

MULLIN DEMEO

BARRISTERS & SOLICITORS

Information About Transactions Involving a Non-Resident Seller

The standard real estate Contract of Purchase and Sale contains a section where the Seller must declare whether he or she is a Resident of Canada for the purposes of the Canada *Income Tax Act*. If the Seller is a non-resident for this purpose, then Canadian tax law requires that the Seller must pay tax on any financial gain realized upon the sale of the property. Further, if a non-resident Seller fails to remit the required tax, then the Buyer may become liable to pay the tax on behalf of the Seller. It is therefore very important that all parties involved in the transaction pay careful attention to this aspect of the Contract.

Typically, a non-resident Seller must remit a tax of 25% of the property's increase in value – that is, the difference in property value between the date the non-resident acquired the property and the date that he or she is selling the property. In computing this tax, no deduction may be taken for costs of the sale, such as real estate commissions or legal fees. However, some of these costs may qualify as deductions on individual tax returns. In addition, some of the costs incurred by the non-resident at the time the property was purchased (such as property transfer tax paid and legal fees) can be included in calculating the acquisition value of the property, which may in turn help to reduce the amount of gain realized. Sellers should consult with their tax advisors in this regard.

If the property being sold by the non-resident was used for rental purposes, it will also be necessary to determine whether or not income tax returns reporting the rental income have been filed. If these returns were not filed, the Seller's accountant may have to correct this, which usually results in significant delays. The penalties for non-filing of tax returns relating to rental income can be substantial.

Well in advance of closing, the Seller's lawyer or the Seller will need to determine the amount of tax payable on the sale. The assistance of an accountant can be especially valuable in this regard. The accountant will prepare the appropriate return for filing with Canada Revenue Agency (CRA), and will also file a request to CRA for a "clearance certificate". This certificate is confirmation that the amount calculated in the return as taxed owed by the Seller is the correct amount to be remitted upon the completion of the sale. It may take as long as six to eight weeks for CRA to provide a clearance certificate.

The clearance certificate is the buyer's assurance that taxes owed by the seller have been correctly calculated, and the buyer's lawyer will communicate with the seller's lawyer to ensure that the appropriate amount is withheld from sale proceeds and remitted to CRA.. In the event that a clearance certificate is not available before the completion date, the seller's lawyer will hold back 25% of the total funds owed to the seller, pending receipt of the confirmed calculation of taxed owed.

In light of the forgoing, whenever a transaction involves a non-resident Seller, it is extremely helpful for the lawyer to have as much advance notice as possible. If you have any questions, please feel free to contact us: