

Purchasers of new residential premises to pay GST to ATO

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The Federal Government recently introduced into Parliament legislation amending the way in which GST is collected and paid on off the plan contracts and contracts for the sale of newly constructed residential premises. The rules also apply to the sale of land that will be used for the construction of residential premises.

Importantly at settlement the purchaser will now be required to ensure that GST is paid to the ATO.

The changes in the law (once passed) will invariably require developers to review and amend their contracts in order to provide for the changes. The changes have been introduced as a result of the Government becoming aware that a number of property developers were deregistering for GST shortly after the sales of their completed projects without the GST on those sales being paid to the ATO. To combat this, the amendments shift the onus onto the purchaser, not the developer, to ensure that GST is paid on the sale of the newly constructed residential premises. The more important details of the changes are as follows:

1. the changes will apply to any contract entered into before 1 July 2018 where settlement occurs after 1 July 2020 (even if settlement was originally set for a date earlier than this). They will also apply to contracts that are signed after 1 July 2018;
2. the requirement for the purchaser to pay the GST at settlement arises in relation to any "sale" or "*long term lease*" of new residential premises. Importantly, residences that become "new" residential premises (for GST purposes) due to them having been substantially renovated, are specifically exempt from the new rules. The new rules will also not apply to the sale of commercial residential premises (eg hotels etc). It appears that the new rules will not apply to options to purchase new residential premises;
3. the new rules will also apply to potential residential premises. This term broadly refers to land whose permissible use is for residential purposes, but that does not contain any buildings that are residential premises (eg "flat" land);
4. the requirement imposed on the purchaser to withhold the GST occurs when any portion of the purchase price for the contract is paid (other than the deposit). This will have particular significance to instalment contracts;
5. the withholding of the GST must be paid to the ATO on or before the day of the supply, which is settlement for GST purposes. The explanatory memorandum states that if the purchaser prepares a bank cheque for the amount of GST payable to the ATO, and that bank cheque is tendered at settlement to the vendor, then despite the fact that the vendor may not in fact pay it to the ATO, the purchaser's onus is nonetheless discharged. This is a very common mechanism that occurs in settlements and undoubtedly purchasers will wish to ensure this occurs in order to discharge their liability under the new rules;
6. the amount to be withheld and paid to the ATO depends on whether or not the margin scheme is being used in relation to the sale, in terms of calculating the GST payable. If the margin scheme is not being used, then GST equal to 1/11th of the purchase price will be required to be paid. If the margin scheme is used, then 7% of the purchase price is to be remitted. Note that the commissioner can increase that amount to a maximum of 9%. The percentage is applied to the unadjusted purchase price (in order to keep things simple);
7. where a vendor has a GST liability on sale of less than 7% of the purchase price (calculating its GST liability under the margin scheme) and 7% of the purchase price is paid by the purchaser at

- settlement, the vendor can request that a refund of the difference be paid to it by the ATO;
8. it is unclear how the new GST payment mechanism will affect payouts to mortgagees;
 9. from 1 July 2018, vendors selling residential premises or potential residential land must provide a notice to the purchaser containing certain matters such as whether the purchaser has a requirement to withhold GST at settlement and pay it to the ATO. The requirement to provide the notice is not limited to contracts for the sale of new residential premises, but will apply to all contracts for sale/long term lease concerning residential premises and potential residential premises. It is therefore envisaged that from 1 July 2018 such a notice might form a standard part of the terms of contract between vendor and purchaser (including, presumably, the standard REIQ contract); and
 10. in relation to existing property development arrangements, including joint ventures, where upon sale of the completed lots of land, parties are to receive a pre-specified allocation of the sale price (eg to account for their profit in relation to the development etc), the new requirement for the purchaser to pay GST directly to the ATO (instead of the vendor) will affect such pre-existing arrangements. As a result, the changes in the law deal with this by providing that where a purchaser makes a payment to the ATO in satisfaction of its obligation under the new law, that payment is deemed to be a payment made in accordance with the agreement between the parties. In other words, a party should not be in breach of contract by making the GST payment to the ATO instead of the payment being made to another party, as required under the joint venture arrangement.

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