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APPLICATION OF GST/HST TO CONDOMINIUM FEES

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General overview

Provinces have legislation that allows for the creation of not-for-profit entities to collect fees from owners of certain real property to pay expenses for the upkeep and maintenance of the property. These entities are often known as condominium corporations. The issue then arises as to whether or not GST/HST applies to the fees being charged.

Perhaps not surprisingly, GST/HST is applicable to condo fees subject to two exemptions: Section 13 of Part 1 of Schedule V of the *Excise Tax Act* and the small supplier rule. The Section 13 exemption applies only to residential condominium units.

In general, if a condo unit is used as a place of residence for long-term accommodation, usually greater than 60 days, it will likely meet the definition of a residential condominium unit and the application of Section 13 is straightforward. Section 13 is applied on a unit basis and not on the condominium complex as a whole.

Condominium complexes often are homogeneous, containing either all residential condo units or all commercial condo units. If all the units in a condominium complex are residential units, the fees charged by the condominium corporation to each unit will be exempt. Conversely, if all the units in a condominium complex are not residential units (for example, condominium complexes in industrial areas whose tenants are businesses), the condo fees to each unit are *not* exempt. The condominium corporation will be required to charge and collect GST, assuming the total condo fees exceed the small supplier threshold of \$50,000 for a non-profit organization (NPO).

However, if the condominium complex units are not homogeneous in the nature of their use, the condominium corporation must consider the use of each individual unit as to the applicability of Section 13. GST/HST will apply to the condo fee charged on a unit-by-unit basis. The application becomes more convoluted if the use of the condo unit changes over time.

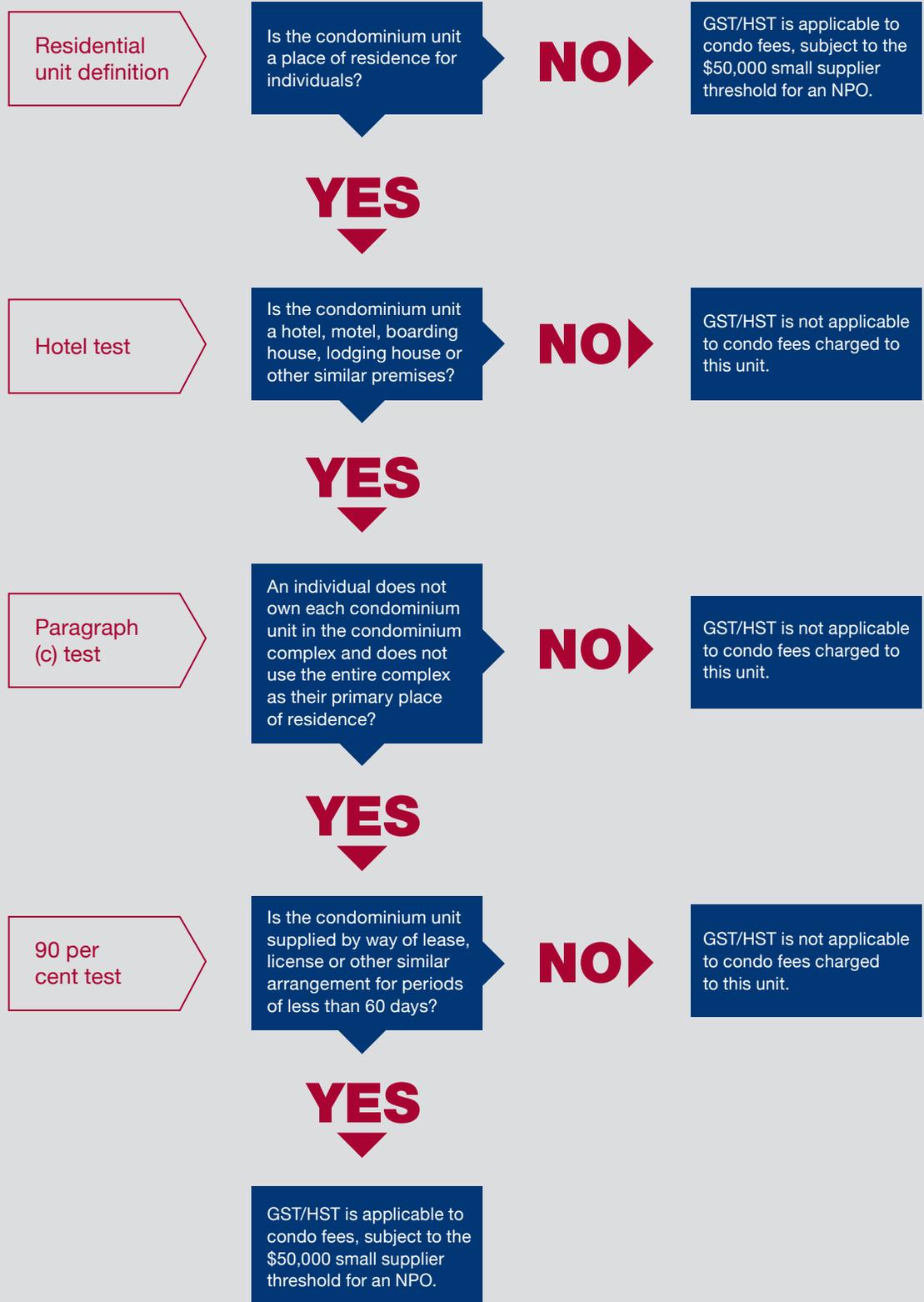
Specific application

The application of Section 13 is driven by the definition of a residential condominium unit, which in turn contemplates the definition of a residential complex. A condo unit will not meet the definition of a residential complex where:

1. the condo unit is a hotel, motel, inn, boarding house, lodging house or other similar premises;
2. the building where the condo unit is located is primarily used as the owner's or family's residence; and
3. all or substantially all (generally 90 per cent or more) of the supplies that are made by way of lease, licence or similar arrangement with respect to the condo unit are, or are expected to be, for periods of continuous possession or use of less than 60 days.

In order to assist with the determination of condition 1 (hotel test), and condition 3 (90 per cent test), the Canada Revenue Agency (CRA) has issued Policy Statements P-099 and P-053, respectively. See the decision tree below for further clarification on the process.

Decision tree for individual units:



Notwithstanding the decision tree, an alternative perspective of an agency relationship is possible. In *Condominium Plan No. 9422336 v. the Queen* (2004), the Tax Court of Canada noted that, where an agency relationship can be established between the owners of the condo units and the condominium corporation, condo fees charged by the corporation are not subject to GST/HST because they are merely the payment of expenses incurred by the corporation on behalf of the owners.

In order to assist with the determination and establishment of an agency relationship, the CRA has issued Policy Statement P-182R, which outlines the three essential characteristics of an agency relationship:

1. the consent of both the principal (condo owners) and the agent (condo corporation);
2. the authority of the agent to affect the legal position of the principal; and
3. the control of the agent by the principal.

Despite the Tax Court's view, the CRA does not agree with the ruling and will still assess where a commercial condo corporation does not collect tax on its fees.

Comments

The application of Section 13 is based on the facts and circumstances specific to each individual condo unit. If the use of the units in a condominium complex is homogeneous, the application can be relatively straightforward.

However, where many units in a complex are used in different capacities, such as short-term vacation rentals, long-term residential use or hotel rental pool involvement, the application of Section 13 requires an analysis of the specific circumstances of the condominium corporation and the respective condo units. In addition, GST/HST input tax credit claims by the condominium corporation in a mixed-use scenario generally must be pro-rated based on the taxable activities of the corporation.

Boards of directors of condominium corporations should be aware that, if there is any question whether the condo units in the complex are residential units, there is a risk the corporation should be charging GST/HST. Initially, a board may be able to assess the risk of the applicability of GST/HST based on the \$50,000 small supplier threshold for an NPO. But if the condo fees of units at risk of GST/HST applicability potentially exceed \$50,000, the board should consider obtaining professional advice.

There is much to consider in determining the applicability of GST/HST. Each case will be different based on its unique circumstances. Contact your Collins Barrow advisor for help in managing this potentially tricky situation.

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