

# FURTHER CHANGES TO ONTARIO'S LAND TRANSFER TAX REGIME: TRUST AND PARTNERSHIP TRANSPARENCY ON THE CHOPPING BLOCK

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When assessing land transfer tax (“**LTT**”) under the Land Transfer Tax Act (Ontario) [1] (the “**LTTA**”), the Province of Ontario (the “**Province**”) has long taken the position that partnerships and trusts are not to be characterized as “persons” for LTT purposes. Instead, such collective investment vehicles are generally “looked-through” when applying the LTTA.

In this regard, many collective investment vehicles have traditionally not borne LTTA reporting obligations with respect to their members or beneficiaries. In addition, special rules have historically simplified LTT compliance by relieving small, indirect transfers of real property held through a partnership from the imposition of LTT.

However, the Province has recently become concerned with what it sees as “increasingly complex partnership and trust structures...being used to acquire and hold land in Ontario.” In the eyes of the Province, this “complexity has created challenges to the effective administration and collection of the LTT in respect of unregistered dispositions of beneficial interests in land.” As a consequence, the Province has been looking to broaden the circumstances under which those with interests in collective investment vehicles will be subject to LTT in connection with the direct or indirect disposition of real property in Ontario.

## 2016 Amendments

In February, 2016, the Province amended the de minimis exemption from LTT offered to certain partnerships that hold land in Ontario. Regulation 70/91 provides an exemption from LTT where membership interests in a partnership change (resulting in acquisitions of the underlying land held by the partnership, since the partnership is “looked-through” for LTT purposes), but only where such a change is minimal. Specifically, the de minimis exemption applies where a person’s entitlement to share in the profits of a partnership, following a change in partnership interests, does not exceed, by more than 5%, the percentage of partnership profits to which the person would have been entitled at the beginning of the year. The February, 2016 amendments to Regulation 70/91 preclude the de minimis exemption from applying where the acquiring person (i.e., the member of the partnership in question) is another partnership or a trust.

In enacting the 2016 amendments, the Province expressed concern that the transparent nature of partnerships and trusts may relieve the application of LTT on large purchases of land made through such vehicles.

### **New Proposed Amendments**

On July 14, 2017, the Province introduced further proposed modifications to Ontario's LTT regime, which are aimed at (i) generating further information about those with interests in collective investment vehicles, and (ii) placing substantive collection (and potential payment) obligations on such vehicles themselves.

The Province proposes to create two new groups of vehicles for the purposes of the LTTA. Group 1 vehicles will include specified investment flow-through ("**SIFT**") trusts and SIFT partnerships,<sup>[2]</sup> trusts governed by a registered pension plan that are exempt from taxation under the ITA,<sup>[3]</sup> and "mutual fund trusts".<sup>[4]</sup> Group 2 vehicles will generally include vehicles that do not fall in Group 1 and that satisfy the following criteria:

1. The vehicle is a "unit trust", as defined in the ITA, or a partnership that has filed, or was required to file, a declaration under the Limited Partnerships Act (Ontario); and
2. The vehicle has issued its "investments" to 50 or more arm's length unitholders or partners, as applicable (or such other minimum threshold as the Ministry of Finance ultimately determines to be appropriate).

The proposed amendments will deem vehicles in Group 1 to be "persons" for the purposes of the LTTA, such that LTT will be levied directly on the vehicle in respect of any purchases of land or interests in land by the vehicle. (The proposed amendments will correspondingly provide that an acquisition of an interest in a Group 1 vehicle by a partner or unitholder will not subject the partner or unitholder to the imposition of LTT, as vehicles in Group 1 will cease to be "looked-through" vehicles for the purposes of the LTTA.)

With respect to vehicles in Group 2, each unitholder and partner of a Group 2 vehicle will be treated as a "person" for LTT calculation purposes. The Province proposes to deem Group 2 vehicles to be "LTT collectors", which will be required to collect and remit LTT, calculated at the unitholder or partner level, on acquisitions of beneficial interests in land through the vehicle. Group 2 vehicles will be entitled to collect LTT from unitholders and partners by deducting or withholding amounts from future distributions to such persons. A Group 2 vehicle that fails to collect LTT, as required by the new rules, will be subject to a penalty in an amount equal to at least the amount that it failed to collect.

The proposed amendments do not have the effect of eliminating the transparent nature of Group 2 vehicles for the purposes of the LTTA; they simply impose the onus of LTT collection on the vehicles. Reporting by Group 2 vehicles in respect of acquisitions of land will be required to be made to the Ministry of Finance on a quarterly basis (or such other period that the Ministry determines to be appropriate based on the results of the current public consultation).

Under the proposed amendments, acquisitions of land held through Group 1 or Group 2 vehicles that arise by virtue of a distribution or dividend reinvestment plan will not attract the application of LTT.

Finally, the Province has indicated that it will enact rules requiring the disclosure of information, at the time title is registered in respect of land, regarding persons, trusts, partnerships, and other vehicles for whose benefit such land is held. In this regard, nominees that hold land for the benefit of a partnership or trust will be required to disclose the legal names and business registration numbers of the principals on whose behalf legal title to the land is held.

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It is important to note that the proposals released on July 14, 2017, are not exhaustive and do not include every potential measure being considered by the Province. The Province is seeking public input on its proposed amendments by August 28, 2017. Following the end of the consultation period, the Province is expected to provide more details on the amendments that will ultimately be enacted into law.

#### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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[1] R.S.O. 1990, c.L.6, as amended.[ps2id id='1' target='/']

[2] As defined in section 122.1 of the Income Tax Act (Canada), R.S.C. 1985, c.1, as amended (the "ITA").[ps2id id='2' target='/']

[3] See paragraph 149(1)(o) of the ITA.[ps2id id='3' target='/']

[4] See subsection 132(6) of the ITA.[ps2id id='4' target='/']