

Seller beware of provision in APS that includes HST as part of purchase price (*Miculinic Investment Corp. v. 2303515 Ontario Inc.*)

HST | Litigation | Litigation & Dispute Resolution | Seller

14 November 2025

In real estate transactions which involve properties that are comprised of both a commercial and residential use, HST is payable on the portion of the land that is used for commercial purposes. Determining the part of the property that is devoted to each use is sometimes a matter of negotiation between the parties. A seller may want to maximize the percentage of land allocated to a residential use, while a buyer may want to maximize the percentage of the land allocated to a commercial use.

However as shown by *Miculinic Investment Corp. v. 2303515 Ontario Inc.*, 2025 ONSC 6269 (not yet on CanLII), a seller should be aware that they take a significant risk in agreeing to a provision in an Agreement of Purchase and Sale ("**APS**") that simply includes the HST as part of the purchase price because in situations where the buyer is an HST registrant under the *Excise Tax Act* ("**ETA**") the buyer is obligated to remit the tax, rather than the seller.

The buyer does this by making a filing with the CRA and remitting the amount of HST they believe is payable based on their allocation of the land between commercial use and residential use. In this regard, the seller has no control over the amount of the HST that the buyer will seek and the amount of HST that will ultimately be assessed by the CRA. A seller's past allocation of use might not govern.

In *Miculinic*, on 4 August 2021, the parties entered into an APS in respect of a mixed residential and commercial use property. The size of the property was 125 acres.

The purchase price was \$11.5 million, and the APS stated that any HST payable on the sale was included in the purchase price.

The APS also did not delineate which parts of the property were for residential use and which parts were for commercial use.

Indeed, the parties never discussed what the allocation between the two uses would be or the amount of HST that would be paid on the purchase price.

Before closing the transaction, a dispute arose over the allocation between the two uses. The buyer contended that a greater portion of the property was for commercial use. This attracted more HST and lowered the amount to be paid to the seller.

While the buyer argued that the residential use of the property did not exceed 2 acres, the seller argued that the residential use of the property was 5 acres. These competing allocations created a significant difference in the amount of HST each party believed should be paid.

The seller calculated HST payable in the amount of \$773,051.33. The buyer calculated HST payable in the amount of \$1,046,902.65.

On an application to determine the amount of HST payable, each party filed expert evidence to justify its allocation of the part of the property that was being used for residential purposes.

Each party also relied respective CRA assessments to support their position. The buyer's CRA assessment determined that the HST payable on the sale was \$1,046,902.65.

The application judge found that the case turned on interpreting the APS and whether the provision that HST was included in the purchase price was ambiguous. The application judge determined that this provision was unambiguous.

Although the Court of Appeal for Ontario had described the APS as containing an "ambiguity concerning the calculation of the purchase price that was inclusive of the Harmonized Sales Tax ("HST")" in a prior ruling, the application judge explained that to the extent that there was an ambiguity, it simply arose from the fact that the parties did not specify what the amount of HST was or how it was to be calculated. Instead, the parties, particularly the seller, took on the risk and uncertainty in leaving this determination to the CRA.

The application judge noted that the parties had negotiated whether HST was to be "included in" or "in addition to" the purchase price. However, they did not discuss whether the HST was to be a specific amount or whether it would be calculated based on the seller's past practice or allocation.

In *Stanziano v. Wolfe*, 2022 ONSC 3823, the court determined that pursuant to the ETA, a buyer of real property was obligated to pay HST that applied to a sale. A buyer who was an HST registrant, like the buyer in this case, was also obligated to remit the tax. In this regard, the parties had entered into an agreement which provided that the buyer would file with the CRA and remit any HST that may be owing.

Accordingly, even though there were competing and inconsistent CRA assessments in this matter, the application judge concluded that the assessment received by the buyer prevailed because it addressed the HST owing and payable on the sale of the property. A PDF version is available to download [here](#).

Representation by Gardiner Roberts LLP

In this case, the buyer was represented by Gavin J. Tighe, K.C., a senior partner in the Dispute Resolution Group at Gardiner Roberts LLP. Mr. Tighe is certified by the Law Society of Ontario as a specialist in litigation.

Mr. Tighe was assisted by Abigail Korbin, a junior associate in the Dispute Resolution Group at Gardiner Roberts LLP.

Stephen Thiele, a partner at Gardiner Roberts LLP, and the firm's Director of Knowledge Management and Legal Research drafted the factum used to support the buyer's position.

Greg Farano, a senior partner in the tax group at Gardiner Roberts LLP, provided guidance on the tax issues throughout this matter.

For more information please contact: **Stephen Thiele**

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