

# GST withholding

## Introduction

Important terms:

- *Residential premises*
- *New residential premises*
- *Potential residential land*
- *Property subdivision plan*
- *Price*

All are defined in the GST Act. The first two are familiar; the second two less so, while the third needs emphasis.

*Potential residential land* – "... land that it is permissible to use for residential purposes but does not contain any buildings that are *residential premises*."

*Property subdivision plan* – "...a plan:

- (a) for the division of *real property*; and
- (b) that is registered (however described) under an *Australian law*."

*Price* means the GST inclusive consideration, excluding the usual settlement adjustments but, where the contract sum is expressed as a GST exclusive amount and the contract requires reimbursement of GST, includes the GST reimbursement.

This presentation will address:

- Contract treatment.
- Supplier/recipient enquiries.
- Supplier notification.
- Substitution/nomination issues.
- Recipient notification obligations.
- Settlement/withholding protocols.

In this discussion, supplier means vendor and recipient means purchaser or, in the case of substitution or nomination, the transferee named in the transfer.

## Contract treatment

Strictly speaking, a special condition dealing with notification and withholding is not necessary but has advantages:

- Create contractual obligations
- Introduce refinements, timelines etc, in a way not inconsistent with the Act.
- Can include a statement as to whether the acquisition is for a creditable purpose.

Regardless of whether a special condition is included, the ATO accepts that the supplier notification can be an attachment to the contract, but it needs to be identifiable as a notice for the purpose of the section – see LCR 2018/4.

## **Supplier enquiries**

It was already a given that a supplier should consider its own GST status and the GST consequence of a proposed supply. Now, the following aspects will also require attention:

- If the premises are new residential premises, whether they were created through substantial renovations or are commercial residential premises.
- If the land is potential residential land, whether it is included in a property subdivision plan; whether it contains a building in use for a commercial purpose; and whether the recipient is registered for GST and acquiring the land for a creditable purpose.

In relation to registration, the supplier may rely on an ABR search and, in relation to creditable purpose, may rely on correspondence between the parties or a statement in the contract – See LCR 2018/4, at paragraph 61.

## **Recipient enquiries**

A recipient needs to address the same issues as the supplier to be able to proceed in the absence of a notification by the supplier and to cross-check any notification against the circumstances surrounding the making of the supply. It needs to be borne in mind always that a failure by a supplier to provide a notification does not exonerate the purchaser from its withholding obligations.

## **Supplier notification (s.14-255)**

A supplier of residential premises or potential residential land must provide a notification even if neither registered, nor required to be registered, for GST. So, even the supply of existing residential premises requires a notification. The exceptions are:

- Residential premises that are commercial residential premises.
- Potential residential land where the recipient is registered for GST and acquires the land (even partly) for a creditable purpose.

In every case where notification is required, the notification must state whether or not the recipient will be required to make a withholding payment. If withholding is required, the notification must state the supplier's name and ABN; the amount to be paid to the Commissioner and when payment must be made; any other matter specified in the regulations. There is also a requirement that applies where some of the consideration is not expressed as a sum of money.

As we have seen, the ATO accepts that a supplier notification may be attached to the contract of sale and that, I suspect, is a course of action that most will follow.

## **Nomination/substitution**

- Nomination/substitution would necessitate, in the case of potential residential land, a fresh enquiry by the supplier in relation to the GST status of the recipient and the intended use of the property; it would be inadvisable to rely on the enquiries made in respect of the purchaser named in the contract.
- If the instituted purchaser has lodged a GST property settlement withholding notification form, a fresh form would have to be lodged by the nominee.

## **Withholding (s.14-250)**

It is important to bear in mind that there can only be an obligation to withhold under these arrangements where the relevant supply is taxable; there will never be an obligation to withhold in relation to a supply that is not taxable.

Withholding applies to taxable supplies by way of sale or long-term lease of:

- new residential premises that have not been created through \*substantial renovations and are not \*commercial residential premises; and
- potential residential land that is included in a property subdivision plan that does not contain a building in use for a commercial purpose; but not where the recipient is registered and acquires the land (even partly) for a creditable purpose.

## **Calculation of withholding sum**

Default calculation:	1/11 of the price without reference to settlement adjustments.
Margin scheme:	7% of the price, calculated without reference to settlement adjustments or the margin scheme.
Between associates:	Where supply is between associates for no consideration or a consideration less than GST inclusive market, 10% of the GST exclusive value.
Supplies only partly caught:	Apportionment is applied using the standard rates.

## **Recipient's online notifications to ATO**

Recipients are required to lodge two separate online notifications in any case where withholding is required:

- GST property settlement withholding notification; this is lodged after entry into the contract.
- GST property settlement date confirmation; this is lodged on the day of settlement.

The forms can be accessed on the ATO website and the link is included in the list of important resources below.

## **Settlement/withholding protocols**

There is no period of grace provided in relation to payment of an amount required to be withheld; payment is required on or before the date when the first consideration (other than the deposit) is paid – in other words, the settlement date.

There are two alternative methods of satisfying the recipient's obligation to make a withholding payment:

- To withhold the relevant amount and pay it on the settlement date to the Commissioner, quoting the payment ID provided in response to the first online notification.
- To give the vendor a bank cheque payable to the Commissioner for the correct amount of the withholding. Where this course is adopted, LCR 2018/D1 (para 59) recommends that evidence be kept of the payment; perhaps a photocopy of the bank cheque, an acknowledgement of receipt, and a copy of the written direction to the vendor to pay the bank cheque to the Commissioner. Where this course is adopted, the purchaser is exempt from any administrative penalty, regardless of what the vendor does with the funds (s.16-30(3)).

I expect that the second course is the one that would have the greater appeal in the short term.

Of course, where settlement occurs by means of an Electronic Lodgement Network Operator, the issue of which payment method to adopt does not arise since payment of the withholding sum will be made electronically at settlement, and you will be aware that electronic settlements become mandatory from 1 October 2018.

**Derry Davine**

July 2018

## Important resources

The following list of resources has been provided by the ATO.

### Law Companion Ruling

The final [Law Companion Ruling LCR 2018/4](#) has been published. Thank you for your feedback.

### Webpages

We have developed the following two new webpages:

- The [GST at settlement](#) page (QC55431)
- [GST property settlement online forms and instructions](#) (QC55781)

**Please note:** these pages were updated on 29 June 2018.

The following two webpages have been updated:

- [GST and property page](#) (QC21960)
- [GST and the margin scheme](#) (QC18646).

**Please note:** these pages were updated on 19 June 2018.

The following webpages will be available next week:

- A guide for suppliers and their representatives
- A guide for purchasers and their representatives

The links to these guides will be available on the [GST at settlement](#) page.

### How to pay

- Information is available on [how to pay](#).
- GST property settlement payments cannot be paid at Australia Post until late September 2018 (automated payment slip with barcode).
- A payment slip is available to be downloaded on [how to pay](#) and is to be included with the cheque when the withholding payment is made to the ATO.

**Please note:** the how to pay options were updated on 29 June 2018.

### Declaration

- A purchaser can authorise a representative to submit the forms on their behalf by providing them a signed declaration.

- Depending on the state or territory the property is located in, the purchaser's representative can include a conveyancer and solicitor.
- Information and a sample of the [declaration](#) are available.

### **GST Property credits withholding account**

Online viewability of the GST property credits withholding account is scheduled for late September 2018.

### **Additional information**

- Webinar recording available on ATOtv (tv.ato.gov.au) – [GST at settlement changes from 1 July 2018](#)
- Podcast on ATO's podcast channel [Tax InVoice](#) (search on QC54552)
- Animated video on ATOtv (tv.ato.gov.au) – [GST withholding for certain taxable sales of property](#)

### **Feedback**

The [GST at settlement](#) webpage will be open for consultation from Monday 9 July. If you have any feedback on this webpage look out for the link located at the bottom of the webpage to enable you to provide feedback.