

# CGF POINT OF LAW

## SPECIAL BULLETIN



### BARBADOS REVENUE AUTHORITY (AMENDMENT) ACT, 2017-10

*"The effect of the 2017 Amendment is that, in the absence of the new tax clearance certificate, conveyances, transfers, assents, disclaimers, mortgages, charges, debentures, releases and leases cannot be recorded at the Land Registry."*

This Special Bulletin of the CGF Newsletter focuses on the effects of the **Barbados Revenue Authority (Amendment) Act, 2017-10** (the 2017 Amendment) on land transactions in Barbados.

The 2017 Amendment came into force on 16 March 2017 and amends the **Barbados Revenue Authority Act, 2014-1** (the 2014 Act).

The following is a brief synopsis of the effects of the 2017 Amendment that are relevant to existing and potential property owners and secured creditors.

- The 2017 Amendment provides for a "tax clearance certificate" that spans a number of "taxing Acts", namely,
  - Excise Tax Act, 2015-32;
  - Income Tax Act, Cap. 73;
  - Land Tax Act, Cap. 78A; and
  - Value Added Tax Act, Cap. 87
- The new tax clearance certificate now covers all taxes due from the taxpayer in relation to all of his tax obligations under the taxing Acts, even if they are not directly related to the land being dealt with.
- Previously, one needed only a land tax certificate to transfer land or create a recordable lease. The other taxing Acts did not come into play as legal impediments to recording documents. With the 2017 Amendment, it is now necessary to obtain the new form of tax clearance certificate in order to record a mortgage, charge, debenture, lease or release of property.

- The new tax clearance certificate to be issued by the Barbados Revenue Authority must be dated and state the period for which it is valid (notwithstanding that the tax periods for VAT, land tax, income tax and excise tax are not coincident) and certify that
  - i) no taxes are due;
  - ii) all taxes, interest and penalties accrued under the taxing Acts have been paid; or
  - iii) a percentage of the taxes, interest and penalties which have accrued under the taxing Acts has been paid.
- The new tax certificate is required in order to facilitate any “Conveyance” (as defined in the Property Act, Cap. 236).
- The Property Act defines a conveyance as any instrument, other than a will, consisting of or comprising a transfer, mortgage, or other charge, lease, assent, vesting declaration, disclaimer, release or other assurance of property or of an interest therein.
- Almost every document that creates or divests an interest in property and that has to be recorded at the Land Registry falls within the definition of a conveyance. This includes transfers, assents, disclaimers, mortgages, charges, debentures, releases and certain leases.
- The 2017 Amendment changes the Land Tax Act so that no **conveyance** of land or **lease** for more than 3 years may be stamped under the Stamp Duty Act, Cap. 91, unless a valid tax clearance certificate is produced to the Registrar of Titles. Consequently, such documents cannot be recorded at the Land Registry without the new tax clearance certificate.
- Previously, the Property Transfer Tax Act (“the PTT Act”) has been interpreted such that a vendor of specific property being conveyed required either:
  - i) a VAT clearance certificate, or
  - ii) a declaration in the conveyance confirming that no VAT input tax had been allowed in relation to the property being transferred (or that security for repayment was given).
- The declaration at (ii) above will no longer be sufficient where no VAT input tax was allowed; a certificate will now be needed in all cases.
- The 2017 Amendment changes the PTT Act so as to require the vendor to have a tax clearance certificate relating to all of his VAT input tax obligations (not just in relation to the specific property being transferred); there is no longer a provision for giving security for repayment of VAT input tax.
- Outstanding VAT input tax remains a first charge on the land on which the building in respect of which the input tax is due and payable is erected and which is the subject of the transfer. Outstanding land tax also remains a first charge on the land to which it relates.
- The effect of the 2017 Amendment is that, in the absence of a tax clearance certificate, conveyances, transfers, assents, disclaimers, mortgages, charges, debentures, releases and leases cannot be recorded at the Land Registry.
- Liquor licence renewals under the Excise Tax Act 2015 now also require the new tax clearance certificate. This may affect the ability of a borrower to operate the business from which a loan is being repaid.
- In order to obtain a tax clearance certificate to facilitate a conveyance of property (as broadly defined above) the property owner must have:
  - i) paid all land taxes, interest and penalties under the Land Tax Act;
  - ii) repaid all VAT input tax under the VAT Act, and
  - iii) paid at least 10% of taxes, interest and penalties due under the Income Tax Act and the Excise Tax Act and made an agreement with the BRA to make scheduled payments to liquidate

the remaining sums due.

### THE STATUS QUO ANTE

Up to the date of this publication, the new tax certificate has not been issued by the Barbados Revenue Authority nor demanded by the Registrar of Titles, and title documents continue to be recorded in the same manner as prior to the 2017 Amendment.

The Barbados Revenue Authority continues to issue, as before, a selection of certificates under various pieces of legislation:

- Land Tax Certificates under the Land Tax Act
- Tax Clearance Certificates referring only to the Income Tax Act and the Value Added Tax Act
- Certificates of Compliance for the purposes of Section 13(b)(iii) of the Property Transfer Tax (i.e. re VAT input tax allowances)
- Clearance Certificates for estates under the Succession Act Cap 249

### HOW DOES THE 2017 AMENDMENT AFFECT LAND TRANSACTIONS GOING FORWARD?

The Land Registry may decline to record documents relating to pending property transactions unless the new form of tax clearance certificate is produced to the Registrar of Titles.

Many kinds of interests in land will be affected in different circumstances.

#### Mortgages

The 2017 Amendment is important to Lenders who must be concerned to know that in the event of having to enforce their security, they may not be able to exercise the mortgagee's usual power of sale where the property owner cannot obtain a tax clearance certificate to facilitate the conveyance.

In practical terms, a borrower who is not repaying his/its loan may well have outstanding land tax and income tax, or even excise tax if the borrower is a licensee under the Excise Tax Act.

If the Lender appoints a receiver of the mortgaged property, but not of the assets of the borrowing company

generally, the Lender may have difficulty in selling the property due to other matters that a traditional mortgagee would not have been concerned with. The 2017 Amendment effectively creates an encumbrance (in respect of the taxing Acts) taking priority to the mortgage in right of which the sale is being made.

Lenders may therefore insist upon having the requisite tax clearance certificates for both the vendor in a purchase/mortgage transaction, and the borrower in other cases, as a hedge against future non-performance of the loan.

It may be that future facility letters/ credit agreements will make it a condition precedent for disbursement of the loan that borrowers produce evidence of their compliance with the taxing Acts, and continue to do so periodically after disbursement, in the same manner as they must now provide evidence of payment of land taxes, water rates and insurances.

Existing mortgagees may also start asking for the new tax clearance certificate from their existing mortgagors, to guard against a delay in exercising the power of sale at some future date. Lenders may invoke the positive covenants to conduct business in a proper and efficient manner; not to do anything to jeopardise or prejudice the value to the lender of the security; not to permit to subsist or arise any encumbrance or any right or option on the charged property which confers a priority of payment.

Further, most mortgages contain a representation (the breach of which constitutes an event of default) that there subsists no breach of any law or regulation which materially and adversely affects or would affect the value of the property as security to the lender.

The mortgage forms may also be amended to (i) include a positive covenant that the borrower will comply with the taxing Acts and (ii) make the failure to comply with the taxing Acts an event of default.

In cases where funds are being borrowed to

outstanding land taxes, the logistics of completing the transaction will be complicated by the property owner's inability to prove that all other taxes are paid up (or appropriate arrangements made), save for the easily determined land taxes.

### **Transfers and Leases**

Vendors and landlords will have to produce tax clearance certificates in order to complete the sale or lease of land.

Again, the logistics of completing the transaction may be complicated by the property owner's inability to prove, ahead of completion, that all other taxes are paid up (or appropriate arrangements made), save for easily determined land taxes.

If there is a dispute between the property owner and the Barbados Revenue Authority as to the incidence of tax non-compliance or the amount due, there is no clear way forward for the property owner barring payment of the tax assessed and the hope of a future refund should the dispute be resolved in his favour.

### **Estates**

The definition of conveyance includes assents and vesting declarations. Normally, the assets of an estate can be sold without tax clearance, in order to get in the assets for settlement of debts (perhaps including outstanding taxes) and distribution to beneficiaries after the clearance under the Succession Act is issued.

The 2017 Amendment now makes this impossible in relation to land, as the personal representative will have to obtain a new tax clearance certificate in order to sell the property either for purposes of administration or to vest it in the beneficiaries.

### **Matrimonial Settlements**

The Family Law Act, Cap. 319, permits the High Court to alter spouses' interests in matrimonial property and to order that one spouse transfer his/her interest in the property to the other spouse.

Quite often, the receiving spouse has to pay the transferring spouse a sum of money in exchange for the

property interest being transferred, and may have to borrow that money through a mortgage loan. The transaction therefore involves both a conveyance and a mortgage.

In some cases, it is even necessary to order the Registrar of the Supreme Court to stand in the shoes of a transferor who is un-cooperative or cannot be found. Uncooperative or missing spouses may have outstanding tax obligations beyond land tax on the property being transferred.

The ability to comply with a matrimonial order may now be affected by the 2017 Amendment, as the transferring spouse and/or the receiving spouse may have outstanding obligations under the taxing Acts. The effect on the parties' ability to order their affairs in the best interests of the family may therefore be adversely affected.

### **Non-Nationals and Non-Residents**

There is no indication as to what form of certificate the Barbados Revenue Authority will issue for property owners who are non-national and/or non-resident, and who are not registered with the Authority except for purposes of land taxes on their Barbados property.

### **CONCLUSION**

Although in practice the 2017 Amendment has apparently not yet been implemented up to the date of this publication, it is a fact that the law is in force and compliance may be required at any time.

Anyone who intends to become involved in a land transaction should take early steps to ensure that, if called upon to do so, he can produce such tax clearance certificate as the Barbados Revenue Authority is able to issue, even if it is not in the specific form prescribed by the 2017 Amendment.

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**CGF POINT OF LAW** published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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