104]

The self-supply rules are set out in subsections 191(1) to (4), each of which is examined below. Certain exceptions to these rules in subsections 191(5) to (7) are also summarized below.

Self-Supply of Single-Unit Residential Complex or Residential Condominium Unit

Subsection 191(1) establishes self-supply rules applicable in respect of a residential complex that is a single-unit residential complex or a residential condominium unit. A builder who has constructed or substantially renovated such a complex is deemed to have made and received a taxable supply of the complex, and to have paid as recipient and collected as supplier GST calculated on the basis of the fair market value of the complex when the following circumstances are present:

1) construction or substantial renovation of the complex is substantially completed;

2) the builder

a) gives possession of the complex to a person under a lease, licence, or similar arrangement (other than an arrangement whereby possession is given pursuant to an agreement of purchase and sale of the complex pending the closing of the transaction) for the purpose of occupancy by an individual as a place of residence;

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[103] Continued . . .

(b) the consideration for one of the supplies or matters exceeds the consideration that would be reasonable if the other supply were not made or the other matter were not provided,

the consideration for each of the supplies and matters shall be deemed to be that part of the total of all amounts, each of which is consideration for one of those supplies or matters, that may reasonably be attributed to each of those supplies and matters.

An unreasonable price allocation that provides undue benefits to the recipient may be challenged by Revenue Canada.

[104] Even without the self-supply rules, there will be a GST cost to a landlord who constructs his own buildings; GST will be paid on the construction materials and will be similarly ineligible for input tax credits. Without such rules, however, the self-supplying landlord would avoid paying GST on the difference between the fair market value and the cost of construction (that is, the value of any labour supplied by employees of the builder, and the profit component added by the marketplace through the sale).

b) gives possession of the complex pursuant to an arrangement whereby the complex is sold but the related land is leased; or

c) where the builder is an individual, occupies the complex as a place of residence; and

3) the individual referred to above is the first individual to occupy the complex as a place of residence after construction or substantial renovation.

The deemed sale (and consequently the liability for GST) arises at the time of substantial completion of the construction or substantial renovation of the complex or the first occupation of the unit, whichever is later. A subsequent sale of the complex will constitute an exempt supply unless the builder has claimed an input tax credit in respect of the deemed acquisition of the complex or an improvement to the complex.

Self-Supply of Residential Condominium Unit

Subsection 191(2) provides an additional self-supply rule pertaining to residential condominium units. This provision applies where

1) construction or substantial renovation of the residential condominium unit is substantially completed;

2) the builder gives possession of the unit to a purchaser under an agreement of purchase and sale prior to the registration of the condominium complex as a condominium;

3) the purchaser (or a tenant or licensee of the purchaser) is the first individual to occupy the unit as a place of residence after construction or substantial renovation; and

4) the agreement of purchase and sale is terminated (otherwise than by completion) and the same parties do not enter into another agreement at the time of termination.

The presence of these conditions will trigger a deemed taxable sale of the unit at fair market value, thereby requiring the builder to account for GST calculated on that value.[105]

Self-Supply of a Multiple-Unit Residential Complex

Self-supplies of multiple-unit residential complexes are dealt with by subsection 191(3). Like the previous two subsections, subsection 191(3) deems a builder who has constructed or substantially renovated a multiple-unit residential complex to have made and received a taxable supply of the complex, and to have paid as recipient and collected as supplier GST

[105] If possession of the unit was transferred before 1991, subsection 191(2) will not deem GST to have been paid and collected, and no GST liability will occur. This result is consistent with the transitional rules reviewed above, which generally provide that a sale is not taxable if either ownership or possession was transferred to the purchaser before 1991. It should be noted, however, that subsection 191(2) will still deem a sale to have occurred, so as to ensure that a subsequent resale of the unit will be exempt pursuant to section 4 of part I of schedule V.

calculated on the basis of the fair market value of the complex when the following circumstances are present:

1) construction or substantial renovation of the complex is substantially completed;

2) the builder

a) gives possession of any unit in the complex to a person under a lease, licence, or similar arrangement for the purpose of occupancy by an individual as a place of residence; or

b) where the builder is an individual, occupies any unit in the complex as a place of residence; and

3) the individual referred to above is the first individual to occupy a unit in the complex as a place of residence after construction or substantial renovation.

The builder will be required to account for GST on the fair market value of the multiple-unit residential complex when the construction or substantial renovation is substantially completed or when the individual referred to above goes into possession, whichever is later. A subsequent sale of the complex will be exempt pursuant to section 5 of part I of schedule V, provided that the builder claims no input tax credits in respect of the GST that arises upon the deemed sale or any subsequent improvements to the complex.

Self-Supply of an Addition to a Multiple-Unit Residential Complex

Subsection 191(4) essentially parallels the provisions of subsection 191(3), except that the former provision applies to an addition to a multiple-unit residential complex (for example, a new wing added to an apartment building). The occupation of a unit in the addition by an individual (or by the builder, if the builder is an individual) will trigger a deemed sale of the addition by and to the builder at fair market value, thereby requiring the builder to account for GST calculated with reference to that value.

Exceptions to the Self-Supply Rules

Subsections 191(5), (6), and (7) establish certain exceptions to the self-supply rules reviewed above. The most significant exception arises from subsection 191(5), which deals with residential complexes self-supplied for personal use. Specifically, the subsection provides that the self-supply rules outlined in subsections 191(1) to (4) do not apply to a builder of a residential complex (or an addition thereto) if

1) the builder is an individual;

2) at any time after the construction or renovation of the complex (or addition thereto) the complex is used primarily as a place of residence of the builder, an individual related to the builder, or a former spouse of the builder;

3) the complex is not used primarily for any other purpose between the time of construction or renovation and occupancy by the builder or related person or former spouse; and

4) the builder has not claimed an input tax credit in respect of the acquisition of or an improvement to the complex.

The exception applies to self-supplied personal-use residences, with the result that the builder is required to pay GST on the material and service inputs rather than on the fair market value. The requirements of subsection 191(5) are identical to those that apply for the exemption conferred by section 3 of part I of schedule V.[106]

Subsection 191(6) establishes an exception that applies in respect of student residences. Specifically, the exception applies if the builder is a university, public college, or school authority, and the complex is constructed or substantially renovated primarily for the purpose of providing a place of residence for students attending the university or college or a school of the school authority.

The final exception is established by subsection 191(7), and relates to residential complexes constructed by a GST registrant for use as a place of residence or lodging by an employee of the registrant at a location at which the employee is required to be in the performance of his or her duties. If this work site is so remote that the employee cannot reasonably be expected to establish and maintain a self-contained domestic establishment, and the registrant elects in prescribed form,[107] no supply will be deemed to have been made by the registrant until the complex is either sold or supplied by way of lease, licence, or similar arrangement to a person who is not an employee of the registrant.

Non-Substantial Renovations

The foregoing discussion relates to substantial renovations, the definition of which is reviewed above. However, section 192 contains a deeming provision that may result in a GST liability to a person who performs renovations that do not constitute "substantial renovations" to a residential complex. The application of that section is restricted to persons who are engaged in the business of making supplies (whether by sale, by lease, or in some other manner) of real property (typically, real estate

[106] It is interesting to recall that paragraph (f) of the definition of "builder" excludes individuals who build or substantially renovate residential complexes otherwise than in the course of a business or an adventure or concern in the nature of trade. Consequently, an individual who self-supplies a residential complex in circumstances that exclude him from the definition of "builder" will not be subject to the self-supply rules of subsections 191(1) to (4), and therefore will not require the benefit of subsection 191(5). It seems that subsection 191(5) is intended to apply in circumstances where individuals construct residential complexes as a commercial undertaking, and in the course of that commercial undertaking construct a residence for personal use.

[107] Form GST 17, "Election Concerning the Provision of a Residence or Lodging to an Officer or Employee at a Remote Work Site."

developers). Section 192 effectively requires such persons to account for GST on the value of otherwise non-taxable costs (other than financing or insurance expenses, or other costs classified as financial services for GST purposes) incurred in the course of the renovations, to the extent that those costs are included in computing the adjusted cost base of the property. For example, labour costs relating to services provided by employees of the developer, which otherwise would not be taxable, will become subject to GST. The tax arising from the application of section 192 will be deemed to have been collected by the developer when the renovations are substantially completed or when ownership of the complex is transferred, whichever is earlier, and the tax must be remitted by the developer with its return for the reporting period during which the earlier event occurs.

Foreclosures and Quit Claims

Sections 182 and 183 are intended to govern the GST consequences of forfeitures, seizures, and repossessions relating to real and personal property. Section 182, which applies to forfeitures of deposits and other amounts, is examined below. Section 183 imposes a series of rules that apply to seizures and repossessions.

The basic rule governing foreclosures is established by subsection 183(1). In circumstances where real property is seized or repossessed by a mortgagee pursuant to the mortgagee's security interest in the property, paragraph 183(1)(a) deems the mortgagee to have purchased the property and paragraph 183(1)(b) deems the consideration for the purchase to be nil,[108] with the result that no GST is payable as a result of the repossession.

Paragraph 183(1)(d) is intended to ensure that in cases where the seized property is personal-use real property owned by an individual or qualifying trust, or where the debtor is a public service body, the deemed sale that arises pursuant to paragraph 183(1)(a) is nevertheless considered a taxable supply for the purposes of sections 193 and 257. For an input tax credit or rebate to be payable to a vendor of real property, the vendor must have made a *taxable* supply by way of sale. In the absence of paragraph 183(1)(d), the deemed supply by the debtor to the creditor could be exempt pursuant to either section 9 of part I of schedule V or section 25 of part VI of schedule V (thereby denying the input tax credit relief of section 193 or the rebate of section 257, as the case may be); yet

[108] The deemed nil consideration does not apply for the purposes of sections 193 and 257, and paragraph 183(1)(c) will deem the sale to have taken place at fair market value for the purposes of those sections. Sections 193 and 257 are intended to permit persons who have incurred previously unrecoverable GST on the acquisition of real property to claim an input tax credit or rebate if the property is subsequently resold in a taxable transaction. Each of these sections, however, restricts the input tax credit or rebate to an amount that does not exceed the GST payable on the resale of the property. Consequently, in the absence of paragraph 183(1)(c), the debtor from whom the property has been seized or repossessed will become ineligible for the relief granted by sections 193 and 257.

the resale of the property by the creditor would also be subject to GST. Paragraph 183(1)(d) alleviates the problem of double taxation by ensuring that the debtor's tax relief (input tax credit or rebate) is preserved, provided that the other requirements are satisfied.

Having permitted the creditor to take possession of the property on a non-taxable basis, section 183 addresses the GST implications of the subsequent disposition of the property. Specifically, subsection 183(2) contemplates a subsequent sale of the property by the creditor, and subsection 183(4) deals with the GST implications resulting from the use of the property by the creditor. In the case of a sale of the property, subsection 183(2) provides as follows:

> **(2) Supply in commercial activity—**Subject to subsection (3), where at any time a creditor who has seized or repossessed property, in circumstances in which subsection (1) applies, makes a particular supply (other than an exempt supply) of the property, except where any of subsections (4) to (6) applied at an earlier time in respect of the use of the property by the creditor, the creditor shall be deemed, for the purposes of this Part, to have made the particular supply in the course of a commercial activity of the creditor and anything done by the creditor in the course of, or in connection with, the making of the supply and not in connection with the seizure or repossession shall be deemed to have been done in the course of the commercial activity.

As will be noted below, subsections (4) to (6) trigger a GST liability in the hands of the creditor in cases where the seized property is used by the creditor,[109] and the property will not be deemed to have been sold in the course of a commercial activity if any of those subsections were applicable. The purpose of subsection 183(2) is to ensure that any sale of the seized property by the creditor (other than an exempt sale, such as a sale of a used residential complex that satisfies one of the exempt categories reviewed previously) is subject to GST.[110] In the context of seized real property, this conclusion is consistent with the general scheme of section 183 (including paragraphs 183(1)(b) and (d), which are discussed above), as the subsections essentially lead to the conclusion that tax is applied once (but only once) to transactions involving the property.

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[109] Subsection 183(4) applies to real property, whereas subsections 183(5) and (6) apply to personal property.

[110] A notable exception to this rule is provided for by subsection 183(3), dealing with court-ordered seizures by an officer of the court. Specifically, that subsection provides as follows:

> **(3) Court seizures—**Where a court, for the purposes of satisfying a judgment of the court, orders a sheriff, bailiff or other officer of the court to seize property of the judgment debtor and subsequently makes a supply of the property, the supply of the property by the court shall be deemed, for the purposes of this Part, to be a supply made otherwise than in the course of a commercial activity.

Hence, the effect of subsection 183(3) is to ensure that sales of property that are made by an officer of a court pursuant to an order of the court are not subject to GST, and do not fall within the general rule of subsection 183(2) dealing with supplies made by creditors.

As originally drafted, section 183 left some doubts as to the application of GST in cases involving powers of sale. For section 183 to govern the transaction, the creditor must have "seized or repossessed" the property; it was not clear whether this terminology would apply in cases where the mortgagee caused the property to be sold but did not physically take possession. The situation is clarified by subsection 183(10),[111] which provides that a secured creditor that exercises a right under a debt security to cause the supply of property is deemed to have seized the property immediately before the supply and to have supplied the property, unless

1) the supply falls within the parameters of subsection 183(2) (the property is sold by an officer of a court pursuant to a court order), or

2) a receiver has authority with respect to the property supplied.[112]

A GST liability is also triggered if the creditor uses the property rather than supplying it. This result arises pursuant to subsection 183(4), which requires the creditor to account for GST calculated with reference to the fair market value of the property, unless the deemed sale of the property qualifies for an exemption.[113] If the creditor is a financial institution that intends to use the property partially or exclusively for its GST-exempt financial service operations, its ability to recover this tax by claiming input tax credits will be restricted or non-existent.

Deposits, Forfeitures, and Holdbacks

Deposits

Pursuant to subsection 168(9), a deposit[114] (whether refundable or not) given in respect of a supply does not constitute consideration paid for the supply unless and until the supplier applies the deposit as consideration for the supply. It is a question of fact whether, in a particular situation, a deposit has been applied as consideration for the purchase of real property. In many cases, however, the deposit is held in trust (either by a real estate agent or by a broker, or by the solicitor for one of the parties), and the time at which the deposit is so applied will be determinable with reasonable certainty.

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[111] Subsection 183(10) was added by SC 1993, c. 27, section 47(6), effective October 1, 1992.

[112] The application of GST to transactions undertaken by receivers in the course of a receivership is determined by section 266 of the Act. In cases where both of sections 183 and 266 are potentially applicable to a transaction, the intent of the Act is to apply section 266 rather than section 183.

[113] For example, if the property qualifies for GST-exempt status under section 2 of part I of schedule V. In cases involving personal-use real property, it is important to bear in mind that the exemption conferred by section 9 of part I of schedule V will apply only if the creditor is an individual (or a qualifying trust) and the property is sold by the creditor otherwise than in the course of a business. Consequently, the application of this exemption in cases involving sales of seized properties by creditors may be expected to be quite rare.

[114] Except for a covering or container used to supply tangible personal property.

Forfeitures

A vendor who accepts non-refundable deposits pursuant to an agreement of purchase and sale should be aware of the possible application of section 182 in circumstances where the deposit is forfeited as a result of the purchaser's breach of the agreement, such as a refusal to close the transaction. Specifically, subsection 182(1) provides as follows:

> **182. (1) Forfeiture—**For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant, an amount is paid or forfeited by a person to the registrant otherwise than as consideration for the supply,
>
> (a) the registrant shall be deemed to have made to the person, and the person shall be deemed to have received from the registrant, a taxable supply of the property or service for consideration equal to the consideration fraction of the amount paid or forfeited, as the case may be; and
>
> (b) except where the agreement was entered into in writing before 1991, the amount is paid or forfeited, as the case may be, after 1992 and tax in respect of the amount was not contemplated in the agreement, the registrant shall be deemed to have collected, and the person shall be deemed to have paid, at that time, tax in respect of the supply calculated on that consideration.

If the vendor is a GST registrant (for example, a developer), subsection 182(1) will apply in the situation described above because the deposit will have been forfeited to a registrant otherwise than as consideration for the supply, which, owing to the breach or termination of the agreement by the purchaser, will not take place. Accordingly, the vendor will be deemed to have made a taxable supply of the property and to have collected GST equal to the tax fraction of the forfeited deposit. Subsection 182(1) will effectively reduce the value to the registered vendor of the forfeited deposit by slightly more than 6.5 percent; registrants who are in the habit of requiring non-refundable deposits in the course of making taxable supplies of real property should be aware of the tax cost that arises from the purchaser's forfeiture of the deposit.[115]

Holdbacks

As has already been noted, GST arising in respect of the sale of real property will typically be payable on the earlier of the day of closing and the day on which the purchaser takes possession of the property. However, subsection 168(7) creates special rules pertaining to holdbacks. The subsection applies where the purchaser retains, pursuant to (1) an act of Parliament or of the legislature of a province, or (2) an agreement in writing for the construction, renovation, or alteration of, or repair to, any

[115] Similarly, if the purchaser is registered and had entered into the agreement of purchase and sale in the course of the purchaser's commercial activities, it will be entitled to claim an input tax credit in respect of the GST component of the forfeited deposit.

real property, a part of the consideration for the supply pending full and satisfactory performance of the supply. Consequently, the subsection applies to deficiency holdbacks as well as holdbacks pursuant to mechanics' liens legislation.

In circumstances where an amount has been held back, GST calculated on the amount of the holdback is payable on the earlier of the day that the holdback is paid and the day it becomes payable to the vendor. This may cause some difficulties if there is a disagreement between the parties as to when or even if the holdback should be released to the vendor. If a purchaser wrongfully refuses to release a holdback, the vendor will nevertheless be required to remit GST calculated with reference to the holdback before the holdback is collected from the purchaser. A possible solution to this problem would be for the vendor to attempt to collect all GST at the time of closing, although the purchaser might disagree with this procedure and the vendor would have no legal recourse to enforce the payment of all GST at that time.

Joint Venture Elections

For the purposes of part IX of the Act, and subject to certain exceptions that are specifically provided for in the Act, when two or more persons act jointly to make a taxable supply, or jointly receive a taxable supply, the GST that is collectible or payable, as the case may be, is allocated among the persons.[116] Consequently, in the case of a supply jointly made, each party is required to account for his respective proportion of the GST that becomes collectible. Similarly, in circumstances involving joint recipients, each party will claim his respective proportion of the GST incurred as an input tax credit (assuming that all other conditions for eligibility are satisfied).

Therefore, persons engaged in a joint venture (other than a partnership) will, in the absence of specific provisions, be required to account separately for GST and input tax credits in respect of their joint venture operations. Similarly, any supply of property or a service made by one joint venturer to another will result in the application of GST, unless the particular supply is exempt or zero-rated. Section 273 addresses this issue by outlining modified rules that apply in respect of certain joint venture activities, including a joint venture in respect of a prescribed activity.

Pursuant to regulation 3(1) of the Joint Venture (GST) Regulations, the following activities are prescribed for the purposes of subsection 273(1) of the Act:

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[116] It should be noted that this result does not arise if the persons acting jointly are engaged in a partnership, as a partnership is a person for GST purposes, and consequently the supplies will be considered to have been made or received, as the case may be, by the partnership. One of the exceptions referred to above arises from section 177, which in general terms provides that if an agent makes a supply on behalf of one or more undisclosed principals, the agent (and not the principal or principals) will be considered to be the supplier.

> (a) the construction of real property, including feasibility studies, design work, development activities and the tendering of bids, where undertaken in furtherance of a joint venture for the construction of real property; and
>
> (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.[117]

Pursuant to regulation 3(2), however, a joint venture otherwise described in regulation 3(1)(b) that involves a non-residential property will not be prescribed if a participant in the joint venture (or a person associated with or related to a participant) uses all or a portion of the property otherwise than exclusively in commercial activities, and

1) the person does not derive its right to use the property by way of a taxable supply, or,

2) if the person does use the property pursuant to a taxable supply, the person either does not pay GST in respect of that supply or pays GST calculated with reference to consideration that is less than the fair market value of the supply.

Consequently, the joint venturers may not obtain the benefits of section 273 if the property is made available to a member of the joint venture group in such as way as to reduce or avoid the GST that would otherwise be payable in respect of the use of the property.

As a result of subsection 273(1), participants in a joint venture pursuant to a written agreement may elect to designate one participant to act as the "operator,"[118] with the result that the operator will account for all GST that becomes collectible in respect of the joint venture's activities, and will claim input tax credits in respect of GST incurred when acquiring supplies on behalf of an electing co-venturer.[119] Additionally, paragraph 273(1)(c) ensures that any property or service supplied by the operator to the other venturers will not be treated as supplies (and therefore will not be subject to GST) during the period in which the election is in effect. As a consequence, the venturers will not be required to pay GST in respect of any fees charged by the operator for its services in coordinating or operating the joint venture.

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[117] PC 1990-2745, SOR/91-36 (1991), vol. 125, no. 2 *Canada Gazette Part II* 146-49, at 146.

[118] Using forms GST 21, "Joint Venture Election," and GST 355, "Streamlined Joint Venture Election."

[119] Co-venturers (including co-venturers that have elected jointly with the operator) that incur joint-venture-related expenses directly will continue to be eligible to claim input tax credits, provided that the other general requirements for input tax credit eligibility are met.

Rebates

The Act includes three categories of rebates that are of interest to the real estate sector:

1) the federal sales tax new housing rebate;

2) the GST new housing rebate; and

3) the GST rebate for taxable sales of real property by a non-registrant.

Federal Sales Tax New Housing Rebate

A home that was constructed in whole or in part before 1991 typically contains a significant federal sales tax (FST) element embedded in its cost, because that tax would have applied to inputs used in the construction process. To avoid the double taxation that would otherwise occur when GST is applied to the sale price of the house, section 121 provides for a rebate intended to remove the estimated FST component from the cost of new homes that were not occupied before 1991. The rebate is calculated as a percentage of the estimated FST component, and different rules will apply depending on whether the complex is categorized as a "specified residential complex" or a "specified single unit residential complex," as those terms are defined in subsection 121(1). The definitions are examined further below.

Estimated Federal Sales Tax

The estimated federal sales tax (EFST) of a residential complex is determined in accordance with the definition of that term in subsection 121(1). Specifically, the EFST is determined by the formula

$$A \times B$$

where A is a prescribed amount per square metre of area in the complex, and B is the prescribed floor space. The prescribed amount and the prescribed floor space are determined in accordance with the Federal Sales Tax New Housing Rebate Regulations.[120] For the purpose of determining the amount of the rebate to which he is entitled, the applicant may select from two alternative calculations:

1) The applicant may calculate the rebate on the basis of the area of the complex, in which case the amount prescribed (A) is $50 and the prescribed floor space (B) is determined in accordance with the rules set out in regulation 4 of the Federal Sales Tax New Housing Rebate Regulations; or

2) The applicant may calculate the rebate with reference to the sale price of the complex (or, in cases where the builder is deemed to have sold the complex pursuant to section 191, the deemed sale price, which will be equal to the fair market value at the time of the deemed sale), in which case the amount prescribed (A) is 4.25 percent of the sale price and the prescribed floor space (B) will be deemed to be one square metre.

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[120] SOR/91-53 (1991), vol. 125, no. 2 *Canada Gazette Part II* 270-73.

A rebate calculated on the basis of the second method of determining the EFST will not be paid unless the person applies for the rebate after tax has become payable, pursuant to part IX of the Act, as a result of a supply of the complex.[121] Consequently, a builder cannot claim a rebate in respect of a residential complex if GST has not yet become payable on the sale of the complex (for instance, if neither ownership nor possession of the complex has been transferred to the purchaser).

Specified Single-Unit Residential Complex

Subsection 121(2) provides for the payment of a rebate in cases involving a specified single-unit residential complex (SSURC), which may include either a single-unit residential complex or a multiple-unit residential complex containing not more than two residential units. To qualify as a SSURC, the construction or substantial renovation of the complex must have commenced before 1991, and the complex must not have been occupied as a place of residence or lodging after construction or substantial renovation and before 1991.[122]

The events that trigger an entitlement to a rebate for a SSURC are described in paragraphs 121(2)(a) to (d). Those required events are as follows:

1) The builder of the SSURC has either made a taxable sale of the complex or given possession of the complex to a person pursuant to a lease, licence, or similar arrangement, and has thereby triggered a deemed taxable sale under either of subsection 191(1) or (3).

2) GST becomes payable as a result of the supply described above.

3) The purchaser or tenant described in point 1 takes possession of the SSURC after 1990 and before 1995.

4) The construction or substantial renovation of the SSURC was substantially completed

a) before July 1991 in cases where the purchaser or tenant took possession of the complex before that time, or

b) before 1991, in cases where the purchaser or tenant took possession of the complex after June 1991.

The amount of the rebate is determined in accordance with paragraphs 121(2)(e) and (f) and the date on which the construction or substantial renovation of the SSURC was substantially completed. Specifically, if

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[121] Subsection 121(4.1).

[122] This latter requirement arises from the self-supply rules of section 191, which are deemed by subsection 121(5) and section 14 of part I of schedule V to have been in force at all times before 1991. As a result of the application of section 191 before the GST came into effect in 1991, GST will not be payable in respect of a residential complex that was constructed or substantially renovated and subsequently occupied as a place of residence before 1991 (because a deemed taxable sale would have occurred before the GST became exigible, thereby rendering that deemed sale non-taxable and any subsequent sale GST-exempt). There is no need to provide for an FST rebate, as no double taxation would arise.

substantial completion occurred and possession of the complex was transferred before April 1991, the rebate will be equal to two-thirds of the EFST. In any other case, the rebate will be one-third of the EFST.

It should be noted that the SSURC rebate may be payable to the builder or the purchaser, depending on the nature of the event that triggered the application of GST to the complex. If the event was the sale of the complex to an individual, the rebate is payable to the individual.[123] However, if GST becomes payable as a result of a deemed sale of the complex by the builder pursuant to subsection 191(1) or (3), the rebate will be payable to the builder. In the case of a rebate application submitted by an individual purchaser, the builder will be required to furnish evidence of the date on which the complex was substantially completed; it is important to remember that subsection 121(2.1) could render the builder liable for the repayment of any rebate that was improperly paid to the individual on the basis of the builder's representations that construction or substantial renovation was substantially completed before 1991. The builder will be liable, however, only if he knew or ought to have known that the representations were incorrect, *and* the purchaser did not know and could not reasonably be expected to have known that the information was incorrect.

Specified Residential Complex

The second FST new housing rebate, which is provided for by subsection 121(3), applies in the case of a specified residential complex (SRC), which is defined in subsection 121(1) as either

1) a multiple-unit residential complex containing more than two residential units; or

2) a residential condominium unit,

where construction or substantial renovation of the complex began before 1991 and none of subsections 191(1) and (2) (in the case of a condominium unit) and (3) (in the case of a multiple-unit residential complex) applied so as to deem the builder to have made and received a taxable supply of the complex after construction or substantial renovation and before 1991.[124]

Pursuant to subsection 121(3), the SRC rebate is payable to any builder of an SRC[125] who, immediately before 1991, owned or had possession of

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[123] The individual may, however, assign the rebate to the builder.

[124] As is noted above in respect of the rebate for a SSURC, this requirement ensures that the rebate will apply only if the complex is not eligible for a GST-exempt sale owing to a pre-1991 deemed taxable supply.

[125] Other than a builder described in subsection 191(5) or (6). Consequently, neither an individual builder who constructs an SRC for personal use nor a university, public college, or school authority that constructs such a complex as a student residence will qualify for the rebate. This denial arises because no GST will be triggered in respect of a sale or deemed sale of these complexes, and consequently there is no need for a rebate in order to

(The footnote is continued on the next page.)

the complex and had not transferred ownership or possession of the complex under an agreement of purchase and sale to a person who was not a builder of the complex.[126] The amount of the rebate is tied to the extent to which the construction or substantial renovation of the complex was completed as of January 1, 1991. Specifically, if the SRC (or, in the case of a condominum unit that qualifies as an SRC, the condominium complex in which the unit is situated) was more than 25 percent and not more than 50 percent completed as of January 1, 1991, the rebate will be 50 percent of the EFST of the SRC. If the SRC (or condominium complex in which the SRC is located) was more than 50 percent completed as of January 1, 1991, the rebate will be 75 percent of the EFST.

Subsection 121(4) establishes a deadline for the filing of a rebate application pursuant to section 121: the application must be filed in prescribed form and manner before 1995.[127]

GST New Housing Rebate

The implementation of the GST resulted in an increase in the tax component of the cost of a new house from approximately 4.5 percent[128] to 7 percent. As a means of lowering the tax cost of acquiring new housing, a GST new housing rebate was provided for in section 254. Similar rebates are provided for in sections 254.1 (rebates for individuals who purchase a residential complex and enter into a long-term lease of the land attributable to the complex), 255 (rebates for purchasers of a share in a cooperative housing corporation), 256 (rebates for owner-built homes), and 256.1 (rebates for owners or lessees of land that is leased for residential purposes).

Subsection 254(2) provides for the payment of a rebate to an individual purchaser of a single-unit residential complex[129] or a residential condominium unit when the following requirements are met:

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[125] Continued . . .
avoid double taxation. The builder of a residential complex located at a remote work site (which therefore qualifies for a temporary exemption from the self-supply rules of section 191) does qualify for the SRC rebate, presumably because the application of GST to such a complex is not relieved altogether, but rather is merely delayed by subsection 191(7) until the complex is sold or leased to non-employees of the builder.

[126] It should be recalled that the definition of "builder" that appears in subsection 123(1), and that is expressly applicable to section 121, includes a person who acquires an interest in a residential complex before it has been occupied as a place of residence or lodging for the primary purpose of making one or more supplies of the complex or parts thereof by way of sale or lease. Consequently, a person who acquired ownership or possession of an SRC before 1991 and retained both ownership and possession immediately before 1991 would be entitled to the SRC rebate, provided that all other requirements outlined below are satisfied.

[127] Using form GST 212, "Application for Federal Sales Tax New Housing Rebate."

[128] The estimated federal sales tax component of the average new house before 1991.

[129] Pursuant to subsection 254(1), for the purposes of section 254, a single-unit residential complex includes a multiple-unit residential complex that does not contain more than two residential units.

1) At the time the purchaser enters into the agreement of purchase and sale, the purchaser is acquiring the complex or unit for use as the primary place of residence of himself or a relation;[130]

2) the total consideration payable by the purchaser for the complex or unit is less than $450,000;

3) the purchaser has paid all GST payable as a result of the purchase of the complex or unit;

4) ownership of the complex or unit is transferred to the purchaser after construction or substantial renovation thereof is substantially completed;[131]

5) after construction or substantial renovation is substantially completed and before possession is given to the purchaser under the agreement, the complex or unit was not occupied by any individual as a place of residence or lodging (other than, in the case of a condominium unit, an individual who was a purchaser of the unit under an agreement of purchase and sale); and

6) either

a) the first individual to occupy the complex or unit as a place of residence following its construction or substantial renovation is the purchaser (or a relation of the purchaser) or, in the case of a condominium unit, an individual (or a relation an individual) who is a purchaser of the unit under an agreement of purchase and sale; or

b) the purchaser makes an exempt sale of the complex or unit and transfers ownership thereof before the complex or unit is occupied by any individual as a place of residence or lodging.

If each of these conditions is satisfied, the rebate payable pursuant to subsection 254(2) in respect of residences that cost $350,000 or less will be the lesser of $8,750 and 36 percent of the GST paid by the purchaser on the purchase of the residence. For homes that cost more than $350,000 but less than $450,000, the rebate is calculated by using the formula

$$A \times \frac{(\$450{,}000 - B)}{\$100{,}000}$$

where A is the lesser of $8,750 and 36 percent of the GST paid by the purchaser, and B is the total consideration paid by the purchaser.

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[130] Subsection 254(1) defines the word "relation" of a particular individual as another individual who is related to the particular individual or who is a former spouse of the particular individual.

[131] As a result of this requirement, the rebate cannot be claimed until ownership of the complex or unit is transferred to the purchaser. In some cases, this may have the result of delaying the purchaser's rebate entitlement until a time that is significantly later than the time at which GST was payable in respect of the purchase. For example, if the agreement of purchase and sale permits the purchaser to go into possession prior to closing (for example, if the purchaser moves into the premises and makes instalment payments for one year prior to closing), the GST will be payable at the time of transfer of possession, but the rebate entitlement will not arise until one year later.

Consequently, in cases where the purchase price exceeds $350,000, the rebate will diminish as the purchase price moves closer to $450,000. If the purchase price reaches $450,000, no rebate is payable.

The purchaser is required to apply for the rebate within four years after he acquires ownership of the complex or unit.[132] Subsection 254(4) permits the purchaser to submit a rebate application to the builder, and the builder may (but is not required to) pay or credit the amount of the rebate to the purchaser. In this way, the purchaser may reduce the amount he is required to tender on closing. If this procedure is followed, subsection 254(5) requires the builder to transmit the application to the minister with the builder's return for the period in which the rebate was paid or credited. Additionally, if the builder pays or credits the rebate to the purchaser, and the builder knows or ought to know that the purchaser is not entitled to the rebate or that the amount paid or credited exceeds the purchaser's rebate entitlement, the purchaser and the builder are jointly and severally liable to repay the rebate (or the excess amount claimed, as the case may be) to the receiver general.[133]

Rebate for Taxable Sales of Real Property by a Non-Registrant

In some cases, a person who is not a GST registrant may pay GST at the time of acquiring real property, and may also be required to charge and collect GST on a subsequent resale of the property. A non-registrant cannot claim an input tax credit in respect of the GST incurred at the time of purchase; therefore, in the absence of a specific rebate provision, double taxation would occur. To address this issue, section 257 provides for a rebate to non-registrants who make GST-taxable supplies of real property. In general terms, the objective is to permit the non-registrant vendor to recover the previously unrecovered tax paid to acquire the property and to make improvements thereto. However, the applicant may not claim a rebate that exceeds the GST that is payable on the resale of the property (or that would be payable if not for the application of a joint election under section 167). This is accomplished by employing the formula

$$A \times B$$

where A is the lesser of the vendor's GST cost of the property (which consists of the GST paid on the acquisition and the making of improvements to the property) and the GST payable on the resale, and B is a percentage represented by the difference between 100 percent and the percentage of any rebate to which the non-registrant vendor may have been entitled under section 259.

For the non-registrant vendor to qualify for the rebate, he must make a GST-taxable sale of the property. This point is particularly important in cases involving undeveloped or vacant land that might qualify for an exemption pursuant to section 9 of part I of schedule V. Specifically, in

[132] Subsection 254(3).

[133] Subsection 254(6).

cases where the non-registrant vendor is an individual, and the property is not capital property used in a business and is not being sold in the course of a business, the sale may be taxable only if the vendor is selling in the course of an adventure or concern in the nature of trade *and* elects to render the sale taxable. In cases where the non-registrant makes such a sale to a registered person for use in commercial activities (thereby entitling the purchaser to avoid the cash flow problems of a GST-taxable purchase), it is important that the election be completed and filed; failure to do so will disentitle the vendor to the rebate.

CONCLUSION

One should never assume that the GST will take care of itself. Many provisions in the Act are designed to apply specifically to real estate matters, and can result in the application of GST to supplies or events that would not trigger the tax in a non-real-estate context. It is always advisable for parties to a conveyance or other supplies of real property to consider and address the GST implications of the transaction and of their own conduct at an early stage, so that no dispute as to the tax's application arises at closing. Similarly, in view of the potential shifting of liability that arises from section 194 and the possible pitfalls of the purchaser-remittance provisions in subsection 221(2), the parties should be mindful of the possible consequences of representing a conveyance as GST-exempt or relying on inadequate evidence of a purchaser's GST registration status.

APPENDIX A

Subsection 221(2)

IN THE MATTER OF: An Agreement of Purchase and Sale dated the ——— day of ———, 199———

–and–

IN THE MATTER OF: The Excise Tax Act, RSC 1985, c. E-15, as amended

I, ——— of ———, in the County of ———, Province of ———, make oath and say as follow:

1) That I am the [office] of [name of corporate purchaser], a party to an Agreement of Purchase and Sale between [name of purchaser] as purchaser ("the Purchaser") and [name of vendor] as vendor ("the Vendor") made the ——— day of ———, 199——— ("the Agreement"), and as such have personal knowledge of the matters herein declared to, unless stated to be based upon knowledge and belief.

2) That pursuant to the Agreement, the Purchaser has agreed to purchase and the Vendor has agreed to sell the property known as [brief description of property], which property is more particularly described in Schedule X appended to the Agreement ("the Property").

3) That the Purchaser is registered pursuant to subdivision (d) of Division V of Part IX of the Excise Tax Act and the Purchaser's registration number is ———.

4) That I am making this declaration and delivering it to the Vendor with the intent and understanding that it will be relied upon by the Vendor, and that the Vendor will, on the basis of such reliance, decline pursuant to subsection 221(2) of the Excise Tax Act to collect any Goods and Services Tax which may arise in respect of the conveyance of the Property pursuant to the Agreement.

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act

APPENDIX B
Section 2, Part I, Schedule V

TO:

AND TO:

Certificate

The undersigned [name of vendor] is a party to an Agreement of Purchase and Sale ("the Agreement") made as of the ——— day of ———, 199——— between the undersigned as vendor ("the Vendor") and [name of purchaser] as purchaser ("the Purchaser"). Pursuant to the Agreement, the Vendor has agreed to sell and the Purchaser has agreed to purchase the property described as [brief description of property], which is more particularly described in Schedule X appended to the Agreement ("the Property").

For the purposes of this certificate:

1) "Act" means the Excise Tax Act (Canada); and

2) the expressions "builder," "exempt supply," "input tax credit," and "residential complex" have the meanings given to those expressions for the purposes of the Act.

This certificate is delivered by the Vendor to the Purchaser pursuant to section 194 of the Act [and paragraph ——— of the Agreement].

The Vendor hereby certifies:

1) that the Property is a residential complex;

2) that the Vendor is not the builder of the residential complex described in paragraph 1 of this certificate;

3) that the Vendor has not claimed an input tax credit in respect of the last acquisition of or the making of an improvement to the Property; and

4) that, as a consequence of the foregoing, the sale of the Property pursuant to the Agreement constitutes an exempt supply pursuant to section 2 of Part I of Schedule V to the Act.

DATED AND SIGNED at ———, in the Province of ——— this ——— day of ———, 199———.

APPENDIX C
Section 9, Part I, Schedule V

TO:

AND TO:

Certificate

The undersigned [name of vendor] is a party to an Agreement of Purchase and Sale ("the Agreement") made as of the ——— day of ———, 199——— between the undersigned as vendor ("the Vendor") and [name of purchaser] as purchaser ("the Purchaser"). Pursuant to the Agreement, the Vendor has agreed to sell and the Purchaser has agreed to purchase the property described as [brief description of property], which is more particularly described in Schedule X appended to the Agreement ("the Property").

For the purposes of this certificate:

1) "Act" means the Excise Tax Act (Canada); and

2) the expressions "business," "capital property," "exempt supply," and "residential complex" have the meanings given to those expressions for the purposes of the Act.

This certificate is delivered by the Vendor to the Purchaser pursuant to section 194 of the Act [and paragraph ——— of the Agreement].

The Vendor hereby certifies:

1) that there is no residential complex situated upon the Property;

2) that the Property has never been capital property used by the Vendor primarily in a business;

3) that the conveyance of the Property pursuant to the Agreement is not made by the Vendor in the course of a business carried on by the Vendor;

4) that the Vendor has not filed form GST 22 (or such other form as may be prescribed from time to time) electing pursuant to subparagraph 9(b)(ii) of part I of schedule V to the Act to treat the conveyance (if taking place in the course of an adventure or concern in the nature of trade of the Vendor) as a taxable supply, nor will the vendor make such an election;

5) that, as a consequence of the foregoing, the sale of the Property pursuant to the Agreement constitutes an exempt supply pursuant to section 9 of part I of schedule V to the Act.

DATED AND SIGNED at ———, in the Province of ——— this ——— day of ———, 199———.