

 <p><b>CARTERS</b> BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>Carters Annual <i>Charity &amp; Not-for-Profit Law</i> Webinar November 9, 2023</p>
<p><b>Top Five Hot Topics in Real Estate for Charities &amp; NFPs</b></p> <p>By <b>Nancy E. Claridge, B.A., M.A., LL.B.</b> nclaridge@carters.ca 1-877-942-0001</p> <p>© 2023 Carters Professional Corporation</p>	
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	2
<p><b>INTRODUCTION &amp; OVERVIEW</b></p> <ul style="list-style-type: none"><li>• Today we are going to talk briefly about some of the hot topics in real estate for charities and not-for-profits (“NFPs”)</li><li>• Top Five Hot Real Estate Topics:<ol style="list-style-type: none"><li>1. GST/HST and the Sale/Purchase of Real Property</li><li>2. Leasing of Commercial Properties</li><li>3. Vendor Take Back Mortgages – Self Financing</li><li>4. Underused Housing Tax (“UHT”) &amp; Vacant Home Tax (“VHT”)</li><li>5. Preparing for Financing Transactions</li></ol></li></ul>	
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## 1

### GST/HST AND THE SALE/PURCHASE OF REAL PROPERTY

#### • What is the GST/HST?

- The goods and services tax (GST) is a tax that applies to many supplies of goods and services made in Canada
- The GST also applies to many supplies of real property (for example, land, buildings, and interests in such property) and intangible personal property such as trademarks, rights to use a patent, and digitized products downloaded from the Internet and paid for individually

- Some provinces harmonized their provincial sales tax with the GST to implement the harmonized sales tax (HST) in those provinces
- Generally, the HST applies to the same base of property (for example, goods) and services as the GST
- GST/HST registrants who make taxable supplies (other than zero-rated supplies) in the participating provinces collect tax at the applicable HST rate
- GST/HST registrants collect tax at the 5% GST rate on taxable supplies they make in the rest of Canada (other than zero-rated supplies)

5

- **Does a charity or NFP have to register for GST/HST?**
  - You have to register for the GST/HST if:
    - You provide taxable supplies in Canada
    - You are not a small supplier - \$250,000 gross revenue test and \$50,000 taxable supplies test
  - You cannot register for GST/HST purposes if you provide only exempt supplies
  - You may voluntarily register for GST/HST purposes if you provide taxable property and services in Canada or you are a small supplier
  - Do not confuse registration for the purposes of claiming a Public Service Body rebate
    - Do you collect GST/HST and claim input tax credits (“ITCs”)? or do you claim the Public Service Body rebate?

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6

- Most property and services that charities supply are exempt from GST/HST, while there is a limited list of exempt supplies by NFPS
- When property or services are exempt, it means that, even if the organization is a GST/HST registrant, it does not charge GST/HST on them
  - Also, the organization generally cannot claim ITCs for the GST/HST paid or payable on property and services it acquired to make its exempt supplies
- Generally, most sales, leases, or other supplies of real property made by a charity or NFP are exempt from GST/HST
- It is the responsibility of the Seller of real property to determine whether the sale is GST/HST exempt or not
- This may require some research to determine how the property was historically used and treated by the charity or NFP

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7

- Reference should be made to **Schedule V** (Exempt Supplies), **Part V.1** (Supplies by Charities) of the **Excise Tax Act** (Canada) for charities and Schedule V (Exempt Supplies), Part VI (Public Sector Bodies) for NPOs
- A supply made by a charity of any property or service [is exempt], but not including a supply of
  - A residential complex, or an interest therein, where the supply is made by way of sale
  - Real property where the supply is made by way of sale to an individual or a personal trust, other than a supply of real property on which is situated a structure that was used by the charity as an office or in the course of commercial activities or of making exempt supplies

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8

- Real property where the supply is made by way of sale and, immediately before the time tax would first become payable in respect of the supply if it were a taxable supply, the property is used (otherwise than in making the supply) primarily in commercial activities of the charity
- Real property in respect of which an election under section 211 of the Act is in effect at the time tax would become payable in respect of the supply if it were a taxable supply
- Similar language applies to Public Sector Bodies which includes NFPs (section 25)
- If unsure, it is strongly recommended that the charity or NFPs obtain appropriate GST/HST tax advice or obtain an advance ruling from CRA, as an error in determining the tax status could be very costly

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- If the sale of real property is a taxable supply, the charity must determine if it must collect the tax or if the buyer is a GST/HST registrant and will self-assess
- Important to verify registration as of date of sale and to obtain an indemnification from the Buyer as part of the closing documents
- CRA has an easily accessible website to check the status of a GST/HST registration
  - Must correctly enter information or there will be no confirmation provided
  - <https://www.canada.ca/en/revenue-agency/services/e-services/digital-services-businesses/confirming-a-gst-hst-account-number.html>

- If purchasing a property, a charity or NFP must determine in advance whether the real property is exempt and whether the Buyer is responsible for paying GST/HST
- If the Buyer must pay GST/HST, it must be paid on closing and therefore factored into the financing required for closing
- Buyer can apply for the Public Service Body Rebate to recoup some, but not all, of the GST/HST paid
  - 50% of GST or the federal portion of HST
  - differing amounts for each province with HST, e.g. 82% for Ontario and 50% for New Brunswick

## 2

### LEASING OF COMMERCIAL PROPERTIES

- Important to do appropriate due diligence before “sealing the deal”
  - Does the local zoning support the intended uses? or would a minor variance be required?
  - Are there restrictive covenants on title that would interfere with the organization’s operations?
  - Does the landlord’s lease with other tenants prevent certain activities?
  - What is the physical condition of the property?
  - What improvements would be necessary to carry out the organization’s functions?
  - Can it meet CRA’s test for personal benefit?

- Need to understand the difference between a lease and a licence
  - A lease generally confers exclusive possession
  - A license generally confers temporary and limited possession
- Need to understand the difference between a “net” lease and a “gross” lease
  - In a net lease, the tenant pays “base rent” and “additional rent”, which will include all expenses related to the lease
    - May need to negotiate amendments to additional rent clauses
  - In a gross lease, the tenant pays one lump sum and the landlord is responsible for all lease expenses

• Where the charity is the landlord, consideration needs to be given to what constitutes “fair market rent”

- As qualified donees, registered charities may not confer a private benefit to non-qualified donees
- Failure to charge fair market value rent to non-qualified donee tenants could result in penalties being assessed in the event of a CRA audit
- Fair market value rent is the value that the property would be rented for at a given time, usually based on similar properties in the same or a similar area
- Recommended to keep records of how you arrived at fair market value rent in the event of a CRA audit

### 3

## VENDOR TAKE BACK MORTGAGES

- With the high prices of real property and the rising interest rates, many sales today will not happen without the Seller assisting in the financing through a Vendor Take Back Mortgage (“VTB”)
- Charities must take into consideration their trust obligations when negotiating the VTB
- VTB may not confer a personal benefit on a non-qualified donee, consider:

Interest  
Rate

Repayment  
Terms

Amortization

Renewal/  
Extension  
Rights

- Structure of the VTB must address the Buyer's intended purpose of the property
  - Is flexibility in granting partial discharges necessary?
  - Will other registrations require priority over the VTB?
  - Is other/more traditional financing required (likely in priority to the VTB)?
- Discuss the options available on default – is that something desirable for the organization?
- Does the organization have the resources to manage and monitor the VTB?

## 4

### UNDERUSED HOUSING TAX & VACANT HOME TAX

- The introduction of the Underused Housing Tax federally and the Vacant Home Tax (Empty Home Tax) in some municipalities is creating additional administrative burdens on unsuspecting land owners, including charities and NPOs
- UHT, introduced in 2021 Federal Budget, imposes a 1% tax on vacant and underused residential real estate owned by certain non-residents and non-Canadians
  - Although registered charities are generally exempt from the new federal UHT requirements, they may still be affected where they indirectly hold reportable residential property through other entities in their structures, such as trusts or nominee corporations



- Similarly, the Toronto and Vancouver taxes impose filing obligations even if the tax may not be payable
  - Currently Toronto is at 1% and Vancouver is at 3%
- Failure to file the required declaration will result in the property being deemed to be vacant
- Further, failure to declare or making a false declaration in Toronto may result in a fine of \$250 to \$10,000 with similar fines in Vancouver
- Recent announcement by the Minister of National Revenue extended the UHT filing deadline for 2022 to April 30, 2024 without being charged interest or penalties
- This will coincide with the 2023 UHT filing, so both returns will be due at the same time

## 5

### PREPARING FOR FINANCING TRANSACTIONS

- Negotiation of new credit facilities is only the first step in securing new financing
- Lots of preparation by the organization is necessary to ensure a smooth closing for a financing transaction
  - Review of governing documents (Articles of Incorporation, Articles of Amendment, Letters Patent, Supplementary Letters Patent, By-laws)
    - Ensure there is proper authority for borrowing
    - Identify requirements for approval
    - Identify procedures for executing documents
    - Ensure minute books and corporate filings are up to date

- Ensure there is sufficient time to give notice and hold required meetings of either members or the board of directors to authorize financing
- Review assets to be used as security for the financing
  - Does title to real property reflect the current name of the organization?
  - Are there outstanding encumbrances that should be discharged?
  - Are there any defects in title that will need to be addressed?
- Carefully review instructions sent to legal counsel to ensure they match the commitment signed with the lender

## KEY TAKEAWAYS



### GST/HST:

- Determine tax status of property early
- Engage tax professionals or obtain an advance ruling from Canada Revenue Agency in order to ensure the GST/HST status is properly captured



### Leasing:

- Due Diligence Before the Lease is Essential
- If you are the tenant, make sure the property is right for you
- If you are the landlord, make sure the terms do not run afoul of charity law



### VTBs:

- Use cautiously
- The VTB terms must comply with charity law, as well as fit within the organization's management resources



### UHT/VHT:

- Don't be caught unaware
- Although most entities will not be caught by the tax, failure to file declarations could prove costly



### Financing:

- Early review is key
- Ensure there is sufficient time to review governing documents and complete all procedural steps before closing

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