

## GST WITHHOLDING FOR PROPERTY

The following are my comments in relation to the Exposure Draft released for comment.

Please note that I still consider that some fundamental aspects of the proposed legislation are not what I consider to be optimal. For example, in my view, it would be better to:

1. Make the GST withholding a fixed percentage of the prima facie “contract price” (when not using the margin scheme), rather than attempting to calculate the precise amount of GST that will ultimately be payable by the vendor in respect of the final “consideration” for the supply to be made. That is because the “contract price” will almost always need to be altered to include adjustments such as ‘settlement day adjustments’ and potentially other adjustments for changes to consideration for, as an example, changes to the consideration for an extended or a delayed settlement (especially where broad acre potential residential land, or lengthy settlements subject to zoning changes etc, are involved). The withholding percentage could be fixed by a Regulation (eg as is it for Reduced Input Tax Credits), and could simply be, say, 9.0% of the “contract price”. That would make the process considerably simpler for every person involved (the vendor, recipient, conveyancer, financier, lawyers, real estate agents, accountants and the ATO).
2. Furthermore, if the margin scheme has been elected, the same approach as the above would be taken, but the calculation would be determined, also by a Regulation, and could simply be, say, 7.5% of the “contract price”.
3. The process in 1 and 2 above is similar to PAYG or ‘no ABN’ withholdings where the withholding is simply a Regulatory withheld amount that is not necessarily equal to the ultimate income tax liability. This will totally eliminate the need for the very complex, inefficient and costly ‘rapid refund’ protocols being put in place.
4. Further, the risk to Revenue could be significantly reduced by the ATO enforcing the current law and requiring vendors to move to monthly lodging when they breach the ‘Projected Turnover’ threshold.
5. I also consider that consideration should be given to allowing “exemptions” from the withholding regime for taxpayers with a strong record of tax compliance on a basis that would need to be worked out. Such a process already exists in relation to the deferred GST import arrangements.

However, on the basis that Treasury has rejected the above suggestion, the following comments on the Draft are based on the current policies implicit from the Draft proceeding.

A. s 14-250 (1):

- a. it is noted that it places the requirement to “pay” the withholding on the “recipient” ie “you”. That makes sense, but see following comments below

B. s 14-250 (5):

- a. it should be clarified that the term “deposit” refers to “security deposits” under Division

- b. does not take into account that the supplier might be registered on a non-cash basis (which is likely), and its liability to attribute GST may arise well before the payment of any consideration, and depending on whether a tax invoice has been issued, the recipient might not be entitled claim to an input tax credit (if the recipient is entitled to make such a claim)
- c. does not take into account that the “consideration” might not be known, or even determinable, at that time and the special attribution rules. Also note that the ATO Determination takes the position that ‘settlement day adjustments’ are not adjustments for the purpose of Division 19
- d. does not take into account adjustment events under Division 19
- e. What constitutes payment, noting the various forms of remitting GST to the Commissioner

C. s 14-250(6)

- a. it is unclear how it is intended to operate when the supply is an ‘instalment contract’ or where it is not an instalment contract but where the consideration exceeds, at some stage, what constitutes a deposit under Division 99

D. s 14-250(7)

- a. see comments in 1 and 2, and B(c) and (d) above

E. s 14-250 (8)

- a. see comments in 1 and 2 above
- b. it should be clarified that the term “deposit” refers to “security deposits” in Division 99
- c. It seems to be the wrong way around (ie the reduced amount seems to refer to the amount not subject to the withholding). Suggest adding “to which subsection (2) applies” after “supplies”
- d. what is meant by “practicable to ascertain”? Is it a reasonable proportion? Are the relative market values? Does s 9-80 apply (held to be ineffective in the Luxotica case)? Does it include adjustment events?

F. s 14-255 (1)

- a. what is the authority, and is it appropriate, that the TAA seeks to “stop” a taxable supply from proceeding? (in my view inappropriate, and question the legislative authority to cause that). Alternatively, it could mean that if the notice is not given, there is no taxable supply and no withholding obligation? (in my view, not what Treasury would want)
- b. “another entity” and “the other entity” are introduced– are/can they be different entities, or should one or both instead be the “recipient” to be consistent with previous provisions? Similar issues are commented on below.
- c. it is now very common for settlements to be deferred, including for ordinary supplies of new residential premises. That is arising for foreign recipients and others due to tighter financing arrangements and an uncertain property market. It is especially

common for “potential residential land”. What are the consequences if the settlement of the supply is deferred (ie could end up being months later)?

- d. now says the “other entity” must pay the withholding, inconsistent with A above
- e. (b)(5)- “such other matters” should include the previous matters under (1)(b) ii, iii and iv.

G. s 14-255 (5)

- a. Should it also include, at the end, “or potential residential land”?

H. s 18-60 (1)

- a. Confusion is arising by making reference to “An entity”, “the entity”, “another entity” and “recipient”, and other comments above.
- b. What happens if withheld but not remitted?

I. s 18-60 (2) (b)

- a. Should “supply” instead be “GST payable”

J. s 18-85 (1)

- a. See comments in 1 and 2 above
- b. Reference is now made to “An entity (the recipient), causing further confusion. Should all references for payments, notices, applications, etc be to the recipient only, who can be represented by various agents (eg partners, lawyers, financiers, etc)

K. Other issues to consider include:

- a. Dealings involving ‘options’
- b. Dealings involving agents of incapacitated entities, and preferential payments to the Commissioner

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