

Understanding the Impact of Commercial Rent Deferrals on Landlord GST/HST Remittance Obligations

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As the COVID-19 crisis continues, businesses have largely closed on a temporary basis to comply with public health orders across all provinces (though we are now seeing provinces begin to announce their plans to “reopen” the economy). All provinces still have some form of emergency order in place which restricts business operations to only those businesses deemed “essential” and all other “non-essential” businesses must be closed. Consequently, many commercial landlord and tenants are entering into rent deferral arrangements until such time as the relevant provincial emergency orders are lifted. Commercial landlords who are discussing such arrangements with their tenants should be mindful of the possible GST/HST consequences prior to entering into a formal agreement.

Commercial Rent Deferral and GST/HST Consequences

The *Excise Tax Act* (Canada) (the “**ETA**”) generally provides that GST/HST on commercial rent is payable by the tenant (and collectible by the landlord) on the earlier of the day the rent is due under the lease and the day it is paid.

Therefore, when rent is payable under a commercial lease, the landlord must remit the GST/HST amount when it files its GST/HST return. This landlord remittance obligation remains even if the actual rent amount (and any GST/HST amount) will not be paid until a later date. If a lease contains a rent acceleration clause upon default, the landlord would still have to remit the GST/HST on the accelerated rent amounts even if the rent has not yet been paid.

Under these ETA provisions, if a landlord enters into a rent deferral agreement with their tenants, the landlord may still have to remit these sales taxes payable on the original due date even if it is agreed that the tenant does not have to pay the rent amount until after the deferral period. This is a risk which can arise if a rent deferral agreement is not properly drafted.

How Landlords can Properly Defer GST/HST Remittance Obligations

Landlords who are in discussions with their tenants about rent deferral during this period should ensure that the rent deferral agreement specifies that the rent (and any GST/HST) payable is not due until a later date. If the rent due date is changed, tenants will also not be eligible to claim an input tax credit for the GST/HST payable on such rent until the new due date. Any changes to the rent due date can only apply to future due dates and not those rent due dates which have already passed.

Landlords should always carefully examine the effects of incorporating rent forbearance clauses or retaining the existing payment schedule in the lease, but also choosing not to exercise the landlord’s rights of default in any final rent deferral agreement with their tenants. These clauses may have unwanted effects which could detrimentally impact the validity or enforceability of all or parts of the lease and any amendments. Landlords are therefore recommended to consult with their legal advisors to examine any proposed terms of rent deferral.

In response to the COVID-19 crisis, the Canada Revenue Agency has allowed taxpayers to defer GST/HST remittances owing after March 27 and before June 2020 until June 30, 2020. This may offer some short-term relief for landlords during this period of restricted economic activity and cash-flow since interest will not apply to payments or remittances made by June 30, 2020. However, due to sometimes unforgiving direct liability provisions in the ETA, corporate directors should be wary of using collected GST/HST to finance operations of a corporation.

Ultimately, a properly drafted rent deferral agreement can best protect landlords from GST/HST remittance liability. A formal rent deferral agreement can also ensure that the landlord can preserve other important rights and remedies which arise from the original lease and any applicable amendments during this deferral period. Landlords and tenants may also benefit from considering the applicability of [commercial rent assistance programs](#) and how these programs may align with rent deferral details.

For more information about these issues, please contact our [commercial leasing](#) and [tax](#) practice groups.

The information and comments herein are for the general information and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, please contact any of our lawyers for further guidance.

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