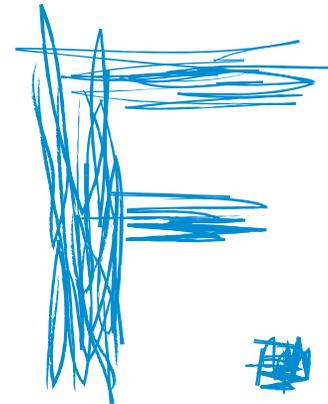


# GST AND REAL PROPERTY

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# PRESENTER

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# WHO IS THE TAXPAYER?

GST liabilities and GST input tax credits cannot definitively be considered until the "taxpayer" is first identified

Common GST taxpayer identification errors include:

## Trusts

- The "Trust" is the GST taxpayer, identified by the ATO as "The trustee for XYZ Trust". If the Trustee changes, the taxpayer ABN and GST is unchanged
- The Trustee normally acts as agent or 'bare Trustee' and normally does not register for GST (eg where a corporate Trustee's name is on a property title)
- The Trustee might be registered for GST (eg where, in its own right, it provides and charges for Trustee services to the Trust)

# WHO IS THE TAXPAYER?

## Partnerships

- Are defined to be an 'entity' for GST purposes, and adopts income tax definition of Partnership (even though not an entity for income tax)
- Common interpretation is the sharing of the net income of the business activities, and sharing remaining net assets of Partnership on dissolution, or tax law Partnerships for joint receipt of income
- The Partnership is treated as a single GST 'taxpayer' and all of the Partners are treated as not being the taxpayers. Analogous to a Company and Shareholders
- This contrasts with the treatment for all other purposes (eg. stamp duty, income tax, capital gains tax, legal and financial principles)
- One consequence is that Partners cannot claim GST input tax credits
- Other consequences are supplies on formation and dissolution

# WHO IS THE TAXPAYER?

## Joint Ventures

- Are defined to not be an entity for GST purposes
- Common interpretation is the sharing of the 'output' of the activities (eg. each Joint Venture gets its share of the units or lots produced, rather than a share of the net income as arises with a Partnership)
- Each Joint Venturer is a separate taxpayer, each liable to GST and each entitled to claim input tax credits (unlike Partners who are not taxpayers)
- In some circumstances, Joint Venturers can elect to jointly 'report' their JV liabilities and input tax credits, ignore a limited number of intra Joint Venture transactions and include a non Joint Venturer Manager
- A Joint Venture GST registration election does not change who the taxpayers are and cannot be 'assessed' for GST purposes.

# WHO IS THE TAXPAYER?

## When Joint Venture Agreements are Partnerships

After nearly 20 years of GST, it is still very common practice to see:

- Joint Venture Agreements, specifically denying existence of Partnerships, drawn up by lawyer, as directed
- Manager, nominee or accountant prepares a single set of accounts, with 'split' between partners' respective obligations and entitlements and positions at end of each period
- Partnership BASs and income tax returns lodged by the accountant, on basis that it is in fact a Partnership

# WHO IS THE TAXPAYER?

When there are Joint Venture Agreements and Partnerships

Implications include:

- Joint and several liability of the Partners to GST
- Partners (and often the Nominee or Manager) are not entitled to claim input tax credits
- Partners' in-kind contributions on formation and following (e.g. land or construction services) are 'supplies' made by a Partner to the Partnership
- Partnership may be ineligible to use the margin scheme downstream, if Partners' in-kind contributions were fully taxable (i.e. margin scheme was not applied, as rarely to see a Contract of Sale of Real Estate)

# WHEN DOES THE SUPPLY OF REAL PROPERTY OCCUR?

Differentiate between:

- when a 'supply' is made
- when is the GST payable 'attributable'
- Supplies arise when obligations are entered into, regardless of when title transfers (ie signing of the contract)
  - Even the standard Contract for Sale of Real Estate states "The DAY OF SALE is the date by which both parties have signed this contract" (not my emphasis)
- Attribution (when GST is payable) occurs when any consideration is first paid or an invoice (distinguish from a Tax Invoice) is issued

# ATTRIBUTION OF GST

## Standard Contract of Sale of Real Estate

- Note the new REIV/LIV contract released on 27 June 2018, with new Special condition 15B together with General Condition 13
- A “security deposit” (usually 10% but can vary in limited cases) is an ‘earnest’, must be forfeitable, and is deemed not to be consideration until applied or forfeited
- Distinguish deposits from first payments (eg could be an instalment), and options and certain rights (eg first right of refusal) (that are separate supplies to the supply of the property)
- Attribution of GST is normally in the tax period in which settlement occurs, only because that’s the first time consideration is paid (ie deposit applied and balance paid) and Settlement Statement issued

# ATTRIBUTION OF GST

## COMMENTS ABOUT STANDARD CONTRACTS

- GST law does not assist in passing on or charging GST to purchasers- it must be dealt with contractually
- “The price includes GST (if any) ...” does not mean GST is payable or is not payable
- “ ... unless the words ‘**plus GST**’ appear in this box” (not my emphasis). “**GST**” in the box is not sufficient to allow vendor to charge purchaser an additional amount for GST payable by vendor
- Allowable to have fall back provisions from GST Free Going Concerns or GST Free Farmland elections to Margin Scheme (only one can prevail)

# ATTRIBUTION OF GST

Instalment contract

For non-cash accounting:

- Attribute the GST payable on the entire contract amount in the earlier tax period in which:
  - any 'consideration' is received (1<sup>st</sup> payment is an instalment and not a deposit, even if less than 10%), or
  - an 'invoice' is issued (ATO accepts that the Contract is not an invoice)
- For cash accounting:
  - attribute the GST payable to the extent of the consideration received in each tax period

# FEE FOR SERVICE (DEVELOPMENT) ARRANGEMENTS

## Fee for service (development) arrangements

- Landowner engages a Developer or Manager to arrange the construction on their land or of the lots
- Developer could engage a separate Builder
- Fee paid by Landowner to Developer is normally cost plus a margin but can include a percentage of the owner's sale price (does not make them Partners)
  - Be cautious if journal or year end entries done within a non-GST group)
- Landowner liable to pay GST on sales of the land

# GST FREE GOING CONCERNS

## GST Free Going Concerns

- It is not the supply of an “Enterprise” as often thought
- Supplier and purchaser must both be registered for GST
- Enterprise of vendor must be carried on up to and including date of supply.
- Enterprise of vendor must be operated up to and including the date of supply. Physical activity not necessary but mere maintenance not enough
- Supplier must supply ‘all things necessary’ for the continued operation of the enterprise to the purchaser, even if the purchaser doesn’t need it all and even if the purchaser has no intention to continue
- Supplier and purchaser must agree in writing to the going concern prior to settlement
- I would rarely advise a vendor to agree without an incentive to do so

# GST FREE FARM LAND

## GST Free Farmland (and comparison to GST Free Going Concern)

- The land must have been used for 5 continuous and unbroken years for a farming business, by anybody, immediately preceding the supply (**enterprise must be conducted by vendor and no 5 year rule**)
- The Purchaser must have the intention that the land will continue to be used for farming, by anyone, after settlement (**the purchaser does not need to intend that it, or anyone, continue to carry on the enterprise- it must only be capable of continuing the same enterprise**)
- Suppliers and purchasers cannot elect or agree to treat, or not treat, a supply as GST Free Farmland- it either is or is not, and does not have to be stated in any agreement (**written election by both parties required**)

# CLAIMING REFUNDS

The four year time limit for claiming GST refunds is the same for the ATO collecting unpaid GST (certain exceptions eg. fraud)

The old 'stop the clock letters' can no longer be used

- As your own BAS is deemed to be an Assessment, you must generally request an Amended Assessment, or lodge an Objection against your own BAS within 4 years of the due date of lodgment of your BAS (certain extensions allowed, but rare), and a further 4 years in respect of the Amendments
- you must know the precise amount of GST overpaid

For tax periods after 31 May 2014:

- if you overpay GST to the ATO, and treated the supply as taxable, and it has been passed on to the purchaser, and you have not reimbursed the purchaser, the supply is deemed to be taxable (so no refund to claim).
- Commissioner does have a discretion if no windfall for the claimant

# CLAIMING REFUNDS

## ATO Refund Verification process

- ATO must now refund net negative amounts on BASs (ie GST refunds) within 14 days of receipt by ATO for processing. This does not apply for requests for Amended Assessment or Objections
- Normal process, if flagged for verification, will be a phone call requesting reasons for the GST refund (could be large, first time, new registration, abnormal in comparison, or based on other ATO parameters) and ATO normally requests copies of the five biggest Tax Invoices
- I encourage proactive co-operation to enable release of refund within 14 days, as the time limits once a Taxation Administration Act s. 8AAZLGA notification is given, the period extend to 60 days and more

# GST MARGIN SCHEME

Still a very significant source of confusion, errors and disputes

- it's a GST concession that was intended to only tax the value added to real property after it enters GST system, and was intended to tax all of that value
  - Normally 1 July 2000, but different times when changing from private to use in an enterprise, and special rules for unimproved government land
- you cannot use the margin scheme if you acquired the property as a fully taxable supply (note contributions of land to Partnerships). But note Commissioner's discretion to extend time to elect margin scheme retrospectively
- if you acquired GST Free Farmland, or land as part of a GST Free Going Concern, how the vendor acquired the land determines if you can use the concession, and if you can, how the margin is calculated. Note the changes on 8 December 2008, and 'grandfathering provisions' if the vendor was the owner then

# GST MARGIN SCHEME

ILLUSTRATION OF WHY LAW CHANGED FOR SALES FOLLOWING A GST FREE SALE

MARKET VALUE 1 JULY 2000	300,000
SOLD TAXABLE JULY 2002	400,000 (+ GST/- CREDIT)
SOLD GOING CONCERN JULY 2007	800,000 (GST FREE)
SOLD GOING CONCERN JULY 2013	1,300,000 (GST FREE)
SOLD MARGIN SCHEME JULY 2015	1,800,000 (GST on 500,000) (VALUE INCREASE 1,500,000)

# SLOWING SETTLEMENT IMPLICATIONS

## Failed settlements

- Still a supply but it's a supply of the contractual rights gained on signing the contract. If the property would have been taxable, the rights are too
- The security deposit (up to 10%) is then 'applied' or is 'forfeited' and it is only then treated as consideration received by the vendor (as distinct from when it was actually received by the vendor). Your contract might allow you to 'apply' some of the deposit to interest that is not taxable.
- Note that if a new purchaser is 'nominated' or a resale takes place, then elections such as for the margin scheme to apply, must be re-agreed in writing between the vendor and the new purchaser

# SLOWING SETTLEMENT IMPLICATIONS

Delayed and renegotiated settlements

Depending on the terms of the contract and the re-negotiation, this may result in any one or more of the following, each of which has a very different GST implication for the vendor:

- Price increase or decrease
- Charging or forgoing contractually agreed interest
- Provision of physical built-in incentives
- Provision of other incentives (cash cards, vouchers, face value vouchers, goods or services, rental guarantees, third party payments, stamp duty, financial accommodation, pre-settlement rental period, etc)
- Nomination of a new step in purchaser with payments to/from the vendor or the original purchaser or the new purchaser

# CHANGE IN CREDITABLE PURPOSE

If you have changed your intentions or application of things you acquired, then you may have to make a Division 129 Adjustment. For example, this occurs if you built a residential property to:

- sell only, and you claimed GST input tax credits in full, but you now actually lease or even just try to lease some or all of the property (some of the past input tax credits claimed have to be adjusted by paying some back to the ATO)
- rent only and didn't claim any GST input tax credits, but you now actually sell or even just try to sell some or all of the property (you can now claim some GST input tax credits from past purchases back from the ATO)
- Rent first and sell, and you claimed a proportion of GST input tax credits, but the relativity of the length and revenue from renting has changed and/or the time it is expected to now take to sell and the price to be achieved, have changed (the apportionments you made when working out what percentage input tax credits you claimed will need to be recalculated)

# CHANGE IN CREDITABLE PURPOSE

## Division 11

This allows input tax credits to be claimed, based on intention when making each acquisition.

If your intention changes in January, all claims for input tax credits on and from January based on new intention; you not wait till June to make Division 129 Adjustments

# CHANGE IN CREDITABLE PURPOSE

Division 129 changes applies to where your 'application or use' is different from your intention, and made in June (or final) BASs

- Look at intention as at 30 June (eg 2018)
- If change in purpose, go back to acquisition made up to one year and one tax period prior to June 2018 (ie March 2017 or May 2017)
- Based on individual acquisitions (builder different to developer)
  - Consumables or \$1000 or less- no adjustment
  - More than \$1000 to \$5000- adjust 2 years back
  - More than \$5000 to less than \$500,000- adjust 5 years back
  - \$500,000 or more- adjust 10 years back
- Numerous special rules (eg for business finance)

# THE FIVE YEAR RULE

New residential premises are subject to GST, but are defined to not include (meaning they will not be subject to GST):

- If that property was previously sold as residential premises (ie the next sale is sometimes called second hand residential premises)
- if the property has been used solely and exclusively for an unbroken 5 year period for the purposes of renting them as residential premises. This is where confusion can arise, as the 5 year period might only be met after a period much longer than 5 years from when you completed the building, maybe even up to 10, 15 or 20 years after then.

# THE FIVE YEAR RULE

For example, if you have a dual purpose of renting and selling the new property, the '5 year period' only starts when you completely cease any intention and actions to sell that property

- If you rent or try to rent for say 4 years, and then try to sell but are unsuccessful and go back to renting, the '5 year period' starts all over again when you completely cease any intention and actions to sell that property. Hence, it will still be fully taxable new residential premises if you sell it within 9 years from new. If you try to sell it again after say year 7, the '5 year period' starts again and the property will still be taxable new residential premises if you sell it within 12 years from new
- There will also be complex Division 129 Adjustments in respect of claims for GST input tax credits that have to be made for up to 10 years.

# SOME OTHER SNIPPETS

Did you know that:

- If you paid GST to the ATO on a tax invoice you issued, but haven't received payment from the debtor for 12 months, you can make an adjustment and get the GST back without writing it off as a bad debt. In contrast, if the debtor claimed a credit of that GST, they have to adjust by paying it back to the ATO. If some or all is paid later, the GST is trued up
- If you give a 'cash card' in place of a reduction in the selling price of new residence, GST payable on the residence is reduced.
- The payment of a rental guarantee to the purchaser of new residential premises can lead to a GST refund, up to 4 years after making the payment.
- Accruing development costs in related entity could lead to an immediate GST liability arising if the entities change the accounting entries to debtors and creditors in the accounts (watch out for year end journals, especially between consolidated income tax groups that are not GST grouped)

# FINAL MESSAGES

THERE IS ALWAYS AN ANSWER AND A SOLUTION, AND  
SOMETIMES THERE IS MORE THAN ONE ANSWER

SEEK ADVICE FROM AN ADVISOR OR THE ATO

**DON'T TAKE A CHANCE BY ROLLING THE DICE ON GST**

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