



GST/HST Memoranda Series

NOTICE OF CHANGE: January 16, 2002

19.1 Real Property and the GST/HST

October 1997

Overview

This section examines terms and concepts that are basic to understanding the operation of the Goods and Services Tax (GST) as it applies to real property. Unless otherwise noted, these terms and concepts apply equally to the application of the Harmonized Sales Tax (HST) in Nova Scotia, New Brunswick and Newfoundland. Several provisions that relate only to the operation of the HST are discussed in Section 19.1.1, *Special Rules for Real Property Under the HST*. Topics in this section are:

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19.1 Real Property and the GST/HST (continued)

Note This section of Chapter 19, *Special Sectors: Real Property* supersedes paragraphs 101 and 102 in GST Memorandum 300-3-5, *Exports*; GST Memorandum 300-6-5, *Tax on Supplies: Time of Liability - Real Property*; GST Memorandum 300-6-13, *Tax on Supplies: Time of Liability - Construction Contracts*; GST Memorandum 300-6-14, *Tax on Supplies: Time of Liability - Holdbacks*; and paragraphs 7 and 8 of GST Memorandum 300-6-15, *Tax on Supplies: Time of Liability - Value Not Ascertainable*. Because rewriting is extensive, sidebarring has not been used to indicate changes.

What is real property?

Definition
ss 123(1)

1. For purposes of the GST and the HST, “real property” includes
 - (a) in respect of property in the Province of Quebec, immovable property and every lease thereof,
 - (b) in respect of property in any other place in Canada, messuages, lands and tenements of every nature and description and every estate or interest in real property, whether legal or equitable, and
 - (c) a mobile home, a floating home and any leasehold or proprietary interest therein.

Lease, licence or
similar arrangement
ss 136(1)

2. A supply of the use or right to use real property by way of lease, licence or similar arrangement is treated for GST/HST purposes as a supply of real property.

Definition: real property
para 123(1)(a)

3. In Quebec, meanings for real property terms arise from the Civil Code of Quebec (CCQ). This new code replaced the Civil Code of Lower Canada (CCLC) effective January 1, 1994. Prior to that time, the CCLC provided that property was immovable: by nature, by destination, by reason of the object to which it is attached, or by determination of the law. The CCQ maintains the distinction between movable and immovable, maintaining that real property is immovable by nature. The main characteristic of an immovable by nature is its incorporation or physical attachment to the land itself. Property which is erected, affixed to or growing upon the land is immovable by nature.

Definition: real property
para 123(1)(b)

4. In the rest of Canada, real property includes all land, messuages, tenements of every nature and description and every estate or interest in real property whether legal or equitable.

• Message

5. A message is a dwelling house, with the adjacent buildings and the enclosed space of ground and building which immediately surrounds and is commonly used with the dwelling house. This area is referred to as the curtilage and generally comprises the courtyard or the space of ground adjoining the dwelling house which is necessary, convenient and normally used for family purposes and the carrying on of domestic employment.

• Tenement

6. The term tenement in its common meaning refers to buildings, but in its original legal sense, means everything that is of a permanent nature.

19.1 Real Property and the GST/HST (continued)

- Estate

7. In real property, the estate refers to the degree, quantity, nature and extent of interest which is held by a person. The common law makes a distinction between a legal and equitable estate. The legal estate of property is recognized and enforced in law, while the equitable estate is that which is not recognized in title, but provides only beneficial interest to the person who holds such interest.
- Interest

8. An interest is a general term to denote a claim, title, right or share in something. In its application to real property, it is used frequently in connection with the terms estate, right, or title. It means any right in the nature of property but it means something less than estate. An interest in real property may arise, for example, by way of lease or security instrument (i.e., mortgage). As noted above under ‘estate’, there may be both legal and equitable interests in real property.
- mobile home ss 123(1)

9. A “mobile home” is

“a building, the manufacture and assembly of which is completed or substantially completed, that is equipped with complete plumbing, electrical and heating facilities and that is designed to be moved to a site for installation on a foundation and connection to service facilities and to be occupied as a place of residence, but does not include any travel trailer, motor home, camping trailer or other vehicle or trailer designed for recreational use.”

10. In most cases, the effective date of this definition is April 24, 1996. However, as this represents a change from an earlier definition, certain buildings (e.g., mini-homes) that had previously been excluded may now be treated as mobile homes. The change in the definition will have different effective dates in certain circumstances. For complete discussion, see Section 19.2, *Residential Real Property*.
- Floating home ss 123(1)

11. “Floating home” means

“a structure that is composed of a floating platform and a building designed to be occupied as a place of residence for individuals that is permanently affixed to the platform, but does not include any freestanding appliances or furniture sold with the structure or any structure that has means of, or is capable of being readily adapted for, self-propulsion.”

(The meaning of floating home is discussed in greater detail in Section 19.2, *Residential Real Property*.)

Meaning of “sale”

- Policy statement P-111
12. For GST/HST purposes, all supplies of real property are made either by way of “sale”, or by way of “lease, licence or similar arrangement”. It is important to understand the distinctions among these terms.

19.1 Real Property and the GST/HST (continued)

13. The meaning of “sale” in respect of real property is important for various provisions including the application of the self-supply rules, the relieving of a supplier under subsection 221(2) of the obligation to collect tax, the requirement of a purchaser to self-assess under subsection 228(4), the availability of rebates, the application of the transitional rules, the timing of tax under subsection 168(5) and the exemptions listed in Part I of Schedule V.

Definition
ss 123(1)

14. A sale of property includes:

“any transfer of the ownership of the property and a transfer of the possession of the property under an agreement to transfer ownership of the property.”

Transfer of ownership

15. For GST/HST purposes, a transfer of ownership of real property generally refers to the legal ownership (that is “titled” ownership). Accordingly, references in the Act to transfers of ownership relating to the underlying real property are generally references to the legal ownership of the property that is transferred on the closing of the transaction. However, a transfer of the legal ownership of an equitable interest in real property may be considered a sale of real property (see paragraph 22).

Agreement not
necessary

16. For purposes of determining whether a sale has occurred, a transfer of ownership need not be made under an agreement to transfer ownership. For example, supplies of a used residential complex, personal-use real property or qualifying farmland by gift or upon death are treated under sections 2, 9 or 10 of Part I of Schedule V, respectively, as exempt supplies by way of sale even though there may be no agreement to transfer ownership of the property.

Transfer of possession

17. A person may be in possession of real property if that person is entitled to hold, control or occupy the property either with or without the right of ownership to the property. Occupation is not necessary for there to be possession, nor does occupation necessarily mean that one has possession. Determining if and when possession is transferred in the case of real property is a question of fact, dependent on several indicators. Factors such as the payment of property taxes, control of entry and access (e.g., keys), the right to alter the land, the planting of crops or trees, collection of rents, repairs to the property, maintenance of the lot, insurance coverage, etc., by the recipient serve to indicate, although not necessarily conclusively, that possession has been transferred. In any event, possession alone is not sufficient under the Act to trigger a supply by way of sale, since such possession must be supplied under an agreement to transfer ownership of the property in order to be considered a sale of the property.

Distinction necessary

18. A transfer of possession under an agreement to transfer ownership must be distinguished from a transfer of possession under an agreement to transfer property by way of lease, licence or similar arrangement. While both constitute a supply for GST/HST purposes, the former constitutes a supply by way of sale while the latter does not.

19.1 Real Property and the GST/HST (continued)

Verbal agreements	<p>19. Unless expressly stated otherwise in legislation, verbal agreements relating to transfers of ownership may, in certain cases, be sufficient to trigger a “sale” where there has also been a transfer of possession, provided such verbal agreements contain the basic elements of a valid contract at law (e.g., offer and acceptance, capacity to contract, consideration paid or payable, certainty of subject matter, essential terms agreed upon). Factors which may indicate that there has been a valid verbal agreement to transfer ownership of property include:</p>
Sale indicators	<ul style="list-style-type: none">• cash, a cheque or a mortgage (i.e., consideration or value) indicating payment for the property along with a receipt given by the vendor;• at some point, a deed evidencing the transfer of ownership being registered on title;• written memoranda of understanding between the parties or professional advisors indicating the date ownership is to be transferred as evidence of the existence of the verbal agreement; and• an order for specific performance of the verbal agreement from a court of law. <p>20. Where the parties are claiming that a verbal agreement to transfer ownership has been made, the onus is on the parties to prove that such agreement has, in fact, been made. In addition to the factors noted above, the parties should be prepared to sign a written declaration to the effect that there was such an agreement specifying when the transfer of ownership is to take place.</p>
Statutes of frauds	<p>21. Any of the preceding points that relate to verbal contracts generally do not apply, of course, in those provinces that require agreements relating to transfers of title of real property to be in writing for the agreement to be enforceable.</p>
Equitable interest	<p>22. The grant or transfer of the legal ownership of an equitable interest in real property may be considered a sale of real property. In other words, an equitable interest can in essence be sold. For example, a person may grant another person an option to purchase or lease real property. The granting of such rights gives the grantee an equitable interest in the property. The consideration paid for the actual grant of the interest may be considered as being in respect of the sale of the interest where there is no consideration related to the actual use of the underlying property. However, any consideration which is not reasonably attributable to the granting of the option, such as consideration payable by the recipient of the option for the use or right to use the property until the option is exercised (whether pre-paid or by periodic payments), would not be consideration for the granting of the option and, therefore, would not relate to the sale of the equitable interest, but rather the right to use the property. Similar considerations would apply with respect to the transfer of an equitable interest by way of assignment or other means.</p>

19.1 Real Property and the GST/HST (continued)

23. The determination of whether the consideration is paid for the grant or use of the property may be reflected in the nature of the interest being transferred, the terms of the agreement, or other documentation relating to the transfer, and the actual dealings among the parties involved. For example, an easement granted in perpetuity for a single consideration or the transfer of the easement by assignment or otherwise would likely be treated by the Department as a “sale” of real property.

Rent-to-own
agreements
Policy statement P-164

24. Note that a sale may occur in a “rent-to-own” situation, where the lessee agrees to purchase a residential complex at the end of a specified rental term under a binding agreement of purchase and sale. If no such agreement exists, the transaction is generally considered to be a lease that includes an option to purchase the complex. For further information about deemed sales, see Section 19.2.3, *Deemed Supply of Residential Real Property*. “Rent-to-own agreements” are discussed further in Section 19.2.3, under the topic “Self-Supply of a Residential Complex”, as well as in Policy statement P-164, *Rent to own agreements*.)

Meaning of “lease, licence or similar arrangement”

Lease or licence

25. In all provinces except Quebec, the distinction between a lease and a licence of real property is made in accordance with common law principles applied to the particular supply based on the nature of the property, the relationship between the parties, the intention of the parties, and the wording of any agreement. In the province of Quebec, the distinction between a lease and licence, for real property purposes, should be made in accordance with civil law principles.

Policy statement P-062

26. In the common law provinces, a lease normally confers exclusive possession, while a licence of real property normally does not. A person may be considered to have a right of exclusive possession, and therefore a lease of the real property, even where the right is subject to some limits, such as restrictions on the use to which a property may be put. An agreement that imposes such limits could still be regarded as a lease, unless the other terms of the agreement clearly reveal an intention to have a licence.

27. Under common law, a licence is in the nature of a right or privilege to enter upon and use the grantor’s land in a certain manner or for a specified purpose. It is a personal right between the licensor and licensee and does not normally create any estate or interest in the property. In the common law provinces, a lease generally confers an interest in the real property, binding on the property owner and on other persons.

28. One difference between a lease and a licence is that a lessee can generally sublet or assign its interest in the real property, subject to the terms of the lease; a licensee may not “sublicence” or assign its rights to a third party, except by the express agreement of the licensor. Another difference is that if real property is sold or the lease is assigned by the lessor, the interest of the lessee normally flows with the property; rights under a licence normally cease upon the sale of the property. The actual reference in the agreement to the supply as a lease or a licence may be helpful but not necessarily conclusive.

19.1 Real Property and the GST/HST (continued)

Emphyteutic leases Policy statement P-174	<p>29. An emphyteutic lease is a type of lease which is found in civil law in the Province of Quebec. In some respects, it is similar to long-term leases found in common law provinces. Essentially, an emphyteutic lease is a lease whereby the lessor permits a lessee to use the land (and any immovables on it) for a given period of time (not less than 10 years nor more than 100 years) in return for a consideration.</p> <p>30. A supply of real property under an emphyteutic lease is considered a supply of real property by way of lease, licence or similar arrangement for GST/HST purposes. The consideration payable in respect of the arrangement includes both the monetary rent and the value of the constructions and/or improvements to the land, as may be applicable. The time of liability rules (i.e., time tax becomes payable) for supplies by way of lease, licence or similar arrangement apply in respect of the applicable consideration. Depending on the circumstances, sections 190 and 191 may apply to trigger the self-supply rules. For further discussion, see Section 19.2.3, <i>Deemed Supply of Residential Real Property</i>.</p>
Similar arrangements	<p>31. There may be supplies of real property by way of similar arrangements which are not strictly leases or licences. The term “similar arrangement” is not defined in the Act. Administratively, it is interpreted as an arrangement which is not strictly a lease nor a licence, but which also offers the possession and use of real property. A similar arrangement could be viewed as an arrangement whereby one of the parties is either granted, imposed or deprived of something for a period of time.</p>
Example	<p>For example, an easement is the granting of an interest in real property (similar to a lease) which can be registered on title, but such interest normally provides for specific and limited rights (similar to a licence). Accordingly, the supply of an easement otherwise than by way of sale, may be considered a “similar arrangement” to a lease or licence.</p>
Place of supply	
Supplies in Canada para 142(1)(d) ss 165(1)	<p>32. Supplies of real property and supplies of services in respect of real property situated in Canada are taxable (unless specifically exempted). The GST/HST does not apply to supplies made outside Canada. (For a discussion of place-of-supply issues that are particular to the provinces participating in the HST, see Section 19.1.1 <i>Special Rules for Real Property under the HST</i>.)</p>
Policy statement P-152	<p>33. When determining whether a supply is made in or outside “Canada”, “Canada” includes its land territory, its internal waters and a belt of sea adjacent to its coast, described as the territorial sea. The territorial sea extends 12 nautical miles from Canada's land territory, subject to international boundaries (e.g., Canada and the United States, and Canada and the islands of St. Pierre and Miquelon). Canada also includes the air space above its land territory, its internal waters, and the territorial sea. It also includes the bed and subsoil of the territorial sea.</p>
ss 123(2)	<p>34. This meaning of Canada is expanded by subsection 123(2) which states that “Canada” includes</p>

19.1 Real Property and the GST/HST (continued)

- (a) the sea bed and subsoil of the submarine areas adjacent to the coasts of Canada in respect of which the government of Canada or of a province may grant a right, licence or privilege to explore for or exploit any minerals; and
- (b) the seas and airspace above the submarine areas referred to in paragraph (a) in respect of any activities carried on in connection with the exploration for or exploitation of minerals.

35. The effect of subsection 123(2) is that the GST/HST jurisdiction extends beyond the territorial sea (the 12-mile nautical limit) to 200 nautical miles, but only for the specific resource-related purposes set out in the subsection, that is, activities related to mineral exploration and exploitation, and not other activities, such as fishing or fish processing.

Place of supply rules

36. Section 142 deems that a supply is made in Canada if:

In Canada
para 142(1)(d)

- in the case of a supply of real property or of a service in relation to real property, the real property is situated in Canada,

and conversely, a supply is deemed to be made outside Canada if

Outside Canada
para 142(2)(d)

- in the case of a supply of real property or a service in relation to real property, the real property is situated outside Canada, or
- the supplier of the service is not registered and is not supplying the service in the course of a business carried on in Canada.

Example 1

A non-resident architect supplies design services in respect of real property located in Canada. Even though the non-resident architect performs all of the services outside Canada, under the provisions of paragraph 142(1)(d) these services are deemed to be made in Canada and if the architect is a registrant or is supplying the services in the course of a business carried on in Canada, the services are subject to GST/HST. If not, under the provisions of subsection 143(1), the services are deemed to be made outside Canada.

Example 2

In contrast, a Canadian company hires a Canadian architectural firm to provide architectural services in respect of real property located outside Canada. Under the provisions of paragraph 142(2)(d), even though these services may be performed entirely in Canada, they are deemed to be made outside Canada and thus are not subject to the tax under Division II.

37. If part of the real property is in Canada and part of it is outside Canada, then all of the supply is in Canada. For example, if a farmer in Alberta who owns land that is crossed by the Canada/USA border hires a firm to install an irrigation system to pump water to areas that includes land lying in the United States, GST applies to the service as if the land were in Canada.

19.1 Real Property and the GST/HST (continued)

Intangible personal property: -in Canada 142(1)(c)(ii)
-outside Canada 142(2)(c)(ii)

38. A supply of intangible personal property shall be deemed to be made in Canada if the property relates to real property situated in Canada, and conversely, a supply of intangible personal property shall be deemed to be made outside Canada if the property relates to real property situated outside Canada.

Example 1

For example, a Canadian marketing firm supplies memberships (intangible personal property) in a vacation club to residents of Canada. Since the vacation club is a multi-destination vacation club, a membership is not for any specific destination. The vacation club may from time to time become a member in other vacation clubs with destinations throughout the world. Many destinations are in Canada. In this situation, because the memberships relate to real property situated in Canada, the supplies are deemed to be made in Canada under the provisions of subparagraph 142(1)(c)(ii).

Example 2

A Canadian marketing firm supplies memberships in a vacation club that relate solely to real property situated outside Canada. Accordingly, the supplies of memberships in this vacation club, even though they are sold in Canada to residents of Canada, are deemed to be made outside Canada under the provisions of subparagraph 142(2)(c)(ii).

Meaning of “in respect of real property”

Exclusion from zero-rating

39. Certain services are considered to be zero-rated exports when provided to non-residents. These are described in sections 7 and 23 of Part V of Schedule VI. However, note that the following are excluded:

Sch. VI, Part V, para 7(d)

- services in respect of real property situated in Canada, and

Sch. VI, Part V, para 23(b)

- a supply of an advisory, professional or consulting service made to a non-resident person when made in respect of real property situated in Canada.

40. Exclusion from the zero-rating schedule means these services in respect of real property are taxable at 7% or 15%, unless exempted under other provisions. Thus, it is important to determine whether a service is “in respect of real property” situated in Canada.

41. Generally, the following criteria are used to determine if a service is in respect of real property situated in Canada:

- a) the service is physically performed on the real property (e.g., construction and maintenance);
- b) the direct object of the service is the real property in the sense that the service enhances the value of the real property, affects the nature of the real property, relates to preparing the real property for development or redevelopment, affects the management of the real property, or the environment within the limits of the real property, (e.g., engineering, architectural services, surveying and subdividing, management services, security services);

19.1 Real Property and the GST/HST (continued)

- c) the purpose of the service is:
 - i) the transfer or conveyance of the real property or the proposed transfer or conveyance of the real property (e.g., real estate services in relation to the actual or proposed acquisition, lease or rental of real property, legal services rendered to the owner or beneficiary or potential owner or beneficiary of real property as a result of a will or testament);
 - ii) related to a mortgage interest or security interest in the real property; or
 - iii) the determination of the title to the real property.

Meaning of "in respect of" real property...
Policy statement P-169

42. The Department has developed additional guidelines to lend greater clarity to subparagraph 41(b) above (the need to determine whether the direct object of the service is the property). The Department's current administrative position is that there must be more than a mere indirect or incidental connection between a service and the underlying real property before the supply of the service will be excluded from zero-rating.

Example

For example, a lawyer's general opinion with respect to the taxation of real property in Canada is, by its nature, primarily advice on taxation legislation in general as it affects real property. It is not, in and of itself, a service in respect of real property as required in the preceding guidelines. Therefore, such a service may be zero-rated pursuant to section 23 of Part V of Schedule VI.

43. Whether the relationship between the service and the property is sufficiently direct for the service to be considered by the Department to be "in respect of" the property, for purposes of sections 7 and 23 of Part V of Schedule VI, will depend on the particular circumstances of each case.

Policy statement P-169
Sch. VI, Part V,
paras 7(d) and 23(b)

44. The following guidelines will be applied by the Department to aid in the determination of whether the connection between the service and the real property is sufficiently direct for the service to be "in respect of" the property for purposes of paragraphs 7(d) and 23(b) of Part V of Schedule VI:

- a) Was the service designed, developed or undertaken to fulfil or serve a particular need or requirement arising from or relating to the property? This guideline involves determining the purpose or objective of the service. The purpose or objective of the service may often be determined by examining a written contractual agreement for the supply between the supplier and the recipient of the service, in order to ascertain whether the supply is a zero-rated supply under the Act.

If there is no formal written agreement, other documentation, such as purchase orders, correspondence between the parties or invoices or receipts may be useful in establishing the purpose or objective of the service.

19.1 Real Property and the GST/HST (continued)

It is important that the supplier's understanding of the purpose or objective of the service, as reflected in the contractual agreement with the non-resident customer, be taken into consideration. The supplier's perspective is important because it is the supplier who must determine whether the consideration for the service may be zero-rated. The Department may assess a supplier for uncollected GST/HST if the supply was zero-rated in error.

- b) Is the relationship between the purpose or objective of the service and the property reasonably direct? The relationship between the service and the real property must be more direct than indirect in order for the service and the property to be considered by the Department to be “in respect of” each other for purposes of paragraphs 7(d) and 23(b) of Part V of Schedule VI. If some object comes between the service and the property, the connection becomes more remote.

45. Consistent with the criteria of paragraph 41, a service and property would generally be regarded as being “in respect of” each other pursuant to the guidelines in paragraph 44 if the purpose of a service is to:

- a) physically count the property;
- b) appraise or value the property;
- c) physically protect or secure the property; or
- d) enhance the value of the property.

46. Similarly, if the service is aimed at effecting or dealing with the transfer of ownership of, claims on or rights to the property, or determining title to the property, the service will generally be regarded as “in respect of” the property, for purposes of Part V of Schedule VI to the Act.

Dismantling property for export

Zero-rated
Sch. VI, Part V, s 20

47. The service of dismantling real property (e.g., an oil refinery) for the purpose of export is zero-rated when it is supplied to a unregistered non-resident. This ensures that registered Canadian suppliers are put on a competitive footing with foreign suppliers of these services when competing internationally for this business. For example, when unregistered non-residents purchase a used plant or equipment in Canada for export, any dismantling service associated with the property is zero-rated.

Floating homes and mobile homes

Floating homes and
mobile homes
ss 142(3)
Sch. IX, Part I, s 2

48. For the purposes of the place of supply rules in section 142 and in Schedule IX to the Act, mobile homes that are not affixed to land and floating homes are treated as tangible personal property and not real property. As a result, the rules for tangible personal property apply when determining if a supply of a mobile or floating home is made in or outside Canada, and in or outside a participating province.

19.1 Real Property and the GST/HST (continued)

Not real property when exported
Sch. VI, Part V, s 24

49. Similarly, mobile homes that are not affixed to land and floating homes are deemed to be tangible personal property for the purposes of Part V (zero-rated exports). This ensures that the sale of a mobile or floating home is zero-rated if the recipient exports the property from Canada in circumstances described in section 1 of Part V of Schedule VI. Such a supply would not otherwise be zero-rated since that section applies only to supplies of tangible personal property. (Note that tax is payable on tangible personal property when importing a mobile home or floating home.)

50. For an account of the “place of supply” rules as they relate to tangible personal property, see GST Memorandum 300-5, *Place of Supply* to be re-issued as Chapter 3, *Tax on Supplies*, Section 3.3, *Place of Supply*, and see Chapter 4, *Zero-Rated Supplies*, Section 4.5.1, *Exports - Tangible Personal Property*.

“Value of consideration” and real property

Definition
ss 123(1)

51. Consideration is defined to include any amount that is payable for a supply by operation of law. It may be money, a thing, a service, forbearance in the exercise of a right or anything else of value which induces the supplier to make the supply.

Taxes, duties, fees
s 154

52. The “value of consideration” for a supply of real property may be an amount that is different from the purchase price of the property. For GST/HST purposes, the value of consideration excludes the GST/HST and prescribed provincial taxes charged in respect of that supply, but may include adjustments for other items that are calculated separately from the purchase price. The term “purchase price” also excludes GST/HST and prescribed provincial taxes, but may include an amount that is the new housing rebate if this rebate is paid or credited to the purchaser by the builder and forms part of the purchase price.

Consideration and rebates

53. The value of consideration for real property is the amount to be paid for the property by a purchaser before any calculation of tax and rebate. Where a vendor charges an amount that is a tax-included amount, the amount must be adjusted for tax to determine the value of consideration for GST/HST purposes. If a purchaser of an eligible residential complex is to be paid or credited the new housing rebate by the builder, the value of the rebate must generally be included in determining the value of consideration of the complex. In those cases where the rebate is in addition to the amount that is the asking price of the complex (that is, the builder does not use the rebate to reduce the amount of the stated price), then a rebate factor must be used to calculate the value of consideration of the complex. (For further discussion and an explanation of how to calculate the tax and rebate when the GST new housing rebate forms part of the value of consideration, see Section 19.3.1.1 *Rebate Forms Part of the Value of Consideration*; when the HST forms part of the value of consideration, see Section 19.3.8, *New Housing Rebates and the HST*.)

19.1 Real Property and the GST/HST (continued)

Value of consideration
ss 153(1)

54. Where the consideration for a supply, or a portion thereof, is expressed in money (defined to include cash, cheques, promissory notes and other instruments), the value of that consideration is equal to the amount of the money. Where the consideration for a supply, or a portion thereof, is other than money, the value of that consideration is equal to the fair market value of the consideration at the time the supply was made. As a result, property or services given in exchange for other property or services can constitute both a supply and consideration for a supply.

Example

For example, assume Charity A transfers vacant land which has a fair market value of \$100,000 to Corporation B. Corporation B agrees to construct a commercial building on the land and to allow Charity A to occupy some space in the building “rent free” for a specified period.

In this example, two supplies are made for consideration:

- Charity A has made an exempt sale of the land to Corporation B for consideration which is equal to the fair market value of the “free rent” of commercial office space given in exchange by Corporation B. The fair market value of the rent-free period may be determinable by reference to market rents or other rents in the building.
- Corporation B has made a taxable supply of real property by way of lease for consideration which is equal to the fair market value of the land transferred by Charity A, i.e., \$100,000. Since this consideration is “paid” at the outset of the agreement, and section 133 deems the supply to be made at the time of the agreement, Corporation B must collect GST of \$7,000 at that time from Charity A.

Combined
consideration
ss 153(2)

55. Where two or more supplies are made for a combined consideration, the total consideration must be attributed reasonably to each supply. If this allocation has not been made reasonably, i.e., if the consideration for one supply exceeds the consideration that would be reasonable if the other supply had not been made, then subsection 153(2) deems the consideration for each of the supplies to be that which may reasonably be attributed to each supply.

Example

A government of a non-participating province sells a two-hectare parcel of recreational land. On this land is an occupied cottage that meets the definition of a residential complex. The price of the two-hectare parcel is \$30,000.

Under subsection 136(2), this parcel is deemed to be two separate supplies: the portion that contains the residential complex (i.e., the cottage plus the land that is reasonably necessary for the use and enjoyment of the cottage as a place of residence—usually a half-hectare) and the remaining portion of land. As listed in section 2 of Part I of Schedule V, the supply of the used residential complex is exempt. As no provision exempts the supply of the excess land, that supply is taxable. The \$30,000 must be allocated in a reasonable manner between the exempt supply of the half-hectare containing the residential complex and the taxable supply of the vacant land portion.

19.1 Real Property and the GST/HST (continued)

- Mortgage buydowns
56. It is not uncommon for builders of newly constructed homes to offer mortgage financing at below-market interest rates. Usually, the builder will do this by arranging financing for qualified new home buyers through a financial institution to which the builder has made a payment to reduce or buy down the interest rate (hereinafter referred to as a “mortgage buydown”).
- Taxable supplies 165

57. Where a mortgage buydown is supplied together with a new residential complex by a builder for a single consideration, the mortgage buydown forms part of the supply of the residential complex by the builder. A supply of a newly constructed residential complex by a builder is generally a taxable supply and the mortgage buydown cannot be separated out of the value of consideration for the home. Furthermore, where the mortgage buydown is provided by way of separate consideration, but not offered as a separate supply, e.g., the purchaser has no option but to take the financing terms offered by the builder, the mortgage buydown will normally be treated as part of the supply of the residential complex.

 - Exempt supply

58. When a mortgage buydown is supplied by a builder for an identifiable consideration which is truly separate from the builder's supply of the new residential complex, then the supply of the mortgage buydown may, in certain cases, be considered an exempt supply of a financial service. This will depend, however, on various factors including: (1) the provisions of the agreement; (2) the terms of the mortgage buydown; (3) the treatment of the mortgage buydown with the agreement; (4) the characterization of the consideration for the new residential complex and the mortgage buydown; and, (5) the nature of the relationship between the builder and the purchaser with respect to the mortgage buydown.

Time of liability

- Sale of real property para 168(5)(b)
59. Where a taxable supply of real property, other than the supply of a residential condominium unit described in paragraph 60 is made by way of sale, tax is payable on the earlier of:
- (a) the day that ownership of the property is transferred to the recipient; and
 - (b) the day that possession of the property is transferred to the recipient under the agreement for the supply.

- Example 1
- On October 1, 1997, an individual and a builder enter into an agreement of purchase and sale for a newly constructed single unit residential complex whereby the builder undertakes to provide possession and clear title to this property, and the individual purchaser undertakes to pay the purchase price to the builder on December 1, 1997. The individual purchaser and the builder meet on December 1, 1997, at which time the builder gives the purchaser the keys to the new home and a copy of the registered deed of legal transfer in exchange for a certified cheque for \$200,000 from the purchaser.

19.1 Real Property and the GST/HST (continued)

Although the parties entered into an agreement of purchase and sale on October 1, 1997, GST/HST liability is triggered only upon the earlier of the transfer of possession or ownership. In this case, both ownership and possession were transferred under the agreement to transfer ownership on December 1, 1997.

Example 2

If, in the same situation as Example 1, the individual purchaser, instead of waiting until December 1, 1997, arranged under the agreement for the supply to take early possession of the residential complex on November 1, 1997, the GST/HST liability would be triggered on November 1, even though ownership does not transfer until December 1.

Exception para 168(5)(a)

60. If possession of a residential condominium unit is transferred to a recipient before the condominium complex in which the unit is situated is registered as a condominium, tax is payable on the sale on the earlier of the day that ownership of the unit transfers to the recipient and the day that is sixty days after the day the complex is registered as a condominium.

Example

An individual and the builder enter into an agreement of purchase and sale on September 1, 1997, for a newly constructed residential condominium unit. Notwithstanding that the condominium complex was not registered as a condominium at the time, the individual takes possession and moves into the unit specified in the agreement of purchase and sale on October 1, 1997. The condominium complex is registered as a condominium on November 1, 1997, and the deed of ownership to the particular condominium unit specified in the agreement of purchase and sale is transferred to the purchaser on December 1, 1997.

Although the purchaser took possession of the residential condominium unit under an agreement to transfer ownership on October 1, 1997, GST/HST liability was not triggered at that time because the condominium complex was not yet registered as a condominium. GST/HST liability occurs at the earlier of the day that ownership of the unit transfers to the recipient (in this case December 1) and the day that is sixty days after the day the complex is registered as a condominium (in this case, December 30, i.e., 60 days after November 1). Therefore, the individual is required to pay the GST/HST on this sale on December 1.

Partial payments for a supply by way of sale ss 168(5)

61. When real property is being supplied by way of sale and consideration is paid through a series of partial payments, GST/HST in respect of all of the consideration for the sale of real property is payable according to the timing provisions set out in paragraphs 59 and 60 (provided the consideration is ascertainable).

Example

For example, an individual and a builder enter into an agreement of purchase and sale for the supply of a newly constructed single unit residential complex on November 1, 1997. The purchase price of the new home is \$150,000, to be paid in three monthly instalments of \$50,000 starting on December 1, 1997. The purchaser acquires possession of the house under the agreement of purchase and sale on November 15, 1997. Ownership of the house will be transferred to the purchaser on December 1, 1997.

19.1 Real Property and the GST/HST (continued)

Notwithstanding that partial payments begin on December 1, 1997, the liability for GST/HST on the entire consideration for the house is due on November 15, because GST/HST liability for the home is triggered by the transfer of possession under the agreement of purchase and sale. (Note that a new housing rebate would not be available until December 1, the day ownership is transferred.)

Partial payments for supplies by way of lease or rental ss 168(2)

62. Partial payments for a supply of real property by way of lease or rental are subject to a different time of liability rule. In these cases, pursuant to subsection 168(2), tax is payable separately on the value of each partial payment on the earlier of the day on which the partial payment is paid and the day on which the partial payment becomes due. Under subsection 152(2), if a lease or rental is pursuant to an agreement in writing that provides for periodic payments such as monthly rental payments, consideration is due on the day each payment is due according to the terms of the lease agreement, regardless of any invoice which may be issued.

Effective April 1, 1997
Lease interval
ss 136.1(1)

63. New subsection 136.1(1) provides that supplies of property by way of lease, licence or similar arrangement will be treated as a series of separate supplies for each period (referred to as a "lease interval") to which a particular lease payment is attributable. This amendment applies to lease intervals that begin on or after April 1, 1997. For each lease interval the supplier is deemed to have made, and the recipient is deemed to have received, a separate supply of the property on the earliest of the first day of the lease interval, the day on which the payment for that interval becomes due, and the day on which the payment attributable to the lease interval is paid. Consequently, for lease intervals that begin on or after April 1, 1997, the timing of liability for the payment of tax for taxable supplies of real property by way of lease, licence or similar arrangement would be subject to the general rule found under subsection 168(1). That is, GST/HST is payable in respect of a taxable supply by the recipient on the earlier of the day on which the consideration is paid and the day on which the consideration becomes due.

Value not ascertainable
ss 168(6)

64. Where the value of the consideration for a taxable supply of real property by way of sale is not ascertainable on the day tax is payable, GST/HST need not be paid until such time as the value is ascertainable. However, tax is payable on any portion of the value of consideration which is ascertainable on that day. For example, where land is expropriated and the compensation is under dispute, if the expropriation is a taxable supply, the GST/HST would not be payable until such time as the dispute is adjudicated or the parties agree to the amount of compensation. If any portion of the compensation is paid with the remainder under dispute, GST/HST is payable on the portion of the compensation that has been paid.

19.1 Real Property and the GST/HST (continued)

In another example, if the consideration for a sale of a commercial building is a fixed amount plus a percentage of the rental income generated by the building over the six months following the transfer of title, and if ownership is transferred to the recipient on a particular day, tax is payable on the ascertainable amount (the fixed price) on that day. Tax on the balance of the consideration (the rental income) becomes payable when the amount becomes ascertainable.

Combined supply
ss 168(8)

65. Instances may arise where a combination of a service, personal property or real property is supplied to a recipient for a single all-inclusive amount. To decide on which set of rules applies to determine the time of liability for the combined supply, one must first look to see if one of the elements in the supply exceeds the value of each of the other elements individually. If so, the entire supply is to be treated as a supply of that element. If no element exceeds the value of each other element individually, and if one of the elements is real property, then when determining the time of liability, the entire supply is treated as a supply of real property. (In any other case, the supply is to be treated as a supply of a service.)

Example

For example, on February 1, 1998, an individual and a builder enter into an agreement of purchase and sale for a newly constructed single unit residential complex and furnishings for a single consideration of \$200,000. The possession and title to the furniture are transferred on February 15, while ownership and possession of the home are transferred on June 30. In this example, if no amount is paid prior to June 30 (other than a deposit), liability for the GST/HST in respect of the sale of the furniture is triggered on June 30, even though possession and title to the furniture were transferred earlier.

Deposits

Nature of payment

66. The GST/HST status of a payment being made or coming due is dependent on whether the amount is considered to be a deposit, a progress payment in respect of a taxable service or an instalment in respect of a taxable sale.

Deposits
ss 168(9)

67. For purposes of determining when tax is payable, a deposit is an amount given by a recipient as security for the performance of a future obligation. A deposit may or may not be refundable.

68. A deposit is not treated as consideration paid for a supply until the supplier applies the deposit as consideration for the supply.

Example

On November 1, an individual and builder enter into an agreement of purchase and sale for the supply of a newly constructed single unit residential complex priced at \$200,000. At that time, the individual pays a \$20,000 deposit in respect of the new house. The balance of the purchase price is to be paid on December 1, when ownership and possession of the house will be transferred by the builder to the purchaser. The deposit will be applied against the consideration for the sale on December 1. In this example, liability for the GST/HST in respect of the deposit occurs on December 1.

19.1 Real Property and the GST/HST (continued)

Tax remittable
ss 225(1)

69. While the purchaser is not obligated to pay GST/HST at the time the deposit is paid or becomes payable, if the deposit includes an amount collected by the vendor as or on account of GST/HST, that tax is remittable by the vendor at that time pursuant to subsection 225(1).

70. If a deposit in respect of a taxable supply is forfeited, the vendor will be required to remit GST equal to 7/107 or HST of 15/115 of the forfeited deposit. The person who made the deposit may claim an ITC, if the eligibility criteria for claiming ITCs are met. (For further information on eligible ITCs, see Chapter 8, *Input Tax Credits: Eligible ITCs.*)

Deposits before 1991
ss 182(2)

71. Note that if the terms of the underlying agreement were entered into before 1991 and tax was not contemplated as part of the terms of the agreement, if the deposit is forfeited after 1992, under the terms of subsection 182(2), the vendor may be entitled to claim an additional amount on account of GST/HST from the recipient (i.e., the amount is not treated as a tax-included amount).

Construction contracts and progress payments

General rule
ss 168(1)

72. Construction contracts are subject to the time of tax liability rule in subsection 168(1). Under this provision, tax is payable by the recipient of a taxable supply on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due. This is different from the time of tax liability rule under subsection 168(5) that applies to supplies by way of sale of real property—see paragraphs 61 to 63 in this section. In other words, construction contracts represent something other than a supply of real property.

Progress payments
ss 168(2)

73. Usually, construction contracts call for progress payments to be made as work on a project proceeds. In some cases, the payments are due on specific dates according to the terms of the contract. They may be for predetermined amounts, or may be based upon the percentage of the work that has been completed on each of the dates specified in the contract. In other cases, a progress payment may be due when specific portions of the contract have been completed (e.g., pouring of the foundation) or when specific events have occurred (e.g., preliminary inspection of the building).

74. Where progress payments are due on specific dates according to the terms of the contract, pursuant to paragraph 152(1)(c) and subsection 168(2), the tax is payable by the recipient (and, therefore, collectible by the supplier) on each progress payment on the earlier of the day the payment is made and the day that payment becomes due according to the terms of the contract.

75. Where the contract stipulates both the amount of a progress payment and the date the recipient is required to make that payment, the tax is payable on the amount called for in the contract at the date specified, even if no payment is made or an amount less than the full payment is made, since the amount called for in the contract has become due on that day.

19.1 Real Property and the GST/HST (continued)

76. Where progress payments become due on the completion of specific portions of the work called for in the contract, or upon the occurrence of specific events, rather than on fixed dates, the payments will be considered to be due when the work has been completed or when the specific event has occurred.

Certificate not an invoice

77. In many cases, construction contracts provide for the contractor to submit requests or applications for payment on a regular basis during the term of the contract. Based on this request or application for payment, another person, often a consultant, engineer or architect, is required to certify the value of the work completed and materials delivered to the time of the request or application and to approve a specific amount for payment. Under the terms of the contract, the recipient of the supply, usually the owner, is required to pay the amount approved within a specific number of days following certification of the value of the work completed. In such cases, the request or application for payment by the contractor will not be considered to be an invoice. Therefore, GST/HST will be payable on the amount approved on the earlier of the day that the recipient pays the amount approved, the day that the recipient is required to pay the amount approved pursuant to the contract, the day the supplier issues an invoice for that amount, or the date of such an invoice, if issued.

Example

For example, a standard stipulated price contract requires the owner (i.e., the recipient of the supply of construction services) to make monthly payments based on the amounts approved by a third-party consultant. Applications for such payments are made by the contractor (the supplier) on a monthly basis as the work progresses. The consultant has 10 days after the date the application for payment is issued either to approve or to amend the application and issue a certificate for payment. The owner is required to pay the amount approved to the contractor no later than five days after the certificate is issued by the consultant. No other documents relating to the progress billing are issued by the supplier.

In this case, the contractor's application for payment will not be regarded as an invoice, since the application is merely a request that a certificate for payment be issued pursuant to the contract, and not a document creating an obligation to pay. The certificate, although it establishes the obligation to pay, is not issued by the supplier, but by a third party and, therefore, the amount approved does not become due under subsection 152(1) as the document is not an invoice issued by the supplier. GST/HST liability is triggered by the terms of the contract in accordance with subsections 168(2) and 152(1). Therefore, the GST/HST becomes payable in respect of a given monthly payment under the contract when that amount is paid or five days after the certificate for payment is issued, whichever is earlier. The latest day that GST/HST will be payable in respect of a given monthly payment under the contract will be 15 days after the application for payment is made by the contractor (i.e., 10 days for the certificate to be issued and five days for the payment to be made). However, if the payment is made before it becomes due under the terms of the contract, then tax will become payable on the day the payment is made.

Invoice issued
ss 152(1)

78. GST/HST in respect of a progress payment would become due at an earlier time if an invoice for the progress payment was issued or dated prior to the due date under the contract.

19.1 Real Property and the GST/HST (continued)

Override rule
para 168(3)(c)

79. Where there is a supply under a written agreement for the construction, renovation, alteration or repair of real property, tax on the consideration or any part which has not been paid or become due on or before on the last day of the month immediately following the month in which the work was substantially completed (90% or more) is payable at that time. The tax is calculated on the value of the consideration or part thereof which has not been paid or become due by that day. However, pursuant to subsection 168(6), if the consideration for the contract is not ascertainable on that day, tax is payable on that day only in respect of any part of the consideration that was ascertainable on that day. Tax on the remainder of the consideration is payable on the day its value becomes ascertainable.

For example, a building contractor is working on a cost-plus arrangement wherein he is reimbursed for expenses plus 10%. The total consideration for the supply, therefore, will not be known until all of the contractor's expenses are known. If the construction is substantially (90% or more) complete on June 3, 1998, the tax is payable on any consideration which has not been paid or become due for the construction on July 31, 1998. If the contractor does not know all of the expenses with respect to the construction, then tax would be payable on that day on any ascertainable consideration (that is, known expenses plus 10%). The tax would be payable on the balance of the consideration when it became ascertainable (that is, when the contractor's expenses are ascertainable).

80. Note that the override rule in subsection 168(3) does not apply to holdbacks. Holdbacks are governed by subsection 168(7) (and are discussed in paragraphs 81 to 84 in this section.)

Holdbacks

Meaning
ss 168(7)

81. A holdback may be defined as a part, usually a percentage, of the consideration for a supply that is retained by the recipient of the taxable supply for a period of time pending full and satisfactory performance of the supply, or a part thereof, by the supplier. Such amounts are excluded from the application of the general timing rules.

Tax payable

82. Under subsection 168(7), where the recipient of a taxable supply retains part of the consideration for that supply pending full and satisfactory performance of the supply, or a part thereof,

- (a) in accordance with either federal or provincial laws, or
- (b) as required under the terms of a written agreement for the construction, renovation or alteration of, or repair to any real property,

tax is payable on the amount held back on the earlier of the day that the holdback is paid out and the day the holdback period expires pursuant to the written agreement or applicable legislation.

83. However, if the supplier collects an amount as tax or on account of tax before it becomes payable, the supplier must remit that tax with the supplier's return for the reporting period in which the tax was collected.

19.1 Real Property and the GST/HST (continued)

Example 1 For example, a construction contractor may invoice the recipient as follows:

Total contract price	\$100,000
plus GST	<u>7,000</u>
Subtotal	\$107,000
less 10% Holdback	<u>10,700</u>
Net Payable, this invoice	<u>\$96,300</u>

In this example, the construction contractor would be required to remit GST of \$7,000 with its return for the period in which the invoice was issued. The recipient, if eligible, could claim an ITC of \$7,000 at that time.

Example 2 Alternatively, the construction contractor might invoice the recipient as follows:

Total contract price	\$100,000
less 10% Holdback	<u>10,000</u>
Subtotal	\$90,000
plus GST	<u>6,300</u>
Net Payable, this invoice	<u>\$96,300</u>

In this second example, the construction contractor invoices the same net amount to the recipient but is required to remit tax of only \$6,300 with the return for that reporting period. The remaining \$700 of GST on the contract will be payable when the holdback is paid by the recipient or becomes due.

84. A holdback that is not required by federal or provincial laws or stipulated in a written contract to construct, renovate, alter or repair any real property does not defer the time at which the tax becomes payable. In such cases, subsection 168(7) does not apply and the tax is payable on the earlier of the day consideration is paid and the day consideration becomes due in respect of the supply.

Liability for tax

General rule
ss 221(1)

85. As a general rule, a person making a taxable supply of real property is required to collect the GST/HST from the recipient of the supply as an agent for Her Majesty in right of Canada. A registered supplier who is required to collect the GST/HST (or a registered supplier who is deemed to have collected GST/HST, in the case of self-supplied real property) must report the tax by filing the regular return, form GST 34, *Goods and Services Tax/Harmonized Sales Tax Return for Registrants*. Non-registered suppliers report the GST/HST collected by filing the non-personalized return, form GST 62, *Goods and Services Tax/Harmonized Sales Tax Return (Non-Personalized)*.

Exceptions
ss 221(2)

86. However, there are exceptions where the recipient, not the supplier, is required to account for the GST/HST on a taxable sale of real property. This occurs when:

- the supplier is a non-resident; or

19.1 Real Property and the GST/HST (continued)

- the recipient is registered for the GST/HST (excluding the situation where an individual is buying a residential complex, or property that is supplied as a cemetery plot or place of burial, entombment or deposit of human remains or ashes).

Recipient remits
ss 228(4)

87. Prior to January 1, 1997, if a person were to make a taxable purchase of real property in these circumstances, the recipient was required to file form GST 60, *Goods and Services Tax Return for Acquisition of Real Property* to report and pay the tax.

ss 228(4)

88. Effective January 1, 1997, registrants who are required to self-assess tax on a taxable purchase of real property and who are using or supplying the property primarily in the course of commercial activities will report the tax on their regular return, that is, on form GST 34, *Goods and Services Tax/Harmonized Sales Tax Return for Registrants* for the reporting period in which the tax became payable.

89. All other persons continue to use form GST 60, *Goods and Services Tax Return for Acquisition of Real Property*, to report and pay the tax, and must file the return on or before the last day of the calendar month following the month in which the tax became payable. For information concerning ITCs and filing GST 60, see paragraphs 117 to 121.

90. Note that if the recipient pays the tax to the supplier in error, the obligation to self-assess the tax under subsection 228(4) is not relieved.

Example

For example, Developer A, a registrant, takes over a construction project from Developer B, also a registrant, by purchasing the land and the units already under construction. The recipient, Developer A, pays an amount as consideration for the project and another amount that is clearly stated in the sale documents to be the GST/HST paid by the recipient and collected by the supplier, Developer B, in respect of this taxable supply of real property. In this situation, Developer A is still assessable under the provisions of section 296 for tax in respect of the acquisition of the taxable supply of real property, even though an amount was paid as tax to the supplier. In this case, it would be the responsibility of the recipient to recover the tax paid in error to the supplier.

Incorrect statement of
exempt sale of real
property
s 194

91. If a supplier were to make a taxable supply by way of sale of real property and incorrectly state or certify, in writing, that the supply is an exempt supply, the consideration for the supply is deemed to be GST or HST-included and the tax is calculated as 7/107 or 15/115 of the consideration as appropriate. In this case, unless the recipient knew (or should have known) that the supply was not exempt, the supplier is considered to have collected — and the recipient considered to have paid — that tax on the day on which ownership or possession of the property was transferred to the recipient. As a consequence, the supplier is required to remit the tax and the recipient, if a registrant, is entitled to an ITC to the extent that the property is for use in a commercial activity.

Construction contract for services vs. sale of real property

19.1 Real Property and the GST/HST (continued)

- Timing of GST liability 92. The general rule for liability for tax under subsection 168(1) (i.e., tax is payable in respect of the supply on the earlier of the day that consideration is paid or consideration becomes due) applies to construction services contracts, but not to the sale of real property. Under subsection 168(5), the liability on a taxable sale of real property occurs on the earlier of the day ownership of the property is transferred and the day possession is transferred under an agreement to transfer ownership, notwithstanding that consideration for the sale may be paid or become due prior to that time.
- Liability for tax 93. The provider of taxable construction services will generally be required to collect and remit GST/HST on progress payments made under the contract. In the case of a taxable sale of real property, the purchaser, if a GST/HST registrant, must self-assess tax during or after completion of construction, i.e., under subsection 228(4) as a result of subsection 221(2), when ownership or possession under the sale agreement is transferred.
- Vendor retains interest 94. The person who constructs the building may retain an interest in the real property until all the terms of the agreement are satisfied. In the case of a residential complex, the person who constructs the complex may be a builder of the complex as defined in subsection 123(1) because of an interest in the real property whether the agreement is for construction services or the purchase and sale of the complex.
- Determining the nature of the transaction 95. There may be instances where an arrangement could be interpreted as either a contract for a supply of construction services (that is, a supply of services and tangible personal property) or as a sale of real property. The applicability of the GST liability provisions depend on a clear determination of the nature of the supply based on the substance of the contract.
96. Several factors to consider when determining the nature of the transaction are:
- Terms of the agreement

Does the agreement clearly set out the nature of the transaction?
Do the parties understand and mutually agree to the nature of the transaction?
 - Ownership of the construction in progress

Does the vendor or the purchaser own the rights to the construction in progress?
If the purchaser does not own the land on which the building is being constructed, are there separate legal titles in respect of the construction-in-progress?
Is the ownership evidenced by payment of property taxes, insurance coverage or other actions taken?

19.1 Real Property and the GST/HST (continued)

- Fulfilment of the performance under the contract

Is the fulfilment of the construction contract evidenced by a transfer of legal title or by a final payment (e.g., holdback) following certification of the building?

97. In the majority of cases, it may be obvious whether the transaction is a supply by way of sale of real property or a supply of construction services (that is, services plus tangible personal property), however, a close examination of the facts and circumstances may be required in certain cases to determine the nature of the supply.

Input tax credits

General rules
s 169

98. Input tax credits (ITCs) may be claimed by a registered person with respect to GST/HST paid or payable by the person in respect of the costs of acquiring, importing, bringing into a participating province, improving, leasing or operating real property to the extent that the real property is for use or supply in the course of commercial activities.

Apportioning ITCs
s 169, s 199, s 206

99. Under section 199, no ITCs may be claimed on the GST/HST paid or payable for the acquisition, importation, or bringing into a participating province of capital personal property unless the property is acquired for use primarily, i.e., more than 50%, in commercial activities. In such cases, ITCs for 100% of the GST/HST paid or payable can be claimed. In contrast, acquisitions, importations or bringing into a participating province of capital real property by persons other than individuals and public service bodies who have not filed an election under section 211, generate proportional ITCs expressed as a percentage of the extent to which the property is acquired, imported or brought into a participating province for use in commercial activities. (For further information on capital real property, see Section 19.4, *Commercial Real Property*.)

Extent of use
s 141.01

100. The determination of the extent to which the property is acquired for use in commercial activities could be based, for example, upon total revenues, production, floor space or other methods, as long as the apportionment is fair and reasonable in the circumstances and is used consistently throughout the year.

Greater than 10%, less than 90%
s 141

101. ITCs are normally directly proportional where the use of capital real property in commercial activities is more than 10% and less than 90% of total use. No ITCs are allowed where such use is 10% or less of total use, while an ITC of 100% may be claimed if use in commercial activities is 90% or more of total use.

Example

For example, a real estate company uses its administration office for its activities relating to both the sale of new residential complexes (taxable) and long-term leases of residential complexes (exempt). Provided the use of the office for taxable activities is greater than 10% and less than 90%, ITC's relating to GST/HST paid or payable on office expenses are available in proportion to its use for the taxable activities based on a fair and reasonable method (such as direct expenses, floor space, etc.) provided the method is applied consistently throughout the year.

19.1 Real Property and the GST/HST (continued)

- Exceptions 102. There are certain exceptions to this apportionment rule for capital real property:
- financial institutions claim ITCs in respect of GST/HST paid or payable on capital real property in proportion to the extent of commercial use of the property without regard to the 10% or 90% limits set out in paragraph 101;
- ss 208(1) and (4)
- a registrant who is an individual may not claim ITCs related to GST/HST paid or payable for the acquisition of, or improvements to, real property if the property is acquired primarily (more than 50%) for the individual's personal use and enjoyment or the personal use and enjoyment of a related individual;
- For example, a lawyer who practises from home is not entitled to ITCs for GST/HST related to acquisition and improvements to the residential complex if more than 50% of the complex is his or her place of residence. ITCs are proportionately available in respect of GST/HST paid or payable on the operating costs related to the commercial use of the building (e.g., utilities and maintenance) provided such use is greater than 10%.
- para 170(1)(a.1)
- Note also that ITCs will be denied where the supply, importation or bringing into a participating province of property or a service acquired or imported for consumption or use is related to any part of a self-contained domestic establishment in which the registrant or individual lives, unless the work space is the principal place of business of the registrant, or is used exclusively for the purpose of earning income from a business and is used on a regular and continuous basis for meeting the registrant's clients, customers or patients in respect of the business.
- s 209
- A public service body or specified Crown agent (other than a financial institution or a public service body that has filed an election under section 211) cannot claim ITCs in respect of the acquisition of, or improvements to, capital real property unless the property is acquired or improved primarily (more than 50%) for use in a commercial activity of the person, in which case full ITCs are allowed. In other words, it is treated like capital personal property. (The election under section 211 is an election by a public service body to have an exempt supply of real property treated as a taxable supply. This election is discussed in detail in section 19.6, *Public Sector Bodies* of this chapter.)
- Deemed separate properties ss 141(5)
- ITCs may be claimed with respect to the GST/HST paid or payable on the portion of the operating expenses that relate to the commercial portion of a building that includes both commercial premises and a residential complex, even if the commercial portion of the building is 10% or less, as the commercial and residential portions are deemed to be separate properties.

19.1 Real Property and the GST/HST (continued)

Example

For example, a registrant who is the landlord of a 20-storey apartment building pays electricity for the entire building, including the ground floor which is made up of retail shops. The landlord is able to claim ITCs for the GST/HST paid or payable in respect of the portion of the electricity expenses attributable to the taxable rentals on the first floor, even though more than 90% of the building is used in exempt rentals. This apportionment may be based on floor space or another method which is fair and reasonable and applied consistently throughout the year by the taxpayer.

Chart

103. The following chart summarizes the availability of ITCs by percentage use in commercial activities:

Type of Property	Percent of Use in Commercial Activity	ITC Eligibility in Terms of Percent of GST/HST Paid or Payable (% = extent of use in commercial activity)							
		General Registrants (partnerships and corporations)	Ref.	Registered Individuals	Ref.	Public Sector ¹	Ref.	Financial Institutions	Ref.
Capital Real Property	≤ 10%	0		0		0		%	
	>10% - 50%	%	206	<u>see note²</u>	208	0 ³	209 ⁴	%	123, 206 & 141(6)
	>50% - <90%	%		%		100%		%	
	≥90%	100%		100%		100%		%	
Capital Personal Property	50% or less	0		0		0		%	
	>50%	100%	199	100%	199	100%	199	%	169 & 199(1)

Notes

- ¹ Governments, non-profit and charitable organizations, municipalities, universities, schools and hospitals (ss 123(1))
- ² In some cases, an individual registrant may be eligible to claim an ITC even if the individual's use of the capital real property is less than 50% in commercial activities. Subsection 208(1) provides that an individual cannot claim an ITC for the acquisition of capital real property that is used primarily for the personal use and enjoyment of the individual or a related individual. There could be cases where an individual acquires capital real property that is to be used partly in exempt activities, partly in commercial activities and partly for personal use and enjoyment. If the combined percentage of exempt and commercial use is 50% or greater, then the property is not being used primarily for personal use and enjoyment and the prohibition under subsection 208(1) against claiming ITCs would not apply. Thus, even though the percentage use of the property in commercial activities may be less than 50%, the individual could still claim an ITC for the commercial use of the property, as long as that commercial use is greater than 10%.
- ³ These registrants excluding governments may elect to be treated as general registrants for this category on a property by property basis (s. 211)
- ⁴ Section 209 refers registrants who are public service bodies or specified Crown agents (other than financial institutions) to the ITC rules under subsections 199(2) to 199(4).

19.1 Real Property and the GST/HST (continued)

ITCs and mixed use of residential real property

- Three types 103. There are three main types of mixed use of residential real property where ITCs may be claimed by a registrant:
- ss 136(2) & ss 141(5) **Type 1:** Real property consisting of one part that is residential real property used solely in the course of exempt activities and the other part that is not residential property and that is being used for commercial purposes; (see paragraphs 105 and 106);
- ss 169(1) **Type 2:** A residential complex used in the course of a commercial activity as well as in the course of an exempt activity (see paragraphs 107 to 109); and
- ss 169(1), ss 208(1) & ss 208(2) **Type 3:** A residential complex owned and acquired by an individual registrant to be used, in part, for the personal use of the individual as a place of residence and used, in part, for other purposes (see paragraphs 110 to 112).

• Mixed-use: type 1

Type 1: issue - capital costs 104. Real property may consist partly of residential property used solely in the course of exempt supplies (usually the supply of long-term residential accommodation) and another part that is being used for non-residential purposes. Under the provisions of subsection 136(2), the supply of each part is a separate supply. The ITCs applicable to the capital cost (acquisition and improvements thereto) of the property are to be based upon the portion of the capital cost that is reasonably applicable to each part.

Example 1 A registrant purchases a building that has stores on the ground floor and rental apartments on the top floors. The apartments are occupied at the time of sale.

The portion of the price applicable to the residential complex must be separately determined since, by subsection 136(2), the residential portion of the building is treated as a separate property sold independently from the rest of the building (the commercial portion). As the sale of the residential portion would, in most cases, be an exempt supply (sale of used residential housing), the portion of the consideration that pertains to the residential complex would not be subject to GST/HST. The portion of the sale price applicable to the balance of the premises (the commercial portion) is subject to GST/HST (sale of real property for use in commercial activities). In this case, the registrant purchaser would be entitled to claim ITCs with respect to the GST/HST paid or payable on the acquisition of that part of the real property which is not a residential complex.

19.1 Real Property and the GST/HST (continued)

Example 2 A registrant constructs a mixed-use building (i.e., residential and commercial) to hold as rental property. All of the GST/HST payable on the construction costs is eligible for ITCs since both the intended rental of the commercial portion of the building and the self-supply of the portion that is a residential complex constitute taxable supplies. Upon the application of the self-supply rule in section 191, however, the person incurs a GST/HST liability on a deemed supply by way of sale of the portion of the building that is a residential complex. That amount cannot be claimed subsequently as an ITC as it relates to the exempt use of the residential complex.

Example 3 A farmer decides to develop some of his farmland that abuts an access road as a residential trailer park. Under the provisions of subsection 190(4), the farmer is required to self-assess tax on the fair market value of the property that forms the residential trailer park when the farmer first leases a site in the park for a period of at least one month of continuous possession or use. Because the provision of a site in a residential trailer park for a period of at least one month of continuous possession or use is an exempt supply, the farmer cannot claim ITCs for costs related to the provision of this exempt supply. However, the farmer can continue to claim ITCs in respect of the operation of the farm.

Type 1 - issue:
operating costs -
residential or
commercial 105. A registrant's eligibility to claim ITCs, with respect to GST/HST paid in connection with operating costs of mixed use properties that include a residential complex, depends on the extent to which the operating cost is for the acquisition of property or services for consumption or use in the course of commercial activities. Such an allocation for operating costs may not be the same as for capital acquisitions or improvements, since operating costs do not necessarily relate to the extent which capital property is used in commercial activities.

- **Mixed-use: type 2**

Type 2: exempt and
commercial supplies 106. A residential complex could be used in the course of a commercial activity, as well as in providing exempt supplies.

Example For example, a building consisting of residential units qualifies as a residential complex, unless the building is a hotel or similar premises, with not more than 10% of the leases, licences or similar arrangements, under which residential units in the building are supplied, provide or are expected to provide, for periods of continuous possession or use of 60 days or more. The supply of rooms for short-term accommodation (i.e., less than a month and consideration greater than \$20/day) will generally be a taxable supply whether provided in a residential complex or hotel. Accommodation of one month or more is exempt only when provided in a residential complex, unless the consideration is for \$20/day or less.

19.1 Real Property and the GST/HST (continued)

Type 2 - issue: ITCs
ss 169(1)

107. Assuming a residential complex is acquired for a mixed-use purpose, ITCs applicable to the GST/HST payable on acquisition would be based under the provisions of paragraph 169(1)(b) upon the percentage of intended use in commercial activity. (Note: the residential complex is not treated as two separate properties under subsection 136(2) since the whole property is a residential complex, and subsection 141(5) does not apply to exclude the operation of subsections 141(1) to 141(4), with respect to the commercial use of the residential complex. No ITCs can be claimed where the intended use in commercial activities is 10% or less of the total use.)

Type 2 - issue:
operating costs

108. Subsection 169(1) applies to operating costs. The general rule (under subsections 141(1) to (4)) for ITC apportionment for non-capital property also applies. Due to the operation of subsection 141(4), no ITCs can be claimed if 90% or more of the intended use of a property or service in respect of that part of the operating cost is in relation to the making of exempt supplies.

• Mixed-use: type 3

Type 3: individually
owned residential
complex with
commercial use

109. Under the provisions of subsection 208(1), an individual may not claim any ITCs for GST/HST payable in respect of the acquisition of capital real property if it is acquired primarily for the individual's (or any related individual's) personal use and enjoyment. A similar rule applies under subsection 208(4) with respect to GST payable on improvements to capital real property in such circumstances. This is consistent with the entire property being considered a residential complex, which will generally be an exempt supply on its resale.

Example

An accountant who conducts her practice from her residential complex is not entitled to an ITC for GST/HST payable on acquisition and improvement costs if her complex is used primarily as her place of residence. In such a case, the resale of the entire property would be considered a supply of a residential complex by someone other than the builder (sale of "used" housing), and therefore exempt.

Type 3 - issue : ITCs

110. Where personal use does not exceed 50%, and there is more than 10% commercial use as a percentage of total use, a partial ITC (under subsection 169(1)) is available based on the extent to which the property is acquired for use in commercial activities.

Example

If a registered individual acquires a newly constructed home from a builder and intends to use 25% of it for the individual's exempt medical practice, lease 30% of it to a dentist, and use the remaining 45% as the individual's personal residence, the individual is able to claim ITCs of 30% (the commercial use) of the GST/HST paid with respect to the acquisition of the residence because even though the total use is not primarily commercial, neither is the total use primarily personal. Since by definition only that part of the building that is to be used as a place of residence is a residential complex, ITCs in respect of this deemed acquisition may be claimed only for that portion of the building that is used in commercial activity.

19.1 Real Property and the GST/HST (continued)

111. This rule does not preclude the claiming of ITCs with respect to a portion of the GST/HST payable on non-capital costs incurred (costs not related to acquisition or improvements) in relation to the home such as repairs and maintenance, even if the personal use of the complex exceeds 50%.

Example

An accountant in Manitoba purchases a newly constructed home from a builder for a price of \$200,000 plus \$14,000 GST, with the intention of using 60% of the home as her personal residence and 40% of the home in her accounting practice. During the first year of use, the accountant paid \$1,000 in GST for improvements to the home and \$500 in GST related to maintenance costs of the entire building.

No ITCs can be claimed by virtue of subsections 208(1) and (4) with respect to the GST paid on the acquisition and improvements because the residential complex is used primarily for the individual registrant's personal use. (The individual registrant may be eligible to claim a GST new housing rebate).

ITCs are allowed with respect to the \$500 of GST paid for maintenance costs of the building to be apportioned between commercial and residential use. Accordingly, the individual, if registered, could claim \$200 (i.e., percentage of commercial use \times GST paid = 40% \times \$500) in ITCs for the GST paid on the maintenance of the home.

Seizures, repossessions and redemptions

Seizures and repossessions ss 183(10)

112. Where the requirements of subsection 183(10) are met, if a creditor exercises a right under an agreement relating to a debt security or under a statute to satisfy in whole or in part a debt or obligation owing by a person to cause the supply of property of the person, the creditor is deemed to have seized the property immediately before that supply, and that supply is deemed to have been made by the creditor and not by the person.

113. In some cases under the terms of a written agreement or under the provisions of a federal or provincial statute, the person who has the debt or obligation (the debtor) has a right within a time period specified by the agreement or statute to redeem the property after it has been sold by the creditor. For example, under some provincial statutes, if a municipality seizes and sells property for non-payment of taxes, the debtor has a period of time (in some instances, up to two years) in which to redeem the property.

Creditor is registrant ss 193(3) Creditor is non-registrant ss 257(3)

114. Effective April 24, 1996, in cases where a creditor has exercised a right either under provincial or federal law or under the terms of a debt security agreement to cause the sale of a debtor's real property in order to satisfy payment of the debt, and the debtor can redeem the property during a period of time, ITCs or rebates that arise from the sale of the property cannot be claimed by the debtor until the redemption period has expired and the property has not been redeemed. Where the debtor is entitled to an ITC, it will be attributed to the reporting period in which the redemption period expires. Where the debtor is a non-registrant and is entitled to a rebate on the sale of the property, the entitlement is considered to have arisen on the day the time limit for redemption of the property expired.

19.1 Real Property and the GST/HST (continued)

GST treatment of redemptions ss 183(10.1)

115. Subsection 183(10.1) provides that if

- a creditor has caused the supply of the debtor's property for the purposes of satisfying a debt owing by the debtor,
- the purchaser of the property has paid the tax amount (i.e., GST/HST) on the purchase, and
- the debtor exercises the debtor's right to redeem the property sold by the creditor,

the GST/HST treatment of the transaction is as follows:

- a) the purchaser is deemed to have sold the property to the debtor for nil consideration when the latter redeems the property,
- b) if the debtor reimburses the purchaser (or the creditor) the tax amount
 - i) except for the purposes of this section, the debtor is deemed not to have supplied the property to the creditor under subsection 183(1) or to have received a supply of the property at the time of the redemption;
 - ii) the debtor is deemed to have paid that amount as tax in error at the time of the redemption
 - iii) the purchaser will not be allowed an ITC (or rebate) in respect of that amount, and
 - iv) there will be a recapture where the purchaser has claimed an ITC or a rebate in respect of that amount.

116. Subsection 183(10.1) applies to redemptions of property occurring after April 23, 1996.

Claiming ITCs

ss 228(4)

117. Effective January 1, 1997, registrants who are required to self-assess on a taxable purchase of real property and who are using or supplying the property primarily in the course of commercial activities are required to pay the tax and report it on their regular return for the period in which the tax became payable, that is, on form GST 34E, *Goods and Services Tax/Harmonized Sales Tax Return for Registrants*. These registrants are not required to file a GST 60, *Goods and Services Tax/Harmonized Sales Tax Return for Acquisition of Real Property*. This tax payable amount will not be included in the net tax calculation.

118. All other persons continue to use form GST 60, *Goods and Services Tax/Harmonized Sales Tax Return for Acquisition of Real Property*, to report and pay the tax and file the return on or before the last day of the calendar month following the month in which the tax became payable.

19.1 Real Property and the GST/HST (continued)

GST 60
para 169(4)(b) and
ss 228(4)

119. Prior to January 1, 1997, if an ITC was to be claimed in respect of the GST paid or payable on a supply of real property where the recipient was required to remit tax, the recipient was required, in addition to standard documentary evidence for ITCs, to file GST 60. (For a discussion of the circumstances where the purchaser of real property and not the vendor is required to account for the GST/HST on the acquisition of real property, see the discussion on liability for tax in paragraphs 85 to 91.)

Offsetting ITC

120. Filing this form enabled the recipient to claim an offsetting ITC at the time of tax payment, provided the property was acquired primarily for consumption, use or supply in the course of the recipient's commercial activities, and the GST 60 was filed with the recipient's regular return, GST 34, for the reporting period in which the tax became payable. Because the real property return was a necessary element of the documentary requirements for an ITC claim in respect of the supply, no credit could have been claimed before that return was filed. This offset was intended to ensure that registrants were not out of pocket for prolonged periods for what was often a large amount of tax in respect of a real property transaction.

121. If the real property was acquired otherwise than primarily for the purpose of consumption, use, or supply in the course of the recipient's commercial activity, the real property return (GST 60) had to be filed, pursuant to subsection 228(4), by the end of the month following the month in which tax in respect of the supply became payable. As a result, in these cases, the recipient could have been required to remit the tax prior to the time the ITC claim could have been made. (Although certain persons cannot claim an ITC unless the "primary" test is met. See paragraph 102.)