

GST withholding and property transactions

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Worthwhile read for: Property owners

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We recently published an article announcing the [exposure draft legislation in relation to withholding GST from property transactions](#). In order to provide a more substantial and in-depth look at the draft legislation, we outlined a number of issues evident in the draft legislation in its current form.

- The law is proposed to apply to "...a supply of..." new residential premises or potential residential land. For GST purposes, the term "supply" includes the leasing or licensing of property. Accordingly, the proposed rules may have a far broader application than first thought, and may not be limited to simply the *sale* of residential property.
- Where a third party (such as a bank) is the entity making the payment at settlement, it can be the case that while the recipient (i.e. the purchaser) is liable to withhold GST, the payment of the purchase monies may not be made by that entity. Where the third party does not withhold GST, the purchaser may not have the ability to pay the amount of GST to the Australian Taxation Office (ATO) due to insufficient cash flow.
- The amount of GST to be withheld is 1/11th of the price for the supply, which is usually the adjusted purchase price calculated at the date of settlement. However, as vendors are required to notify recipients of the requirement to withhold GST at least 14 days prior to settlement, vendors will not usually know what the final adjusted settlement price is for the property at that point in time.
- A vendor will be required to notify a purchaser of the requirement to withhold GST, where the supplier makes a taxable supply of *residential premises or potential residential land*. This is a far broader requirement than limiting the notification to supplies of "new" residential premises or potential residential land. In other words, the notification requirement may apply to a wide variety of supplies of residential premises, not only those that are "new" for GST purposes. A broad change such as this will have wide ramifications in terms of conveyancing practice.
- The law is unclear as to what the result would be if the notification requirement has not been satisfied by the vendor, and whether this somehow taints the supply, (for GST purposes) to the purchasers. Although it is difficult to see how this would be the case, the position is unclear. The law is also unclear in relation to what other ramifications, if any, ensue (other than the fact that the vendor will be liable for a penalty where it fails to properly notify).
- In order for a vendor to obtain a credit for GST withheld by the purchaser, the purchaser must have actually paid that amount to the ATO. Hence, there will be practical implications for vendors to ensure that such payments are in fact made. This may manifest itself in the vendor requiring a cheque at settlement to be made payable to the ATO. In addition, there is currently no commentary contained in the Explanatory Memorandum indicating how the ATO will match the payment obligation of the purchaser, where the payment is actually made by the purchaser and the credit to then be provided to the vendor. Presumably, a system similar to that introduced with the 12.5% non-resident CGT withholding will apply, where the ATO will provide the purchaser with a payment slip that is to be used when payment of the GST is in fact made.
- In terms of obtaining a partial refund for GST paid (e.g. where the vendor's GST liability under the margin scheme is less than the amount of GST paid by the purchaser at settlement), the draft legislation provides that the Commissioner needs to be satisfied that it would be "fair and reasonable" to refund the excess GST to the supplier. There are a number of criteria that the Commissioner must have regard to. The fear is that such criteria may easily be used by the ATO to delay refunds being provided to vendors. It is noted that the law already provides the

Commissioner with the ability to investigate a refund before it is in fact paid to a taxpayer, should he choose to do so.

- In relation to refunds, the draft legislation provides that a supplier must make a refund application no later than 14 days before the day on which GST is payable on the supply. However, the Explanatory Memorandum states that the application must be lodged at least 14 days before the end of the tax period to which the taxable supply is attributed. These two statements are contradictory and require clarification.
- In relation to seeking a refund from the Commissioner, the proposed wording of the legislation is confusing, as it refers to the person applying for a refund as the “recipient” when in fact that term is usually used in the GST context to connote the purchaser. In fact, it will be the vendor or “supplier” of the taxable supply that will be seeking the refund from the Commissioner.
- In terms of transitional provisions for existing property development arrangements, the exposure draft legislation provides for a statutory override of contractual terms, in that the law will provide for one party to discharge its obligation to pay another party, if the GST is withheld and paid to the Commissioner. There is a question as to whether the legislation can in fact contractually override the bargain struck between the parties in relation to their property development arrangement.

We will continue to keep you updated as further developments take place.

For more information or discussion, please contact our [Taxation](#) team.

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