



fact sheet

for property managers

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Managing GST in Commonwealth property transactions: be aware of the risks

This fact sheet provides Australian Government agencies with guidance on managing GST in some common property transactions.

Commercial leasing

Agencies need to make sure that the lease properly protects the agency from a GST point of view. They need also to be aware of the GST implications of the various payments and other provisions of the lease. For example:

- Contributions to outgoings attract GST in the same way that ordinary rent does. Agencies need to ensure that the lessor is not double-dipping on outgoings.
- Paying out a make-good obligation on termination may involve a separate taxable supply by the lessor. Advice needs to be considered in these situations.
- More generally, tax invoices need to be obtained for all enterprise inputs: office premises, cleaning, postage, stationery, consultants, capital purchases, and office equipment.

If a lease incentive is provided by the lessor, this may also have GST implications:

- A cash incentive to enter into a lease is consideration for a taxable supply by the lessee to the lessor: 1/11th will be payable to the ATO via BAS procedures.
- Whether a fit-out incentive involves a separate taxable supply usually depends on which party will own the fit-out. If the lessee owns it, the lessor will be liable for GST.

Selling unimproved land

Government land disposals are generally GST-free if the land has 'no improvements'.

- Purchasers often try to influence an agency to treat a land disposal in this way. Be aware of the commercial reasons for doing this and the dangers involved for the agency.
- Whether land has 'no improvements' is a matter of fact to be measured against the 'enhancing market value' test. A public ruling provides assistance in this regard (see GSTR 2006/7).
- All information about the land should be gathered in advance of any disposal. Sometimes it is necessary to search historical sources, including old photographs.
- In cases of doubt about the correct position, legal advice should be considered.
- If land is sold GST-free on the basis that it is unimproved, it is important to shift the tax risk to the purchaser. This is achieved by GST recovery clauses and special indemnity provisions.

Margin scheme

Some property disposals are taxed on a concessional basis under what is called the 'margin scheme'. This is often advantageous to purchasers, especially developers.

- Where it applies, GST is payable on the difference between the sale price and a valuation (usually undertaken as at 1 July 2000).
- No tax invoice is given on margin scheme sales and no credit is available.
- Purchasers often try to influence an agency to treat a land disposal in this way. Again, be aware of the commercial reasons for this and the dangers involved for the agency.
- In order to shift the tax risk to the purchaser, GST recovery clauses and special indemnities are advisable before the agency agrees to apply the margin scheme.
- It is common practice to require the purchaser to pay for the valuation usually required under the margin scheme, but the agency should retain control of the process.
- It is also advisable to scrutinise valuations before they are accepted. Valuations can be challenged by the ATO if they proceed on the basis of an error in principle.

Forfeited deposits

- Deposits forfeited in taxable property transactions are consideration for a separate supply by the vendor, and on which GST is payable at the time of forfeiture.

Swapping land

Some agencies engage in land swaps with private parties from time to time. This is often referred to as countertrade, barter, in-kind supplies or swapping.

- Agencies need to remember that GST is usually payable on each side of the transaction, by reference to the GST-inclusive market value of each piece of land swapped.
- However, be aware that a public ruling provides relief by allowing arm's length parties to adopt a presumption that each thing swapped is of equal market value (see GSTR 2001/6).
- Market value is determined on a reasonable commercial basis, generally without the need for an expensive and possibly protracted valuation exercise.
- This allows the parties simply to agree market value, swap tax invoices on settlement, and net off liabilities and credits in their respective next BAS returns.
- Neither party pays money to the other, and neither of them pays money to the ATO.

Residential premises

Some agencies sell off unwanted housing stock from time to time.

- If they are 'residential premises' at this stage, no GST is payable. One downside here is that credits are not claimable for inputs to the selling process (e.g. legal expenses).
- To be 'residential premises', it must be possible to say that they are 'to be used predominantly for residential accommodation' (regardless of the term of occupation): s 40-65(1) of the GST law.
- The ATO view, set out in GSTR 2000/20, is that whether premises are 'residential premises' is determined exclusively by reference to their physical characteristics.
- The correctness of the ATO's view was confirmed by the Federal Court in a recent case, *Sunchen Pty Ltd v Commissioner of Taxation* 2010 ATC 20-229. In that case, the Court accepted that the characteristics of property, and not any person's intended use of the property, determined whether it was to be used predominantly for residential accommodation.
- Agencies are best placed by knowing as much as possible about the premises in question, as well as about all relevant circumstances of their disposal.

More information

If you require further information about AGS's property-related GST services, please contact one of our GST specialists:

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