



## RealTalk® about Real Estate

Issue 2019-1

### **Topic: Buyer's Liability to Pay for Non-Resident Seller's Taxes**

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A recent Court decision highlighted the risks to buyers who fail to make a reasonable inquiry into the seller's residency status and fail to withhold 25% of the purchase price of a residential property, despite the presence of red flags.

#### What Happened?

In *Kau v The Queen*, 2018 TCC 156, the buyer knew that the condo he was purchasing was not the seller's residence. The buyer also knew that the seller's address for service was in California, where the seller would be signing documents. Despite these red flags, the buyer relied on the seller's unsworn statement that the seller was "not a non-resident of Canada" nor "a non-resident of Canada at the time of closing". The buyer did not receive a Clearance Certificate from CRA and the buyer's lawyer did not withhold 25% of the purchase price as required by section 116 of the *Income Tax Act*.

The Court found that the buyer did not make a "reasonable inquiry" into the seller's residency status. As a result, it upheld the CRA's assessment to the buyer to pay 25% of the purchase price to CRA.

#### Why Should This Matter to You?

If you act for the buyer, your clients may be at risk to pay at least 25% (and possibly more) of the full purchase price if they fail to make a reasonable inquiry into the seller's residency status.

If you act for the seller, you will likely have a disgruntled client if you fail to advise them of their obligation to provide a Clearance Certificate or you fail to give enough time before closing to allow them to do so.

#### What Can You Do?

Watch for red flags indicating that the seller is not a resident of Canada. Specifically, be careful if the seller signs the closing documents outside Canada or if a seller signs a Power of Attorney outside Canada.

If you act for the seller, make sure that your clients are in Canada when signing the contract and they remain in Canada until the time of closing. We recommend that the seller request the Clearance Certificate from CRA at least 3 months prior to closing, or that you ensure there is enough equity for a 25% holdback from the full sale price. If you act for the buyer, be explicit in the offer that there will be a holdback of at least 25% of the full purchase price (to be held by the buyer's lawyer) which will not be released unless and until a Clearance Certificate is issued by CRA.

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