

Getting GST right for property transactions

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Overview

- GST risk
 - GST basics
 - Tax invoices
 - Going concern
 - Margin scheme
- GST withholding
- Drafting GST clauses
- Higher risk scenarios

GST risk

- Lawyers – document agreements, resolve disputes
- Various supplies under any one arrangement:
 - intangible – rights
 - tangible – goods, services
 - supplies in both directions – barter supplies etc
- GST operates independent of any contract or legal document
- Inherent tension – GST borne by supplier, but often passed on to the recipient

GST risk

- Risk to both parties – identifying:
 - correct suppliers, recipients & their GST status – registered or required to be registered
 - all possible supplies (by supplier and recipient)
 - the appropriate GST treatment for each supply/type of supply

GST risk

- Recipient's risk - whether supplier:
 - continues to be registered for GST
 - will remit money to ATO to enable ITCs to be claimed
 - will issue valid tax invoice to claim ITC
- Documenting appropriate clauses – protect client's interests if different circumstances arise

GST basics – GST status of Supplier

- GST treatment – dependent on:
 - status of supplier
 - type of supply made
- Required to be registered:
 - carrying on an enterprise (an activity, or series of activities; MT 2006/1)
- Registered – ABN register
- Supplies for consideration
 - monetary v non-monetary consideration
 - ‘barter transactions’

GST basics – GST turnover

- GST turnover meets the registration turnover threshold
 - \$75,000 turnover – most entities
 - \$150,000 turnover – not for profits
 - current and projected turnover
 - turnover – excludes proceeds of capital assets, including on cessation of enterprise

GST basics – types of supplies

Supply	Example	GST Payable	Input tax credit
Taxable supply (default position)	<ul style="list-style-type: none">• New residential premises• Commercial leasing• Sale of commercial premises	Yes	Yes
Input taxed supply	<ul style="list-style-type: none">• Existing residential premises• Residential leasing	No	No
GST-free supply	<ul style="list-style-type: none">• Supply of going concerns• Farmland	No	Yes

GST basics – mixed supplies

- Mixed supplies – more than one type of supply under an arrangement
 - development stock for sale v development stock for rent
 - Sale of farm – GST-free going concern, GST-free water rights, GST-free farmland, input taxed residence

GST basics – mixed supplies

- Composite supplies – dominant supply and ancillary supplies
- Apportionment (GSTR 2001/8)
 - arms' length basis
 - can use any fair and reasonable methodology
 - commonly used methodologies for property transactions:
 - area basis
 - rental income

Tax invoices and input tax credits

- GST – intended to be borne by end consumer
- Mechanism –input tax credits can be claimed on creditable acquisitions
 - tax period in which any consideration is provided for the acquisition or
 - if before consideration is paid, the period in which a tax invoice is issued

Tax invoices and input tax credits

- Tax invoices (section 29-70, GSTR 2013/1):
 - name, address and ABN of supplier
 - name, address and ABN of recipient (if supply value > \$1,000)
 - labelled 'tax invoice'
 - sufficient details to identify supplies, including taxable supplies, and value of each
 - date on which document was issued
 - must be provided within 28 days of request by the recipient
- Some flexibility to overlook oversights – sections 29-70(1A) and (1B)

GST-free supplies of going concerns

- Requirements (s 38-325):
 - supply for consideration
 - recipient registered or required to be registered
 - agreed in writing that the supply is of a going concern
 - ‘supply of a going concern’: a supply under an arrangement under which:
 - the supplier supplies to the recipient all things necessary for the continued operation of an enterprise; and
 - the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as a part of a larger enterprise carried on by the supplier).

GST-free supplies of going concerns

- Agreed in writing – GSTR 2002/5 paragraph 181
- Identified enterprises being carried on
 - business enterprise v ancillary leasing enterprise
 - all things necessary for supply of each enterprise (eg supply business enterprise, then leasing enterprise)
- Ensuring same enterprise continues and does not cease
 - eg *Aurora Developments Pty Ltd v Commissioner of Taxation* [2011] FCA 232

GST-free supplies of going concerns

- Enterprises of leasing
- Division 135 increasing adjustment
 - Recipient has a cost if GST-free acquisition used to make input taxed supply
 - e.g. lease residential premises – retirement villages
- Further guidance: GST public ruling GSTR 2002/5

Margin scheme

- Benefits of margin scheme and when to use
 - GST on margin but no ITC - timing difference
 - usually residential land (ie where recipient not intending to claim input tax credit)
- Eligibility (s 75-5)
 - Sale of a freehold interest, stratum unit or grant or sale of a long-term lease
 - Agreement in writing
 - Entire interest not acquired through a supply that was ineligible for the margin scheme

Margin scheme

- ‘ineligible for the margin scheme’ – s 75-5(3)
- Taxable supply without margin scheme
- Look back to previous acquisition for certain supplies – inheritance, GST group, GST joint venture, GST-free going concern or farmland, from associate
 - Whether previous entity’s acquisition was through a supply ineligible for the margin scheme

Margin scheme

- Calculation – s 75-10 and s 75-11
- Difference between the ‘cost base’ and the selling price
- Cost base – consideration or valuation
- Special rules: inheritance, GST group, GST joint venture, GST-free going concern or farmland, from associate
 - cost base can be: consideration paid by the previous owner, valuation at 1 July 2000, or GST inclusive market value of earlier supply, not amount paid by the current supplier.
- Other specific rules in s 75-12 to s 75-16

Margin scheme

- Evidence of agreements to apply the margin scheme
- Extension of time to agree (PS LA 2005/15)
- Valuation issues
- Cost base apportionment issues
- Further information: 'GST and the margin scheme' and 'Eligibility to use the margin scheme' search for www.ato.gov.au/marginscheme or search for QC 18646 on ato.gov.au; GSTR 2006/7 and GSTR 2006/8

GST withholding

- Purchasers will have a GST withholding obligation if:
 - They are the recipient of a taxable supply
 - The supply is by way of sale or long-term lease
 - The supply is of:
 - New residential premises (subject to exclusions)
 - Potential residential land where particular requirements met
- Supplier required to notify purchaser
- Purchaser required to lodge forms with ATO and make payment to ATO

GST withholding – common questions

- Is the sale a taxable supply?
 - E.g. registered or required to be registered for GST, enterprise, no GST-free concession
- Who is the supplier?
 - GST group; partnership; trust; mortgagee in possession
- Do settlement day adjustments affect the calculation of the withholding amount?
 - Contract price; normal adjustments
- When can a purchaser rely on notice provided by supplier?

GST withholding

- Further information:
 - ato.gov.au/gstatsettlement or search ato.gov.au for 'GST at settlement' or QC 55431
 - Public ruling: LCR 2018/4

GST – drafting appropriate clauses

- **GST inclusive** clauses – unregistered recipients/private acquisitions
- **GST exclusive** clauses – registered recipients
- Careful drafting required – *South Steyne*
- Warranties – usually inserted to ensure respective parties meet specific requirements of any GST exemptions or concessions,

GST – drafting appropriate clauses

- Example: Going Concern warranties:
 - Recipient warrants it is registered or required to be registered
 - Supplier warrants it will:
 - Supply all things necessary for continued operation of enterprise; and
 - Carry on enterprise until day of supply

GST – drafting appropriate clauses

- Cascading clauses
 - Not registered for GST
 - If required to be registered, then parties acknowledge and agree GST going concern (to extent things supplied are used and continued to be used in an enterprise)
 - Notwithstanding going concern, parties acknowledge GST-free supplies – farmland, water etc
 - If for any reason a supply is a taxable supply then parties agree margin scheme will apply to supplies of eligible land

Cascading clauses

- To the extent any part of the land is used for residential accommodation then supply will be **input taxed**
- If **taxable supply** then:
 - Recipient to pay an amount equal to the GST amount in the same manner as the consideration
 - Timing of payment of GST amount – only when Supplier issues a valid tax invoice
- **General warranty** – if supplier issues a tax invoice for a taxable supply, then the Supplier warrants it will remit the GST amount to the ATO

GST – higher risk scenarios

- Transactions involving:
 - Complex circumstances – multiple suppliers, multiple types of supplies
 - Non-cash consideration, barter transactions
 - Property developers
 - Intended or possible change of use
 - Consideration being paid in stages

GST – higher risk scenarios

- Claiming of exemptions/concessions – going concern, margin scheme
- Transactions differing to standard circumstances:
 - Sale of lot intended for commercial use within a residential subdivision
 - Sale of new residential premises to non-family buyers
- Arrangements with timing differences –staggered consideration



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