

TAKE STEPS TO AVOID GST CLAIMS

GST is not simple but there are some easy steps you can take to help protect you and your clients.



Section 9 of A *New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) sets out the four legs of a “taxable supply”. The fourth, s9(d) is that the supplier is “registered or required to be registered” for GST.

Practitioners need to be aware that ABN and GST registration are two different things, and it is possible for a vendor to have an ABN but not be registered for GST.

A vendor’s GST registration status can be confirmed via the Australian Business Register (www.abr.gov.au). The initial search result will tell you whether the vendor has an ABN and you will then need to click on that ABN number to bring up Current Details which will include GST registration status. The same information is also available direct from the ATO.

Where a client is acting in the capacity as a trustee, ask for the ABN for the trust, and then check the GST status of that ABN.

Margin scheme

Since changes to the GST Act in June 2005, the position has been that the parties must have agreed in writing to apply the margin scheme prior to the date of supply. For conveyancing purposes settlement day is generally the date of supply.

Some practitioners are still occasionally approached by former clients and asked to amend their now performed contracts of sale to include an agreement to apply the margin scheme.

The reason for the requests, sometimes several years after the sale, is that the former clients have been audited by the ATO and questions raised as to the appropriateness of applying the margin scheme.

To apply the margin scheme after settlement, assuming all parties agree, requires an extension of time from the Commissioner of Taxation. See s75-5(1A) of the GST Act.

Practitioners are also still being caught out by when the margin scheme can be applied.

The margin scheme cannot be applied to a sale where the property had been purchased by the vendor on a full GST basis. Vendors’ practitioners must clarify the GST basis on which the vendor purchased the property before drawing a contract stating that the margin scheme will be applied to the sale.

Going concern

We have seen standard LIV contracts of sale of land which purport to be sales of going concerns with the relevant box filled in, and clients advised that no GST will be payable on the sale.

Sometimes, prior to settlement, it then transpires that the “sale of going concern” criteria are not met and GST

will be payable. The vendor rightly claims that GST will be payable by the purchaser pursuant to subclause 19.2(d) of the LIV August 2019 contract of sale of land (previously 13.1(c)) which states the purchaser must pay to the vendor any GST payable by the vendor if:

“... the particulars of sale specify that the supply made under this contract is a going concern and the supply (or a part of it) does not satisfy the requirements of section 38-325 of the GST Act . . .”

A purchaser in this position may not be able to fund the GST payable and may seek to recover compensation from the practitioner where the practitioner had the opportunity to warn the client about the prospect GST might be payable, and the client could prove they had suffered some loss resulting from that advice not having been given in a timely way.

Another issue we have seen relating to going concern sales is the failure to fill in the “going concern” box. This effectively means there is no written agreement to sell the property as a going concern and will result in the contract being a GST-inclusive taxable supply with the vendor liable to pay GST out of the sale proceeds.

Some vendors’ practitioners say they leave the going concern box blank until it is confirmed that the purchaser is registered for GST. The risk is that in a busy practice the practitioner may overlook obtaining the confirmation and the contract then proceeds on a GST-inclusive basis. The safer course when acting for a vendor is to fill in the “plus GST” box and leave it to the purchaser to seek a variation of the contract as drafted.

Risk management

Failure to manage the legal issues, a simple oversight and poor engagement management are the three most common causes of GST related claims.

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 any GST issues are raised with the client, clear instructions are obtained and clients are given correct advice on the GST treatment of the transaction
- where there is doubt about the potential GST treatment, always suggest the client seek an opinion from their accountant or other independent GST expert, or recommend that a private ruling be obtained.

For more general information about GST, including a checklist, refer to the LPLC website (lplc.com.au/taxgst). ■

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

TIPS

- Always check the client’s GST registration status.
- Use the LPLC GST checklist to identify possible GST issues (lplc.com.au/checklists/gst).
- Discuss the GST treatment with the client and where necessary refer them to their accountant or other independent expert to check the GST treatment of the sale.