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Real estate agreements of purchase and sale: Beware HST provisions

By **Stephen A. Thiele**

Law360 Canada (November 20, 2025, 10:50 AM EST) -- In a real estate transaction, buyers and sellers often haggle over the purchase price of a property. While the buyer will want to pay as little as possible for a property, a seller will want to maximize their return.

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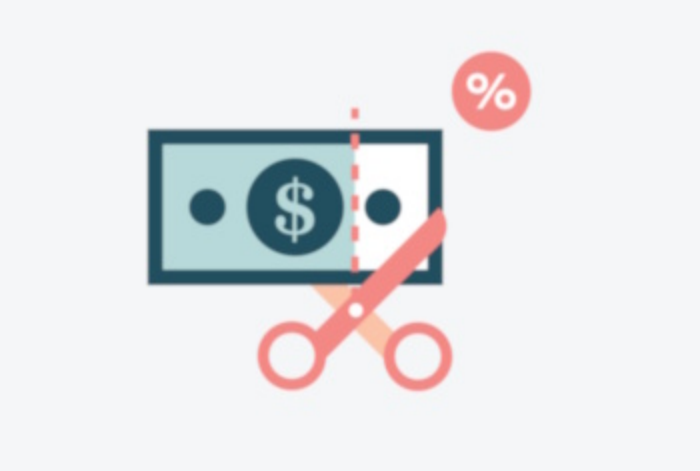
For mixed-use properties, buyers and sellers will also negotiate the allocation of the property between its commercial and residential uses because in such a transaction HST will be payable on the portion of the land that is used for commercial purposes.



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If the parties do not agree on an allocation of the respective uses this can have subsequent ramifications on the amount of money actually received by the seller, particularly where the Agreement of Purchase and Sale (APS) provides that the HST is "included" in the purchase price. In this circumstance, as shown by the decision *Miculinic Investment Corp. v. 2303515 Ontario Inc.*, 2025 ONSC 6269, a seller potentially takes a significant risk that they will get less money than expected because in situations where the buyer is an HST registrant, the *Excise Tax Act* (ETA) provides that the buyer is obligated to remit the tax, rather than the seller.

Thus, the seller surrenders control over the amount of the HST that might be assessed by the CRA for the purchase based on the buyer's allocation of the land used for commercial and residential purposes. Any assessment obtained by the seller from the CRA in connection with the HST that ought to have paid based on a different allocation of use is irrelevant.

In *Miculinic*, the parties entered into an APS in respect of a mixed residential and commercial use property. The property comprised 125 acres.

While the parties agreed to a purchase price of $11.5 million, they never discussed how much of the property was to be allocated between the commercial and residential uses or how much HST should be paid.

Rather, as described by the application judge, after some negotiation, the parties agreed that HST was to be included in the purchase price instead of being "in addition to" the purchase price.

The failure of the APS to specifically describe the amount of land allocated for commercial and residential use triggered a dispute between the parties before the closing of the transaction and attracted significant litigation that resulted in the Court of Appeal for Ontario ultimately remitting an initial finding in favour of the buyer on essentially the amount of HST that was included in the purchase price to a second application judge to interpret the APS and again determine the amount of HST that was included in the purchase price based on inconsistent CRA assessments obtained by the buyer and the seller.

The buyer contended that a greater portion of the property was for commercial use and that a CRA assessment it received after the transaction closed in connection with the HST that was included in the purchase price governed.

Under the buyer's allocation, which was based on only two acres of the land being used for residential purposes, more HST was payable and, correspondingly, less money was to be paid to the seller. A higher amount of HST payable was beneficial to the buyer because it claimed the higher amount as an input tax credit.

In contrast, the seller argued that historically it had allocated a lesser portion of the property for commercial use and that five acres of the property was used for residential purposes. After the transaction closed, the seller also obtained an assessment from the CRA, which it contended supported its allocation.

Based on the different allocation of uses, the seller calculated HST payable in the amount of $773,051. The buyer calculated HST payable in the amount of $1,046,902. Each amount was reflected in the respective CRA assessments obtained by the parties. Expert evidence filed by each party also supported their respective use allocations.

The case turned on the interpretation of the APS and whether the provision that HST was included in the purchase price was ambiguous.

Notwithstanding that the Court of Appeal for Ontario had described that the APS contained an "ambiguity concerning the calculation of the purchase price that was inclusive of the Harmonized Sales Tax (HST)" and overturned the initial finding in favour of the buyer, the application judge found that this provision was unambiguous.

The application judge explained that to the extent that there was an ambiguity in the APS, 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. In this regard, the parties took on the risk and uncertainty in leaving this determination to the CRA.

In concluding that the buyer's CRA assessment governed the amount of HST that was included in the purchase price, the application judge relied on *Stanziano v. Wolfe*, 2022 ONSC 3823.

In *Stanziano*, 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.

The process under the ETA and the agreement permitted the application judge to conclude that the assessment received by the buyer prevailed because it addressed the HST owing and payable on the sale of the property. The seller's competing and inconsistent CRA assessment was irrelevant.

The key takeaway from this case is that buyers and sellers must carefully assess whether to "include HST in" the purchase price of a real estate transaction or make HST "in addition to" the purchase price. Where the property is a mixed-use property, the parties must also consider whether the APS should specifically describe therein the amount of property that is respectively being used for commercial and residential purposes. A clear allocation of the respective uses will allow both parties to determine the HST that might be payable and assessed on a transaction and avoid uncertainty and

costly litigation.

In this case, the buyer was represented by Gavin J. Tighe, a senior partner in the dispute resolution group at Gardiner Roberts LLP, who was assisted by Abigail Korbin, a junior associate in the Dispute Resolution Group at Gardiner Roberts LLP. Greg Farano, a senior partner in the tax group at Gardiner Roberts LLP, provided guidance on the tax issues throughout this matter.

Stephen A. Thiele, the director of legal research at Gardiner Roberts LLP, drafted the factum used to support the buyer's position. He primarily works closely with dispute resolution lawyers, providing advice, value-added analysis and opinions on a wide range of litigation matters. He is the co-author of A Practical Guide to the Law of Defamation *(2024: LexisNexis).*

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