

# GST & RESIDENTIAL PROPERTY: PURCHASERS TO PAY GST TO ATO

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The Government announced in its 2017-18 Budget that, from 1 July 2018, purchasers of new residential premises (new homes / apartments) and subdivided residential lots will need to pay any applicable GST on the sale directly to the ATO. This differs from the current GST rules under which the vendor is liable for GST and passes on this cost to the purchaser as a part of the purchase price.

By way of background, the measure is aimed at addressing ATO concerns regarding "phoenix operators" who do not remit GST on their residential sales. The concern is that these operators generally establish a new special purpose company (**SPC**) to undertake each separate residential development project. The SPC claims full input tax credits for GST incurred on land, construction and development costs. As no sales occur during the development phase of the project, these credit claims trigger cash refunds from the ATO. However, when the project is completed and the new residential premises or residential lots are sold, the SPC does not remit the GST on the sales to the ATO.

While the ATO can initiate recovery action against the SPC and other parties (including potentially the directors), the prospect of the ATO recovering the GST in full is reduced once all the sale proceeds and other assets have been distributed out of the SPC. Further, such recovery action is costly and time consuming.

The new measure seeks to address these concerns by requiring purchasers to pay the GST component of the purchase price directly to the ATO on settlement.

The announcement of the measure was unexpected and does give rise to a number of issues.

The most pressing of these will be to seek Treasury guidance on any proposed transitional arrangements. For example, if a developer is entering a contract for an off-the-plan apartment today, for a sale that will complete after 1 July 2018, what does the contract need to say about GST?

There is presently no detail on the form of the amendments. The statement on the new measure is extracted from the Budget Papers and included further below.

## ISSUES REQUIRING CONSIDERATION NOW

The following issues will each need to be considered:

- **Clear Transitional Rules** - as explained above, this will be crucial for contracts / options entered between now and 1 July 2018.

- **Who will be liable for the GST?** It is clear that the GST will be paid by the Purchaser to the ATO. The question though is whether the Purchaser will make the payment on behalf of the Vendor, or whether the Purchaser will be the party liable for the tax.
- **What happens if the Purchaser fails to pay the GST?** This is related to the question immediately above. Is the Vendor still liable if the Purchaser fails to pay, or is the Purchaser liable for the tax? This will be relevant to any indemnities the Vendor may want from the Purchaser under the contract.
- **What is the stamp duty impact?** If the GST liability is shifted to the Purchaser, and the purchase price payable to the Vendor will exclude GST, this may reduce the stamp duty payable by the Purchaser. This is because the Purchaser is liable for duty based on the GST inclusive purchase price paid for the property. If the purchase price is reduced as a result of a shift in the GST liability, this may also result in lower duty. This issue is illustrated in an example further below.
- **How will the proposed rules work for margin scheme sales?** The margin scheme provisions are complicated. Where applicable, the GST payable on the sale depends on a range of factors, including valuations. Which party will be responsible for calculating the GST if the margin scheme applies and what are the risks if they get it wrong?
- **Will Vendors need to disclose their margin to Purchasers?** At present, a Vendor is not required to issue a tax invoice if the margin scheme applies to a sale. This allows the Vendor to keep its "margin" on the sale confidential. How will this confidentiality be maintained if the Vendor needs to disclose the GST payable on a margin scheme sale to the Purchaser for GST remittance purposes?
- **What will happen if other taxable supplies are made together with the supply of new residential premises or subdivided residential land?** Developers may offer buyers a range of sales incentives that can involve various goods, services and other things. If those things are supplied together with the property, either under the one contract or as part of one arrangement, will the Purchaser also be liable for the GST on those things?
- **Will the Vendor be entitled to GST adjustments for "rental guarantee" payments?** A rental guarantee is a common form of sales incentive where a developer is targeting residential investors. Where rental guarantee payments are made to a Purchaser, the ATO currently accepts that this may involve a refund of a part of the Purchase Price and trigger a GST decreasing adjustment. Will the Vendor still be entitled to such adjustments if the GST liability on the sale is shifted to the Purchaser?
- **What impact will the new measure have on "Property Development Agreements" (sometimes called "Development Management Agreements")?** Such agreements often involve complex payment arrangements (waterfall arrangements) and the impact of a change in the GST position of the land owner will need to be carefully considered, as this may also impact the price payable to the developer for development services. Again, there should ideally be transitional rules to carve out existing PDA / DMA projects so that any amendments can be well considered ahead of any future projects.
- **Will the Vendor still need to issue a tax invoice?** This may seem to be a relatively minor compliance issue, but Vendors will need to understand the impact of the measure on their obligation to issue tax

invoices if requested to do so. Some Vendors express their settlement statements in the form of a tax invoice and this may need to change.

- ***Amendment of precedent contracts.*** In each State and Territory, there is a precedent Contract for the Sale of Land (generally prepared and made available by the relevant State / Territory Law Society). Those precedents contracts will need to be amended to reflect the new measure. Again, this highlights the importance of appropriate transitional arrangements to allow time for this.
- ***What are the price display impacts?*** Vendors selling to consumers (such as "mum and dad" residential purchasers) must display and advertise their prices on a GST inclusive basis. Will this requirement continue to apply if the Purchaser is instead responsible for payment of GST?
- ***What will be the compliance and systems impacts?*** Most Vendors will already have compliance and accounting systems in place to deal with GST on their sales. Large developers may use "contract tracking" software to assist in managing the financials for their apartment or estate development. Vendors will need to update these systems to reflect the proposed changes.

In the fourth dot point above it is noted that there may be a stamp duty impact associated with the reform, depending on the nature of the amendments. If the GST liability remains with the Vendor, but is paid for by the Purchaser (in other words, there is a form of GST withholding), the duty position is unlikely to be changed. However, if the GST liability is instead shifted to the Purchaser, it is arguable that there is a stamp duty impact.

To illustrate, assume a Vendor is selling a new apartment in NSW for \$1 million, plus \$100,000 of GST which is payable to the ATO by the Purchaser.

If the Vendor is liable for the GST, the Vendor will constructively receive consideration and benefits totaling \$1.1 million. This is the purchase price, combined with the benefit of the Purchaser having discharged the Vendor's GST liability.

In contrast, if the GST liability is instead "reverse charged" and imposed on the Purchaser, the Vendor will only receive consideration and benefits totaling \$1 million, being the GST exclusive purchase price. The \$100,000 GST payment to the ATO will discharge the Purchaser's own GST liability and doesn't benefit the Vendor.

The duty saving in this example is \$5,500, being 5.5% of the \$100,000 referable to GST. While this is not a material amount in the context of a \$1.1 million transaction, it is nonetheless handy and of benefit to the Purchaser (and potentially the Vendor if it feeds through to higher prices). Such savings would also add up to a large number if applied across all sales of new residential premises and residential lots which are dutiable (noting that some sales are not subject to duty due to concessions for first home buyers or other measures).

We already see this duty outcome in circumstances where a Purchaser who has acquired a property GST-free as a going concern is liable for a GST adjustment under the provisions in Division 135 of the GST Act. The Purchaser is only liable for duty based on the GST exclusive purchase price and duty does not apply to the Purchaser's GST amount.

The author expects that the measure will likely involve a form of GST withholding, in which case the duty benefits discussed above are unlikely to arise.

As noted above, there is presently little detail on these or other issues. The following is an extract of the relevant statement from Budget Paper No. 2 [p 38]:

From 1 July 2018, the Government will strengthen compliance with the GST law by requiring purchasers of newly constructed residential properties or new subdivisions to remit the GST directly to the Australian Taxation Office (ATO) as part of settlement. Under the current law (where the GST is included in the purchase price and the developer remits the GST to the ATO), some developers are failing to remit the GST to the ATO despite having claimed GST credits on their construction costs. As most purchasers use conveyancing services to complete their purchase, they should experience minimal impact from these changes. The measure is estimated to increase GST revenue by \$660.0 million and associated payments to the States and Territories, net of administrative costs, by \$1.6 billion over the forward estimates period. The different is due to the timing of when GST is collected and recognised.

One hopes the Government moves quickly to release draft legislation on this to give suitable time for working through how the measures will work and if any changes might be needed.

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