Foreign Nationals Can Legally Avoid Ontario's Foreign Buyer Tax

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Overview

On April 20, 2017, the Ontario Government announced plans to impose a 15% tax on foreign nationals, in order to cool the real estate market in the Greater Toronto Area. The Non-Resident Speculation Tax ("NRST") was implemented on April 21, 2017.

As of April 21, 2017, the NRST now applies to all transfers of residential real estate located in the Greater Golden Horseshoe ("GGH") region by (a) individuals who are not citizens or permanent residents of Canada, (b) foreign corporations, and (c) taxable trustees. The term "foreign corporation" is defined as one of the following:

a. A corporation that is not incorporated in Canada.

b. A corporation, the shares of which are not listed on a stock exchange in Canada, that is incorporated in Canada and is controlled, directly or indirectly in any manner whatever, by one or more of the following:

    1. A foreign national;

    2. A corporation that is not incorporated in Canada; or

    3. A corporation that is collectively controlled by foreign nationals or corporations that are not incorporated in Canada.

The term "taxable trustee" is defined as the trustee of:

a. A trust with at least one trustee that is a foreign entity; or

b. A trust having a beneficiary who is a foreign entity.

The GGH includes the following geographic areas: (a) City of Barrie, (b) County of Brant, (c) City of Brantford, (d) County of Dufferin, (e) Regional Municipality of Durham, (f) City of Guelph, (g) Haldimand County, (h) Regional Municipality of Halton, (i) City of Hamilton, (j) City of Kawartha Lakes, (k) Regional Municipality of Niagara, (l) County of Northumberland, (m) City of Orillia, (n) Regional Municipality of Peel, (m) City of Peterborough, (n) County of Peterborough, (o) County of Simcoe, (p) City of Toronto, (q) Regional Municipality of Waterloo, (r) County of Wellington, and (s) Regional Municipality of York. The NRST clearly extends far beyond the geographical limits of the City of Toronto.

Sales of residential real estate in the Greater Toronto Area plummeted after the NRST came into effect. However, it is still unknown whether this drop in sales is the direct result of foreign buyers deciding to buy elsewhere or the indirect result of prospective home buyers who decided to take a step back because of the uncertainty caused by this measure.

Of course, uber-wealthy foreign nationals do not appear overly concerned, since sales of houses selling for more than $4 million continued to climb after the NRST was first implemented. However, the NRST can be an inconvenience for other foreign nationals who wish to purchase residential real estate in the GGH. Some of these foreign nationals may wish to acquire residential real estate for investment purposes but many others will be motivated by a work relocation or an enrollment at a post-secondary educational institutional in the GGH. Fortunately, there are still some exclusions, exemptions, and rebates available.

Seeking Canadian Permanent Residence

Since the NRST does not apply to Canadian permanent residents, some foreign nationals may believe that they can avoid paying it if they become Canadian permanent residents before they purchase/acquire their residential property. Although this strategy can theoretically work, it is not very practical.

These days, it is much more difficult to obtain Canadian permanent residence; many foreign nationals simply cannot qualify. Even if it is possible, unless the foreign national qualifies under Express Entry, it could take years for them to actually acquire Canadian permanent resident status. Also, since Canadian permanent residents are subject to a residency obligation, foreign nationals who obtain Canadian permanent residence but who do not actually reside in Canada could lose their status in as little as three years.

For the above reasons, seeking Canadian permanent residence for the sole purpose of avoiding the NRST is not a practical solution.

Limited Exemptions Available

Limited exemptions from the NRST are available in the following situations:

a. Provincial Nominees: A foreign national who is nominated under the Ontario Immigrant Nominee Program ("OINP") at the time of the purchase or acquisition, and the foreign national has applied or certifies that they will apply to become a permanent resident of Canada;

b. Protected Persons (Refugees): A foreign national on whom refugee protection is conferred (protected person) under the *Immigration and Refugee Protection Act* at the time of the purchase or acquisition; or

c. Spouses: A foreign national who jointly purchases residential property with a spouse, who is a Canadian citizen, permanent resident of Canada, provincial nominee, or protected person. The term "spouse" includes either of two persons who are married to each other, or who are not married to each other but who have cohabited: (1) continuously for a period of not less than three years; or (2) in a relationship of some permanence, if they are the natural or adoptive parents of a child. To qualify for the spousal exemption, the foreign national (and, if applicable, their spouse) must certify that they will occupy the property as their principal residence. The spousal exemption will not apply if the property is also purchased with another foreign national who is not a provincial nominee or protected person.

Clearly, the above exemptions are very limited and will only apply to a small number of foreign nationals.

Rebates Available

Fortunately, there are also rebates available, which should apply to a larger number of foreign nationals. Although they will still be required to pay the NRST at the time of their purchase/acquisition, eligible foreign nationals may seek a rebate of the tax at a later date. Rebates of the NRST may be available in the following situations:

a. A foreign national who becomes a permanent resident of Canada**:** A foreign national who becomes a permanent resident of Canada within four years following the date of the purchase/acquisition may apply for a rebate. This will be relevant to a foreign national who has not yet become a Canadian permanent resident but who expects to be one within four years (perhaps someone whose permanent residence application is pending).

b. An international student**:** A foreign national may apply for a rebate if they are a student who has been enrolled full-time for a continuous period of at least two years from the date of purchase or acquisition in an "approved institution" at a campus located in Ontario. Full-time means enrolled in at least 60% (if the individual does not have a disability) or 40% (if the individual has a disability) of what the approved institution considers a full course load for the academic year. This rebate is clearly relevant to international students who will be attending an approved post-secondary institution in Ontario for at least two years. However, it may also be relevant to the parents of such students. Instead of purchasing/acquiring the property themselves, they could arrange for their child to purchase the Ontario property. If the child later completes two years of full time post-secondary study in Ontario, he or she should be eligible to apply for a rebate at that time.

c. A foreign national working in Ontario: The foreign national has legally worked full-time under a valid work permit in Ontario for a continuous period of at least one year since the date of purchase or acquisition. Full-time means an employment position that requires no fewer than 30 hours of paid work per week over a 12 month period and no less than a total of 1,560 hours of paid work over that period. In other words, foreign nationals who relocate to Ontario for work may seek a rebate of the NRST after they have been legally employed in Ontario, on a full-time basis, for at least one year.

To qualify for a rebate, the foreign national must exclusively hold the property, or hold the property exclusively with his or her spouse. The property must also have been occupied as the foreign national's principal residence (and, if applicable, his or her spouse's principal residence) for the duration of the required period, which must begin within 60 days after the date of the purchase/acquisition.

Eligible foreign nationals must apply for the rebate within four years after the day on which the NRST becomes payable, except in the case of a foreign national who becomes a Canadian permanent resident. In such cases, the foreign national must apply within 90 days of becoming a Canadian permanent resident and not more than four years and 90 days from the date that the NRST became payable.

Conclusion

There is no doubt that the NRST (and other Ontario Government initiatives) has caused a significant drop in residential real estate sales. However, it may not have as significant an impact on many foreign nationals. Although those who wish to purchase residential real estate solely for investment purposes will be required to pay the NRST, many others could be eligible for an exemption from or a rebate on the tax.