

Non-Resident Speculation Tax in Real Estate Transactions

Carrie Ritchie, Ritchie Smyth Lawyers

For those who practice real estate law in Toronto, we are all too familiar with the thankless task of explaining the Land Transfer Taxes that are imposed on (almost) all purchases in the City of Toronto. In 2022, the Government of Ontario introduced an additional tax on real estate conveyances, this time extending the reach to all of the Greater Golden Horseshoe area, and later all of Ontario.¹ The Non-Resident Speculation Tax (“NRST”) is paid in addition to the Provincial Land Transfer Tax,² and the Municipal Land Transfer Tax.³ The taxable rate currently is twenty-five percent (25%) of the consideration for the transfer of the property, the consideration generally being the purchase price under the agreement of purchase and sale.

Legislative Background

The NRST was originally passed as Schedule 1 to the *Budget Measures Act* and received assent on June 1, 2017.⁴ The regulations initially set the taxable rate for the NRST at 15% and agreements that were entered into at that time that have not yet closed also continue to have this rate.⁵ This 15% NRST was also only applicable to properties located within the Greater Golden Horseshoe Region, which included much of southern Ontario. At the time of assent, the regulations already included an embedded ability for a revision of the applicable NRST taxable rate, at the discretion of the Minister.⁶

On March 30, 2022, amendments came into force that increased the rate to 20% by way of Ontario Regulation 240/22.⁷ These changes also expanded the scope to include all municipalities outside of the Greater Golden Horseshoe Region in Ontario, making the tax applicable everywhere in the province.⁸ These changes did not apply to any agreement of purchase and sale that was entered into prior to March 29, 2022.

As of October 25, 2022, the rate has increased to the 25%, which is the rate that is currently in effect. In addition to the rate increase, this amendment also added transitional provisions to

¹ A full overview of the NRST can be found here: <https://www.ontario.ca/document/land-transfer-tax/non-resident-speculation-tax#section-8>.

² *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, ss. 2-3.

³ City of Toronto, By-Law No. 1423-2007 *To adopt a new Municipal Code Chapter 760, Taxation, Municipal Land Transfer Tax, to make minor consequential amendments to Municipal Code Chapter 27, Council Procedures, and to Chapter 767, Taxation* (13 December 2007) [*Bylaw*].

⁴ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, as amended by *Budget Measures Act (Housing Price Stability and Ontario Seniors' Public Transit Tax Act Credit)*, 2017, S.O., c 17 - Bill 134.

⁵ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 2(2.1)(a).

⁶ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 22(1.1)(d).

⁷ O. Reg. 240/22, s. 1.3(1).

⁸ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 2(2.1)(a).

allow for the differing tax during the time period between March 30, 2022, until October 25, 2022.⁹

Application of the NRST

The following circumstances must be in place, in order for the NRST to apply:

1. The property must meet the definition of “**designated land**”, being at least one and not more than six family residences. The definition also provides some exclusions for properties located on agricultural land.¹⁰
2. Be in Ontario (or located in the Greater Golden Horseshoe Region if the transitional rules apply).¹¹
3. Be a Foreign Entity, which includes a foreign corporation or foreign national, or Taxable Trustee.¹² The definition of foreign entity is distinct from the treatment of residency under the *Income Tax Act*.¹³ A Taxable trustee includes trusts with at least one foreign national as trustee, or if a beneficiary of the trust who holds a beneficial interest in the trust is a foreign entity. The definition specifically excludes those trustees that fall into the categories of real estate investment trusts (“REIT”), mutual fund trusts, and specified investment flow-through (“SIFT”) trusts.¹⁴

Exemptions and Rebate Criteria

There are rebates and exemptions available to persons who may meet the requirements for applicability. Differing circumstances, such as education or employment criteria, that may modify individuals’ foreign status may impact the amount of NRST which applies to their transaction.¹⁵

Practical Considerations

As of April 25, 2023, six months have elapsed since the most recent amendment, and a full year since the incremental increase in the rate and applicability to all regions. Teraview, the Ontario electronic land registration system, has been updated with the appropriate law statements to accommodate declarations in respect of the applicability and submission of the NRST at the time of transfer. Given the lock-step increases in the applicable NRST rates, the law statements required by real estate counsel need to be navigated with care, to ensure the applicable rate is afforded to the transaction. Many pre-construction agreements of purchase and sale for condominiums would have been entered into potentially within the period of applicability to only the Greater Golden Horseshoe Region or be at the reduced rate of fifteen or twenty-

⁹ O. Reg. 182/17 as amended by O. Reg. 506/22, s. 1(1)(a).

¹⁰ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 1(1).

¹¹ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 1(1).

¹² *Immigration and Refugee Protection Act*, S.C. 2001, c. 17, s. 2(1).

¹³ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

¹⁴ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 1(1).

¹⁵ *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 2.1(5).

percent, rather than the currently applicable twenty-five percent rate. Careful consideration of the criteria should be provided to ensure that the applicable rate is used.

Previously, Teraview did not have the ability to accept payment of the NRST directly until December 2017. This meant that for this transitional period, between June and December 2017, payment of the NRST had to be made in advance of closing by way of submission of funds to the Ministry of Finance.¹⁶ For paper registrations, which is much rarer, payment of the NRST is also required to be made in advance of closing in much the same way.

Transfers of beneficial interests in land, where no change in registered owner is taking place (i.e. no transfer will be registered on title), payment of the NRST is still required to be made, via paper filing. Paper filing of a return, together with the payment, must be submitted to the Ministry.¹⁷

These legislative updates, together with changes to corporate record keeping requirements, such as the Real Property Register¹⁸ in respect to corporate owned properties, and the Significant Control Register¹⁹ in respect of individuals in control of a given corporate entity, are requiring corporate owners of land to consolidate information in respect of the residency status, legal and beneficial ownership, and controlling parties for any given property. Lawyers and clients should ensure that all records of land ownership are in sync and ensure proper recording of beneficial ownership if trusts are involved at the time of registration so that the applicability of the NRST is accurately determined.

¹⁶ Submission of payment, along with supporting documents is made to: Ministry of Finance Compliance Branch Land Taxes Section Third Floor, 33 King Street West PO Box 625 Oshawa ON L1H 8H9.

¹⁷ Returns can be made at <https://forms.mgcs.gov.on.ca/en/dataset/013-0775>.

¹⁸ *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 140.1(1)-(3).

¹⁹ *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 140.2(1)-(8).