

Recent and emerging GST issues

GST is payable on sex, but not by who you might think: The AAT confirmed a GST liability of \$7M for a brothel operator and confirmed that the actual 'provider' was not liable for GST. *Implications: While this might seem irrelevant to most of you, this is the pointy end of the very broad implications for all businesses using casual employees or contractors (now often asserted to be employees) to provide specific one-off services directly to consumers.*

Jailed for 6 years: A supposed property developer was found guilty of fraudulently claiming false GST credits (he actually printed fake tax invoices!) and phoenix activity. He has been jailed and has to pay reparations. *Implications: Don't do it! The entire property development sector is being increasingly scrutinised by the ATO. If the ATO makes contact, it's best to seek advice immediately to ensure that it doesn't unnecessarily escalate by being referred up the line to a full audit – there is no benefit in getting into a fight with the ATO, especially if you've done everything right.*

Feminine hygiene products now GST-free: From 1 January 2019, per a Decision of the Health Minister, feminine hygiene products are now GST-free. *Implications: Consider other health/medical products that may achieve GST-free status. You may be surprised about what is classified as GST-free or GST taxable in this sector as well as in the food sector.*

GST refunds will be refused even when you win: The ATO has issued a Draft Determination (MT 2018/1) which means you will be refused a GST refund even if you win a court challenge, gain a favourable Private Binding Ruling or otherwise wait for the ATO to make a decision unless you actually claim the refund in a BAS within 4 years. *Implications: It's now much more critical to know whether and when to claim the refund in your BAS, seek a Private Binding Ruling, lodge an Objection or Appeal or Request an Amended Assessment. Indeed, you might need to do more than one, and the date by which to take each action is critically important. Yes, this is based on a technicality, but all of GST is a technicality.*

Allocations/apportionments challenged: The ATO has thrown a challenge to the finance sector by issuing a Draft Determination (GSTD 2018/1) in relation to issuers of credit cards allocating costs between taxable (e.g., merchant fees) and input taxed (e.g., interest) supplies. *Implications: This is not just for the banking sector, but also directly relevant for businesses with internal financing arrangements, financiers dealing with both leases (taxable) and loans (input taxed) and property developers dealing with new residential properties for sale (taxable) and for rent (input taxed).*

New residential premises withholding by purchasers: From 1 July 2018, in certain circumstances, purchasers of new residential premises have had to withhold from their payment to the vendor the GST that the vendor owes the ATO. The purchaser must then send the GST directly to the ATO instead of paying it to the vendor. While there have been some hiccups and bumps in the road since the introduction of this law, the ATO is being responsive by fixing its systems and processes relatively promptly. *Implications: Ensure you know whether your property deal is subject to the new GST withholding or not, especially if the contract was signed before 1 July 2018, and comply with the paperwork. Even if GST is not payable, failing to do the paperwork prior to settlement is a criminal offence.*

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Recent Fehily Advisory activity

Some of the matters that I've worked on for clients and/or their advisors since September 2018 that might be relevant to you and/or your clients include:

Reducing GST payable by developers and retailers using cash cards: Many vendors are unaware that using cash cards as incentives or discounting can reduce their GST payable, and can sometimes lead to up to four years of refunds. This applies not only to developers selling apartments, but also to retailers of goods and services.

Clarifying complex, multi-party GST dealings: There are many different multi-party arrangements where the commercial and GST complexities must be clarified, particularly where only some of the supplies are subject to GST, such as in medical clinics. One business that makes taxable supplies to consumers had some sub-contractors that were registered for GST, some that were not and some that needed to be registered, and the business lacked clarity about who got to keep how much, what was and was not subject to GST, who got GST credits and who had to provide tax invoices. Clarifying these kinds of arrangements ensures that the business and the sub-contractors end up with correct net revenue and are compliant for GST purposes.

Reducing unnecessary legal and accounting costs and CGT and income tax issues for a property development: A developer who purchased a property with a lease-holding tenant went through the tortuous process of setting up a GST-free going concern, which also led to unnecessary CGT and income tax issues. The developer could have instead very simply achieved the same GST outcome with significantly reduced legal and accounting costs and no unnecessary CGT and income tax issues.

Ensuring you know if you have protection under a Private Binding Ruling: A business wanted to rely on a Private Binding Ruling, but the PBR related to a different matter and a different entity, the relevant laws had changed and other ATO Public Rulings had been issued since. Failure to identify that this PBR didn't apply could have led to wasted time and money, non-compliance, unsuccessful representations to the ATO, unnecessary attention and unexpected GST liabilities. PBRs only apply to who they are written to and easily cease to provide protection.

Resolving honest GST error with major income tax consequences: A retail franchisee, in an honest mistake, inadvertently underpaid significant GST amounts by misreading a franchisor report for four years. A successful GST outcome was negotiated with the ATO, including the remission of most penalties and all GIC and allowing time to pay. In addition, an easy process was established for the franchisee's accountant to amend past BASs as well as past income tax returns for all of the downstream trusts.

Taking advantage of GST concessions by insolvency practitioner: An Administrator was intending to use full GST, instead of the margin scheme, when selling a distressed property. Generally, insolvency practitioners can adopt the same GST concessions that the incapacitated entity would have been entitled to, which advantages the position of the creditors as well as purchasers wanting to use the margin scheme in future.

Claiming a GST credit in the absence of a tax invoice: A purchaser was unable to claim a GST credit because it did not receive a tax invoice from a vendor. This vendor sought to avoid its GST liability by not registering for an ABN or for GST. The Commissioner can exercise his discretion to treat a property Settlement Statement (or any other document) as a tax invoice so the purchaser can still claim a GST credit regardless of whether or not the vendor has paid the GST to the ATO.

Safeguarding entities from increased ATO scrutiny of enterprise status and ABN eligibility: The ATO is increasingly challenging individuals, partners, companies and trusts that have ABNs and are claiming GST

refunds on the basis that they are not carrying on an Enterprise. For example, the ATO has challenged Partners in Partnerships, holding companies and single entities paying the legal fees of related entities in return for a portion of litigation proceeds. Failure to prove Enterprise status can lead to the ATO retrospectively cancelling ABN and GST registrations and clawing back all previously claimed GST credits.

Confirming the validity of GST-free going concern status: Many Vendors and Purchasers continue to elect and use the GST-free going concern provisions in property deals by entering into mere licences or 'tenancy at will' arrangements alone. A well-known real estate agent told me, "We do this all the time." (I'm not surprised about that, but am still bewildered by people relying on such advice from non-tax professionals.) These do not meet the test of going concerns for GST purposes and can result in GST liabilities and penalties for the Vendor and price increases for the Purchaser, sometimes years after settlement.

Claiming GST credits for the purchase and export of second-hand goods: A business that purchases second-hand goods from unregistered consumers and exports them cannot claim a special Division 66 GST credit. However, there are circumstances, such as where the exporter is not the purchaser from the unregistered consumer, in which the Division 66 GST credit can be claimed.

Solving complex GST implications for Deceased Estates and inheritances: There can be very complicated GST obligations associated with Deceased Estates and inheritances. For example, a Deceased Estate had two beneficiaries who wanted to keep a portfolio of properties and one beneficiary who wanted a cash equivalent, which required identifying and resolving the many possible GST implications along with the many other sensitive personal issues.

Clarifying GST implications for wholesalers re-consigning high-value goods to related retailers: A wholesaler who was using a 'cash basis' and selling high-value goods on consignment to a related retailer using a 'non-cash basis' wanted to re-consign the goods to a different related retailer before the first retailer paid for the goods. This incurred unexpected GST liabilities for the related retailer, but a simple method of compliance was achieved.

Claiming GST credits for manufacturers' cash rebates under retailers' sales promotions: Manufacturers and importers can claim GST credits when they pay 'cash rebates' directly to downstream consumers of their products that are sold by retailers under a sales promotion. If unclaimed, up to four years of past credits can be claimed.

Resolving inconsistencies between lawyers and accountants: Associated entities often instruct lawyers to draw up a JV Agreement that states that the association is not a Partnership, but most of the time, the accountants then prepare Partnership accounts and lodge income tax returns and BASs as a Partnership. Joint Ventures and Partnerships are treated very differently for both commercial and tax purposes. These inconsistencies can be resolved, avoiding disputes with the ATO that often result in the denial of past GST credits claimed.

Ensuring responsibility for Settlement Deed GST requirements: A Settlement Deed between commercial parties in dispute had the appropriate GST pass-on clause and an appropriate clause that required tax invoices to be issued. The lawyer, the accountant, the payer and the receiver all said 'the other guy' needed to execute this, but none did. The passing on of GST and the issue of tax invoices must be fully dealt with at or before the payment of the settled amount to ensure compliance.

Determining the ideal way to sell a retirement village for GST purposes: A unit trust was evaluating whether to sell its retirement village by way of assets or units in the unit trust. It had to determine whether the 2009 'concession' allowing 'assumed liabilities' to not be included in the consideration for GST purposes still applied. Gaining clarity in regard to the continued application for the concession resulted in the achievement of very significant GST savings.

Ensuring compliance by local agents of overseas non-resident insurers: A local agent of an overseas non-resident insurer had to deal with multiple unrelated entities that provided supplies and services to the agent, non-resident insurer and insured. This led to confusion about which entity should or could claim which GST credits. An administratively efficient and compliant model was adopted.

Clarifying the nature of build-to-rent property models to determine GST position: Many property developers are describing proposed development models as 'build-to-rent' when they are in fact 'build-to-sell-to-rent', using the terms interchangeably. These two models have completely different GST implications, leading to significant consequences for the developer and, more importantly, potential investors and financiers. Understanding the difference between these two models and their different consequences can enable more informed decisions up front about which approach to take and what type of investors and financiers would be most appropriate.

Identifying claimable GST refunds for property developer rental guarantee payments: Property developers can claim GST refunds on 'rental guarantees' they have paid to purchasers of new residential premises from their developments. If they have not claimed the GST refunds, they have up to four years to do so, provided there is sufficient and appropriate documentation.

Clarifying GST consequences of nominations and option transfers in property dealings:

The GST implications of making a nomination or transferring an option in respect of property dealings depend on the nature of the nomination or option transfer, who makes and receives that nomination or option transfer and the nature of the underlying property. All of the above needs to be understood, along with an analysis of all relevant documentation, before the GST consequences can be definitively determined.

Distinguishing between stamp duty and GST in property rearrangements: A group of associated entities rearranged its ownership of a property in a manner that was exempt from stamp duty, but did not consider GST, leading to unexpected GST liabilities and the inability to use the margin scheme in future. In another matter, a property was supplied to associated entities in a GST group, and while no GST was payable, there were still potential stamp duty, CGT and income tax consequences.

The above comments refer to specific entities in specific circumstances and should not be relied upon by others without getting professional advice specific to your relevant circumstances.