

Ten Questions About HST to Ask Yourself When Handling a Real Estate Transaction

1. Are you comfortable giving your client tax advice?

- a. If you are not, have you advised your client, in writing, that you will not be giving tax advice with respect to the transaction and explicitly excluded tax and HST matters from your retainer?
- b. Lawyers should not simply rely on statements from the vendor as to whether HST applies to the property (whether or not the vendor is their client). Even when representing sophisticated clients, potentially with accountant advisors or real estate agents involved in the transaction, the lawyer has a responsibility to advise their client on HST matters unless they have explicitly excluded it from their retainer and recommended their client receive outside advice with respect to HST (and documented this advice).
- c. If the client has not received outside HST advice, lawyers should consider seeking expert assistance if they are not confident in the HST implications of a given transaction.
- d. The CRA can provide interpretations (non-binding) or rulings (binding) on the applicability of HST to a particular transaction.¹ However, obtaining such rulings or interpretations can often take too long to be helpful when negotiating an APS. (The CRA states it is a “goal” to provide answers on HST matters within “45 Days”, but such results can and do take longer)
- e. More immediate assistance may be available by consulting with a specialized tax lawyer.

2. Does the transaction involve a new home?

- a. Primary residence buyers may qualify for HST housing rebates. (These are often assigned to the builder as part of the APS.)
- b. Landlords may qualify for the new residential rental property rebate (NRRP)
 - i. Rental rebates cannot be assigned to a builder.
- c. These rebates are conditional on the purchaser actually using the property for the intended purpose. That is, the *recipient* who pays for the property must actually reside in it upon taking position (or, alternatively, an immediate family member of the

¹ See online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/1-4/excise-gst-hst-rulings-interpretations-service.html>

recipient). In the case of a NRRP rebate, the property must, in fact, be used for long-term rentals (longer than 60 days).

3. If the property is a residence, who will live in it?

- a. For a “new home” to qualify for the New House Rebate, the purchaser or one of the purchasers or their “relatives” (within the meaning of the *Income Tax Act*) must reside in the property after purchase as their primary place of residence.
- b. For a “new home” to qualify for the New Residential Rental Property Rebate, the purchaser must not sell the property within one year after its first occupied, the landlord cannot occupy the property themselves, and the first people to occupy the property must be tenants.

4. Who is the supplier and who is the recipient?

- a. The *ETA* places HST obligations on the *supplier* of the property (defined as the “person making the supply”) and the *recipient* of the property (generally defined as the person who is liable under an APS to pay the consideration for the property). This can create complications if the person liable to pay the consideration (such as a corporate body named in the APS, a trustee taking legal title, or other arrangement) is not the party intended to take possession of the property.
- b. Land purchased in the name of a corporation may be disqualified from claiming an HST rebate.
- c. Vacant land sold by a partnership, association or corporation does not qualify for an HST exemption.

5. To what use did the vendor put the property?

- a. The nature of the property and use by the vendor generally determines whether HST will apply, not the nature of the purchaser or the intended use.
- b. Generally, property used as either a personal primary residence or for long-term rentals are exempt from HST (*note: property used for short term rentals like AirBnb rentals are treated differently, as discussed below)
- c. Land used in the furtherance of an “adventure in the nature of trade” is not exempt from HST. The most common example of this is “house flipping”. A house that was not purchased for the primary purpose of being resided in by the purchaser or a family member of the purchaser may be considered an investment property and may not qualify for an HST exemption when it is resold.
- d. Property that had a primarily commercial use (other than long-term rentals) will not qualify for an HST exemption.
- e. Vacant land by an individual may be HST exempt if the land was for “personal use”. However, if the vendor once licensed timber rights to the land, or otherwise used the land for a commercial purpose at any point, that exemption may be lost.

- f. Use of the property by the vendor for short-term rentals can impact the exemption status of a residential property. If the primary use of the property is as a rental property, and if those rentals are short-term, the property may be considered commercial in nature and HST will apply.
- g. Under section 194 of the ETA, the sale is deemed to have been tax-included if the seller provides a written certification to the buyer that the sale is exempt under certain provisions and this proves to be incorrect, unless the purchaser knows or ought to have known the sale was not exempt.

6. Has the land been subdivided into more than two parcels?

- a. If HST-exempt land is subdivided into more than two parcels, those resulting parcels of land will no longer qualify for an HST exemption. Lawyers should be careful that HST may be later applied to the sale of a residential resale property, for example, if the lot in question resulted from a subdivision by the vendor into more than two lots.
- b. Vacant land can only benefit of the exemption if the supplier is an individual or a personal trust (not a partnership, association or corporation).

7. Was the property renovated by the vendor?

- a. Resale homes that have been substantially renovated by the vendor are not exempt from HST when sold. “Substantially renovated” means that all or substantially all of the building that existed immediately before the renovation or alteration has been removed or replaced.

8. Is the recipient confirmed to be an HST registrant?

- a. Purchasers that intend to self-assess as an HST registrant can make mistakes as to their registration status or registration number.
- b. Doing an online search and documenting the results of that search is the safest way for the vendor to protect themselves from being on the hook for the HST on the transaction.²

9. Is the purchaser being assigned a previous APS?

- a. Some tax implications, such as the availability of rebates, turn on the identity of the person providing the consideration (i.e., the *recipient*). If assignments are not drafted to ensure assignees legally qualify as the *recipient* of the property under the *Income Tax Act*, rebates may not be available (and other unforeseen tax consequences could occur).

² HST registrations can be checked online at https://www.businessregistration-inscriptionentreprise.gc.ca/ebci/brom/registry/pub/reg_01_Ld.action

10. Has the vendor claimed any ITCs (Input Tax Credits) on the acquisition of the property or any improvement to the property?

HST registrants can claim ITCs on costs incurred when acquiring, developing, or renovating property that will be taxable on resale. For example, house flippers that “substantially renovate” a residential property, such that it becomes subject to HST, can claim ITC on the input costs of the renovation project

Confirm and document in your file the exemption!