

## Taxing issues

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### Do you have sufficient tax knowledge to know which taxes may impact on a client's matter?

[Rule 7](#) of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* provides that a practitioner must ensure clients make informed choices. Alerting a client to any relevant tax issues is sometimes necessary to help the client make informed choices.

### What information and advice do you provide to clients about taxes?

For example:

- checklists
- written advice
- links to websites
- copy relevant rulings
- articles about tax issues

### At what point in a matter do you raise tax issues?

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### Do you agree with the client who has responsibility for resolving any tax issues?

In some matters you may need to recommend that the client discuss any tax consequences with their accountant and/or financial advisor before making a decision.

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## Duty - Overview

### Legislation

- Duties Act 2000 (Vic)

#### **Purpose**

To charge a number of duties.

- Taxation Administration Act 1997 (Vic)

#### **Purpose**

The administration and enforcement of taxation laws.

- Taxation Administration Regulations 2007 (Vic)

### Recent changes

The Duties Act was amended in June 2016 pursuant to the *State Taxation and Other Acts Amendment Act 2016* (Vic) to provide that unpaid duty owed by a foreign purchaser will be a first charge on the land.

### Did you know?

You can apply for a private ruling from the SRO seeking clarification of a tax technical and/or legislative issue where the tax technical and/or legislative issue has not previously been dealt with in any SRO rulings.

## Duty - example of a claim

### Background

A practitioner acted for a purchaser of real estate. The purchaser was paying cash.

Following settlement the practitioner arranged for the stamping of the transfer and lodging at Land Use Victoria.

A requisition was issued by Land Use Victoria.

The practitioner was unsure about how to respond to the requisition so the transfer was withdrawn to give the practitioner time to deal with the requisition.

In the meantime the transfer was placed on the file and was only discovered many years later when the client sought to mortgage the land.

### Questions

- What processes do you put in place to deal with any requisitions issued by the State Revenue Office and Land Use Victoria?

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- Do you regularly review files to ensure documents are stamped and registered promptly?

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## Duty exercise

### Background

You act for a husband and wife buying 'Highton' at [140 Highton Lane Mansfield](#).

The property sold for \$2.2M pursuant to a contract dated 22 April 2017.

Settlement is due in 60 days.

The clients tell you that the property has a lot of development potential and they have provided you with a proposed plan of subdivision.



The husband is a builder and is thinking of building a number of townhouses on the property and selling them off-the-plan.

The client's accountant tells you that a company will be incorporated and needs to be nominated as an additional purchaser. This company will be responsible for the development of the land to be sold off-the-plan.

### Action

List three duty issues you would raise with your clients about their purchase.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

## Land tax - overview

### Legislation

*Land Tax Act 2005* (Vic)

*Land Tax Regulations 2015* (Vic)

### Aim

To provide for collection of a tax on the unimproved value of land.

### Recent changes

The *Land Tax Act 2005* was recently amended so that the land tax surcharge rate payable by an absentee owner of taxable land increased from 0.5 per cent to 1.5 per cent on 1 January 2017.

An absentee owner is defined in the *Land Tax Act 2005* as a foreigner who does not ordinarily reside in Australia and was absent from Australia on 31 December in the year immediately preceding the tax year, was absent from Australia for a continuous period of at least 6 months or for periods that when added together equal a period of at least 6 months.

### Did you know?

The principal place exemption can cover two properties at the same time where an owner who sells their principal place purchases another property to be used as their principal place.

This additional exemption does not apply if the owner:

1. fails to move into the new principal place within 12 months of the purchase;
2. fails to use the new land as their principal place for at least six continuous months; and/or
3. derives income from the new principal place.

## Land tax - example of a claim

### Background

In June 2011 a practitioner acted for a purchaser of a house in Gippsland. The property was marketed as a development site with the potential for a '*number of premium townhouses STCA*'.

The individual purchaser nominated a company as substitute purchaser.

The matter settled in September 2011.

In early 2016 the State Revenue Office (SRO) determined that the property was subject to the land tax surcharge for trusts and sought additional land tax of approximately \$20,000.

The client contacted the practitioner and sought an explanation as to why notice was not given to the SRO of the acquisition by a trust.

### Questions

- Who is responsible for notifying the State Revenue Office of the acquisition by a trust?

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- What information do you provide to your clients about land tax?

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### Tip

Carefully check all conveyancing documents including the contract of sale and any nomination form for any reference to a 'trust'.

### More information

- See s.46B of the *Land Tax Act 2005* about nomination of the unit holders for land tax purposes. This nomination only takes effect from the tax year following the year in which it is received.

- State Revenue Office: [land tax and trusts](#)

- LPLC publications:

[Land can be taxing](#) LIJ 1 March 2014

[More land tax woes](#) blog posted 12 December 2014

## Capital Gains Tax (CGT)

### Overview

**Legislation:** *Income Tax Assessment Act 1997* (Cwlth)

**Commencement:** 20 September 1985

**Aim:** To collect tax on any net gain on disposal of a CGT asset

**Imposition:** Payable as part of income tax

**Amending legislation:** *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2015* (Cwlth) (withholding obligations)

**Commencement:** 1 July 2016

**Aim:** To collect capital gains tax (CGT) payable by foreign residents

**Imposition:** 10 per cent withholding by an acquirer of certain taxable Australian property unless a clearance certificate is received for direct interests / variation obtained / declaration given for indirect interests

### Examples of assets caught by the new withholding regime

- \$2M or more value for acquisitions directly from the owner of:
  - freehold
  - leasehold
  - mining, quarrying or prospecting rights
- \$2M or more value for acquisitions of company title interests.
- Any value for acquisitions indirectly such as acquiring shares in a company, interest in a partnership or units in a unit trust and where the transferor owns 10 per cent or more of the entity and the entity is land rich.
- Any value for options or rights to acquire any of the above

### Further information

#### [ATO](#)

Three LPLC bulletins:

- [1 July new CGT withholding payments for real property sales of \\$2M or more](#)
- [New CGT withholding payments for options, company title interests and indirect Australian real property transactions.](#)
- [1 July 2016 new CGT withholding payments – practical examples](#)

## CGT - example of a claim

### Background

A practitioner acted for a husband in a matrimonial dispute. Agreement was reached after many weeks of negotiations. The practitioner prepared and sent draft consent orders to the client and spoke with him on two occasions about the draft.

The orders provided for the transfer of an investment property from the wife to the husband and for the wife to retain ownership of the principal place of residence.

Two years after the orders were made the husband contacted the practitioner complaining that he only recently realised that if he sells the investment unit that was transferred to him he would have to account for any capital gain.

The client believed the orders should have required the ex-wife to pay any CGT.

The practitioner was firmly of the view that the client understood the possible CGT consequences and got the best deal they could have in the circumstances but there was no written advice to the client about the CGT consequences.

### Question

- What processes do you put in place to prevent settlement remorse?

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## CGT exercise

### Background

You act for a husband and wife selling 28 Sevenoaks, Street Balwyn 3103.

The husband is a foreign resident. The wife is an Australian citizen and resident tax payer.

The property sold for \$2M pursuant to a contract dated 22 April 2017.

Settlement is due in 60 days. The sale is input taxed for GST purposes.

### Action

List three issues you would raise with your clients about CGT.

1. \_\_\_\_\_  
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2. \_\_\_\_\_  
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3. \_\_\_\_\_  
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\_\_\_\_\_

# Goods and Services Tax (GST)

## Overview

**Main legislation:** *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth)

**Commencement:** 1 July 2000

**Imposition:** 10 per cent value added tax payable on most goods and services. Only registered businesses can collect GST and those in the chain of supply are entitled to claim a credit for any GST paid. The end consumer is not entitled to claim a credit.

## Examples of supplies

Taxable, input taxed, going concern

## Causes of GST claims

- Failure to manage the legal issues.  
Example - did not check that the supply qualified as a going concern. See s.38-325.
- Simple oversight.  
Example - margin scheme 'box' not completed.
- Poor engagement management.  
Example - a practitioner acted for a client who purchased a property on the margin scheme. When the property was on-sold the practitioner did not discuss with the client whether the margin scheme was to apply to the sale.

## Frequently asked questions

- Can the going concern exemption continue to apply after the tenant has vacated?
- How do I deal with GST when a client is selling a property that is a residence upstairs and a shop downstairs?  
Relevant case: [Ashton v Monteleone](#) [2010] NSWSC 258. In this case the vendor did not deal with the mixed supply issue.

## Two recent cases

*A & A Property Developers Pty Ltd v MCCA Asset Management Ltd* [2016] VSC 653 (2 November 2016)

*FKYL v Commissioner of Taxation* [2016] AATA 810 – 14 October 2016.

## GST - example of a claim

### Background

A practitioner acted for a vendor selling apartments off-the-plan. The practitioner was advised that the margin scheme was to be applied to the sale of the lots.

The practitioner prepared the off-the-plan contract as a proforma and this proforma was used in the sale of all lots. There were more than 100 lots involved.

The contract did not specify that the 'margin scheme' applied. The mistake was discovered many years later during an audit by the ATO.

The practitioner was instructed to assist with obtaining the agreement of all purchasers to apply the margin scheme. The client ultimately paid full GST on contacts where the consent could not be obtained and brought a claim against the practitioner for this amount.

### Questions

- What processes would you put in place to prevent this claim?

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- Can this error be cured post contract?

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### Notes

Since 2005 there has been a requirement that the parties agree in writing to apply the margin scheme.

The ATO guide for staff PSLA 2005/15 provides guidance about when the ATO will exercise discretion to extend the time in which the agreement in writing must be made to apply the margin scheme under Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth).

Section 75-5(3) introduced in 2009 provides that an acquisition is ineligible for the margin scheme in certain circumstances. Examples include:

- the property was acquired as a going concern
- the acquisition of the property was made on a full GST basis.

## GST exercise

### Background

You receive a draft contract and section 32 statement from a client buying a factory in Officer. The vendor is an owner occupier.

The client tells you they are prepared to pay \$1.2M, with a 10 per cent deposit and a 60 day settlement.

None of the GST boxes have been completed but the contract contains a special condition about GST.

### Special condition

*For the purposes of this special condition: 'GST' means GST within the meaning of the GST Act; 'GST Act' means A New Tax System (Goods and Services) Act 1999; Expressions used in this special condition which are defined in the GST Act have the same meaning as given to them in the GST Act.*

*The consideration payable for any taxable supply made under this contract represents the value of the taxable supply for which payment is to be made; Where a taxable supply is made under this contract for consideration which represents its value, then the party liable to pay for the taxable supply must also pay at the same time and in the same manner as the value is otherwise payable the amount of any GST payable in respect of the taxable supply.*

### Action

List three issues you would raise with your purchaser client about GST.

1. \_\_\_\_\_  
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2. \_\_\_\_\_  
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3. \_\_\_\_\_  
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### Relevant case

[Cityrose Trading Pty Ltd v Booth & Anor](#) [2013] VSC 504

## Tax issues checklist

This checklist contains the most common taxes and related charges and is not intended to be exhaustive. Ticking a box indicates who is responsible for considering the selected item. Both practitioner and client may be selected. A column has been included for initial comments. It is recommended that a memorandum be sent to the client after the checklist is completed setting out what was agreed.

Duty			
Item	Client	Practitioner	Comments
Estimate – <a href="#">transfer duty</a> \$.....	<input type="checkbox"/>	<input type="checkbox"/>	
Exemptions – eg <a href="#">spouse</a>	<input type="checkbox"/>	<input type="checkbox"/>	
Concessions – eg <a href="#">pensioner</a>	<input type="checkbox"/>	<input type="checkbox"/>	
First home owner grant - <a href="#">FHOG</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Principal place</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Land rich</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Farmland</a>	<input type="checkbox"/>	<input type="checkbox"/>	
Growth areas infrastructure contribution - <a href="#">GAIC</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Aggregation</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Congestion levy</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Lease duty</a> – ie right of first refusal	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Self-managed superannuation fund</a> issues	<input type="checkbox"/>	<input type="checkbox"/>	
Request a <a href="#">private ruling</a>	<input type="checkbox"/>	<input type="checkbox"/>	
For more information go to: <a href="http://www.sro.vic.gov.au">www.sro.vic.gov.au</a>			

CGT			
Item	Client	Practitioner	Comments
Estimate of amount payable \$.....	<input type="checkbox"/>	<input type="checkbox"/>	
Withholding obligation	<input type="checkbox"/>	<input type="checkbox"/>	
Exemptions <ul style="list-style-type: none"> <li>• Principal place</li> <li>• Pre 20 September 1985 assets</li> <li>• Rollover relief</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
Long term contracts spanning multiple financial years	<input type="checkbox"/>	<input type="checkbox"/>	
Deceased estate – payment by testator and/or beneficiaries	<input type="checkbox"/>	<input type="checkbox"/>	
For more information go to LPLC CGT withholding obligation <a href="#">bulletins (x3)</a>			
Land tax			
Item	Client	Practitioner	Comments
<a href="#">Principal place exemption</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Dual principal place exemption</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Trust rate</a> – lodge form 8 notice	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Foreign owner</a> rate (absentee owner)	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Special land tax</a> – a one off payment where an exemption ceases to apply	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Other exemptions</a> – eg: retirement villages	<input type="checkbox"/>	<input type="checkbox"/>	
Administrative matters			
Item	Client	Practitioner	Comments
<a href="#">ABN application</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">TFN application</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Lost superannuation</a>	<input type="checkbox"/>	<input type="checkbox"/>	

## Lodging fees

Item	Client	Practitioner	Comments
<u>Lodging fee:</u> Estimate \$.....	<input type="checkbox"/>	<input type="checkbox"/>	

For more information go to:

<http://www.delwp.vic.gov.au/property-and-land-titles/forms,-guides-and-fees/fees>

Note - Land Registry lodging fees are subject to annual increases by the State Government from 1 July each year.

## Subdivisions

Item	Client	Practitioner	Comments
Public open space	<input type="checkbox"/>	<input type="checkbox"/>	
Planning / development levy	<input type="checkbox"/>	<input type="checkbox"/>	

## Other charges

Item	Client	Practitioner	Comments
Local council	<input type="checkbox"/>	<input type="checkbox"/>	
Water rates	<input type="checkbox"/>	<input type="checkbox"/>	
Owners corporation	<input type="checkbox"/>	<input type="checkbox"/>	
Estate agents commission / fees	<input type="checkbox"/>	<input type="checkbox"/>	
Fire services property levy	<input type="checkbox"/>	<input type="checkbox"/>	
Insurance	<input type="checkbox"/>	<input type="checkbox"/>	

## GST checklist

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

References to divisions and sections can be found in [A New Tax System \(Goods and Services Tax\) Act 1999 \(Cwlth\)](#)

### Input taxed supplies

#### Is the supply wholly input taxed?

No GST payable where the supply is input taxed. The recipient of an input taxed supply is not entitled to an input tax credit.

Existing residential premises are input taxed.

Supplies which are not input taxed include:

- new residential premises – see [ATO information](#)
- vacant land - see s.9-5 and [ATO information](#)
- commercial real estate
- commercial residential premises - see Division 87 and [GSTR 2012/6](#) and [ATO information](#).

See s.40-5 to s.40-130 and [GSTR 2012/5](#)

### Registration

#### Is a party registered for GST?

You can check a parties' GST status by searching on the Australian Business Register (ABN lookup) for the entities current details. You can search by name, ACN and/or ABN. Go to: <http://abr.business.gov.au/>

If a party is a trustee you need to determine the GST status of the trust not the trustee.

#### Is a party required to be registered?

Must register where turnover is \$75,000 or more.

Turnover consists of current GST turnover and projected GST turnover and includes turnover from all activities and sources.

Sometimes the sale of an asset, such as land, may be considered the sale of trading stock where for example, the property was purchased for development and resale. The proceeds will be considered turnover and not capital. See [GSTR 2001/7](#) about the meaning of turnover.



## Land transactions

### Do any of the following special rules apply?

#### **Going concern**

The supply of all things necessary for the continued operation of an enterprise carried on until the day of supply. The supplier and recipient must be registered for GST purposes and agree in writing that the supply is of a going concern.

Where there is a nomination, the nominee and the supplier need to agree in writing that the supply is of a going concern.

If before settlement a tenant vacates the ATO considers that an entity's letting enterprise continues when premises that have been let become vacant and the landlord immediately commences and maintains a marketing campaign to re-let the property on reasonable commercial terms.

For the sale of tenanted commercial premises pursuant to the standard contract of sale of real estate in Victoria:

1. Refer to general condition 13 relating to GST.
2. The contract must contain the words 'going concern' and 'subject to lease' in the relevant boxes in the particulars of sale.

See s. 38-325, s.135-5, s.135-10 and [GSTR 2002/5](#)

#### **Margin scheme**

On the margin scheme GST is calculated on the difference between the value of the land when acquired and the sale price on a subsequent sale.

For example, a home owner sells their existing home to a developer for \$500,000. The developer then builds five townhouses on the land. The developer can use the margin scheme in the contracts of sale for the five townhouses. Assume each sold for \$600,000 with a land value of \$100,000 each. GST is calculated on \$600,000 minus \$100,000 being GST of \$50,000.

The margin scheme cannot be applied in certain circumstances the most common of which is where the property was acquired through a taxable supply to which the margin scheme was not applied. See s.75-5(3).

Special rules relating to calculating the cost of acquisition apply in certain circumstances. See s.75-11.

An input tax credit cannot be claimed where the margin scheme applies and the supplier is not obliged by law to provide a tax invoice. See s.75-20 and s.75-30.

See also [ATO information](#) and rulings [GSTR 2006/7](#) and [GSTR 2006/8](#) and [Determination MSV 2009/1](#).

For the sale on the margin scheme pursuant to the standard contract of sale of real estate in Victoria:

1. Refer to general condition 13 relating to GST.
2. Seek instructions as to whether the price is 'plus GST' or 'GST inclusive'.
3. Where instructed that the price is 'plus GST' the contract must contain the words 'plus GST' in the relevant box in the particulars of sale.
4. The contract must contain the words 'margin scheme' in the relevant box in the particulars of sale.

□ **Farmland**

The sale of farmland is GST-free where a farming business has been carried on for at least five years preceding the supply and the recipient of the supply intends that a farming business be carried on, on the land.

See s.38-475 and 38-480 and [ATO information](#)

For the sale of farmland pursuant to the standard contract of sale of real estate in Victoria:

1. Refer general condition 13 relating to GST.
2. The contract must contain the words 'farming business' in the relevant box in the particulars of sale.

□ **Substantially renovated residential premises**

The sale of substantially renovated residential premises is usually a taxable supply. In summary substantial renovations means all, or substantially all, of a building is removed or replaced.

See s.195-1 and [GSTR 2003/3](#)

For the sale of a taxable supply pursuant to the standard contract of sale of real estate in Victoria:

1. Refer general condition 13 relating to GST.
2. Seek instructions as to whether the price is 'plus GST' or 'GST inclusive'.
3. Where instructed that the price is 'plus GST' the contract must contain the words 'plus GST' in the relevant box in the particulars of sale.

□ **Mixed supply**

Some supplies are mixed supplies for GST purposes, for example the supply of a dwelling and shop in the same building. This means GST is payable on the supply of the shop but not the supply of the dwelling.

The purchase price must be apportioned between the two components of the sale. The basis of the apportionment should be set out in the contract in a special condition. Apportionment can be on any reasonable commercial

basis that does not skew the apportionment towards one component or the other. It can be on the basis of rents or council values or a written appraisal and/or sworn valuation from an estate agent or valuer.

See [GSTR 2001/8](#)

For the sale of a mixed supply pursuant to the standard contract of sale of real estate in Victoria:

1. Refer general condition 13 relating to GST.
2. Seek instructions as to whether the price is 'plus GST' or 'GST inclusive' in relation to any taxable supply.
3. Where part of the supply is a going concern the contract must contain the words 'going concern' in the relevant box in the particulars of sale.
4. Where part of the supply is farmland the contract must contain the words 'farming business' in the relevant box in the particulars of sale.
5. Your special condition should explain which part of the supply is taxable, input taxed, going concern, farming business as applicable.

### Other considerations

#### **Are the parties 'associates'?**

The supply to an associate is deemed to be at market value except where the recipient is registered for GST and would be entitled to a full input tax credit.

See Division 72.

#### **Is a party a bare trustee?**

Special rules apply where an entity causes the trustee of real property (held on a bare trust for the entity) to transfer the property to a third party. For example, no GST is payable on a transfer by a retiring bare trustee to a new bare trustee.

See [GSTR 2008/3](#)

### The contract

#### **Is GST properly dealt with in the contract?**

When completing the particulars of sale in the LIV standard contract of sale:

1. consider whether 'plus GST' needs to be inserted
2. make sure the right boxes are ticked about GST.

### Settlement

#### **Has GST been accounted for on the adjustments?**

See ATO ruling about adjustments: [GSTR 2004/9](#) and [GSTD 2006/3](#)

□ **Is a tax invoice required?**

A tax invoice is required for all taxable supplies. In preparation for settlement make a written request for a tax invoice at least 28 days prior to settlement.

See s.29.70 which gives a supplier 28 days to provide a tax invoice on request.

□ **Does the tax invoice contain all relevant information?**

For example, ABN of supplier and price for the supply.

**More information**

- A lot of information is available about GST on the LPLC website:  
[www.lplc.com.au](http://www.lplc.com.au)
- ATO information:  
<https://www.ato.gov.au/General/Property/In-detail/GST/Property-contract-and-tax-invoice---GST-questions/>  
[Common GST problems and property](#)
- Can't find the answer in the LPLC FAQs – please email Derry Davine from the LPLC GST hotline: [dc.davine@bigpond.com](mailto:dc.davine@bigpond.com)