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Most of you would have heard about and even received notices that you might be required to complete a new Underused Housing Tax return.  We are sending this communication to you as a reminder to the rules and the upcoming deadline of October 31, 2023 as well as the penalties involved for failure to file and/or late filing.

As a result of changes made in the Federal 2021 Budget, Canada now has an Underused Housing Tax. For 2022 and future years, certain individuals and entities will need to file an Underused Housing Tax return. The deadline to file the 2022 return is October 31st, 2023, although in future years, the UHT returns will be due by April 30th of the year following (i.e. return for 2023 will be due April 30th, 2024).

The purpose of the return is to have certain owners, referred to as "affected owners" of certain residential properties pay a 1% tax, based on the greater of the assessed value and the most recent sale price of the property or a fair market value appraisal as an option. This tax is aimed at foreign owners of residences that are vacant or not being used sufficiently. "Excluded owners" are not required to file a UHT return. The government hopes that this tax will increase the supply of properties to individuals to help lower the price of housing and residential rent.

While designed to impact foreign owners, there are a number of Canadians who may need to file a return even if no tax is owed. ***Failing to file a return in a timely fashion may result in a penalty owed to CRA being $5,000 for individual owners and $10,000 for non-individual owners at a minimum, up to 5% of the UHT payable plus 3% of the UHT payable multiplied by the number of months that the return is past due.*** It will be very expensive to miss filing deadlines even if no tax is owed!

Excluded owners include individuals who are Canadian citizens or permanent residents of Canada, unless the individual is an owner of the residential property as:

- A trustee of a trust other than an executor of a deceased individual's estate

- A partner in a partnership

Note that this is not an exhaustive list of excluded owners as additional entities are also exempt from filing, including Canadian public companies, mutual fund trusts, real estate investment trusts, charities, cooperative housing corporations, and government bodies, among others.

If you own residential property and you are not an excluded owner, you are an affected owner and will need to file a UHT return. This generally includes private corporations, partners of partnerships, trustees of trusts, and non-Canadian citizens and residents.

Residential property is defined to include:

- Detached house
- Duplex
- Triplex
- Semi-detached house
- Townhouse or rowhouse unit

- Residential condominium unit

***Note that buildings with greater than three units are not considered residential property for the purposes of the UHT.***

It should be fairly clear who needs to file and who is exempt from filing, with a couple of significant exceptions. First, let's consider those individuals who own an interest in one or more properties jointly with others. Those in a co-ownership arrangement who otherwise meet the criteria of an excluded owner are exempt from filing a return. However, those who are partners of a partnership are required to file even if the individual partners meet the definition of excluded owners. As a result, we need to consider the difference between a co-ownership arrangement and a partnership.

Most situations such as this will likely be considered a co-ownership. However, a partnership may exist if persons have a relationship to carry on a business in common with a view to a profit. CRA tells us that joint tenancy, tenancy in common, joint property and part ownership does not by itself create a partnership. And case law tells us that to be considered to be carrying on a business, a certain degree of effort is required of the partners to be expended by them in the management of the partnership. Simply owning a property jointly with others likely would allow Canadian citizens and permanent residents to not have to file a return.

The second exception relates to trustees of trusts. Trustees of formal trusts will be clear that they are trustees. But there is a fairly common situation where individuals may be considered to be trustees and not realize it. This situation arises if an individual is a bare trustee of a bare trust. A bare trust exists where a trustee holds legal/titled ownership and is not required to perform any active duty to carry out the trust. The beneficiaries of a bare trust hold beneficial ownership of the property, meaning they are entitled to the use and proceeds from the property. A bare trust may exist where an individual or other entity has been named as a legal owner or added on title, but does not have economic rights to the property.

We see this scenario frequently in estate planning where an elder parent may add a child on title so that the property will pass without probate applying. The adult child holds legal title in trust for their parent unless the parent specifically intended to make a gift of some portion of the property at the time the child's name was added on title. As such, the adult child will be considered to be a trustee and will need to file a UHT return. We also see this situation arise in families where a parent or other family member may be added on title in order for other family members to qualify for financing as another example.

For those Canadian corporations, partners, and trustees who are required to file a return, there are a number of common exemptions that apply that would allow no tax to be owed. Common exemptions include:

- The property being used by you, your spouse, or your common-law partner as your primary place of residence, as well as your child or child of your spouse/common-law partner as their primary place of residence while pursuing authorized study at a designated learning institution.

- The property is used by an individual who deals at arm's length with continuous occupancy as evidenced in writing.
- The property is used by an individual who does not deal at arm's length with you but pays at least fair market value rent.
- The property is owned by partners, all of whom meet the test as exempt owners, or by trustees of a trust whose beneficiaries all meet that same test.
- The property is not suitable for year-round use.
- The property is only seasonally accessible because public access is not maintained.

There are additional exemptions for properties recently under construction, have been recently purchased, or have been made uninhabitable due to disaster or hazardous conditions. There is also an exemption for properties located outside census areas of less than 30,000 people.

For those who need to file a return, CRA has made available a fillable version of form UHT-2900 Underused Housing Tax Return and Election Form here - UHT-2900 Underused Housing Tax Return and Election Form - Canada.ca. In addition, CRA has published questions and answers about the return here - Questions and Answers on the Underused Housing Tax - Canada.ca. Finally, see here for further CRA information and an interactive tool to help you decide if you are required to file a return - Underused Housing Tax (UHT) - Canada.ca

If you require our further assistance, please feel free to contact us as soon as possible.