

RISK AND GST

Have you correctly dealt with GST issues?

LPLC regularly receives notifications where failing to correctly deal with GST issues gives rise to a claim. Most GST claims occur in relation to the sale of commercial or new residential land or the sale of businesses, but claims have also arisen involving the preparation of leases as well as documenting terms of settlement in litigation. The mistakes come about for a variety of reasons, often because the right information is not obtained from the parties about GST registration status or because of a lack of understanding of how the GST rules apply.

Recent GST case

In *A & A Property Developers Pty Ltd v MCCA Asset Management Ltd* [2016] VSC 653 the letters GST were inserted in the relevant box in the particulars of sale instead of plus GST.

The contract contained the usual general condition 13 as prescribed by the *Estate Agents (Contracts) Regulations 2008* (Vic) which requires the words “plus GST” to be written in the relevant box in order for the purchaser to pay GST as well as the purchase price.

Justice Ginnane determined that the “. . . inclusion of the letters in the box did not shift the burden of the payment of GST to the purchaser”.

Mixed supply

In *Ashton v Monteleone* [2010] NSWSC 258 the property was a mixed use property with a shop downstairs and a residence upstairs. As there was no mention of a mixed supply in the contract, by default the sale of the property was GST inclusive. GST should have been payable on the supply of the shop but not on the supply of the dwelling. At the public auction, the auctioneer announced that the sale was “plus GST”.

Justice Gzell decided that as the auction was conducted on a “plus GST” basis the contract should be rectified. He also ordered that a ruling be obtained from the Australian Taxation Office (ATO) about apportioning the price between the taxable supply of the shop and the input taxed supply of the residence.

GST special condition

In *Cityrose Trading Pty Ltd v Booth & Anor* [2013] VSC 504 Justice Emerton decided that as the GST special condition was incapable of meaning, it was void for uncertainty and severed from the contract. Without that clause there was no reference to GST in the contract so the price was deemed to be GST inclusive.

ATO – most common errors

According to the ATO the most common GST errors in property transactions are failure to satisfy all statutory requirements when applying the margin scheme or where there is a supply of a going concern and not properly dealing with GST on adjustments. For more information see www.ato.gov.au/Business/GST/In-detail/Your-industry/Property/Common-GST-errors-and-property/.

GST issues in litigation and commercial agreements

In addition to GST claims in conveyancing matters LPLC has also seen GST issues arise in:

- litigation where the terms of settlement did not deal with payment of GST
- commercial agreements where neither the practitioners nor clients raised GST as an issue.

In one claim a practitioner acting for a landlord was instructed to prepare a new lease and a separate agreement for the sale of certain goods by the landlord to the tenant for approximately \$150,000. The GST position was not discussed by the parties or practitioners acting.

About six months after settlement, the tenant requested, and the landlord provided, a tax invoice for the goods. The landlord then sought to recover the GST from the practitioner. The client alleged the practitioner should have raised the GST issue.

An informed client would either seek to increase the price to capture the GST payable or at least understand that the price was GST inclusive. The practitioner had not advised the client about either of these options.

Risk management

The key to avoiding GST claims is to:

- have checklists or workflows that raise potential GST issues at appropriate times and situations
- have sufficient knowledge about GST so issues can be raised with the client allowing them to make an informed decision.

For more general information about GST including a checklist, refer to the information about GST on the LPLC website. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

TIPS

- Use the LPLC GST checklist to identify possible GST issues.
- Regularly review and update your GST precedent clauses.
- Do not dabble in GST issues without the relevant experience or expertise as they are extensive and complex.

