

NEWS ALERT 07.09.18

# NEW GST WITHHOLDING REGIME— *beware the pitfalls*

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The new GST withholding regime has now been in place for about two months and it seems the initial teething problems have largely been resolved. However, Mark Lyons and Luke Hefferan from our Real Estate team warn there are some pitfalls sellers need to know about when conducting transactions under this new regime.

## OVERVIEW OF THE REGIME

The new GST withholding regime came into effect nationally on 1 July 2018. For contracts entered into from that date, a seller of new residential premises or vacant land where the land is “potential residential land” must notify the buyer of the supplier’s details and the amount of GST the buyer needs to withhold at settlement.

Once the seller has provided this information, the mechanism put in place by the ATO requires the buyer to complete forms—

- detailing information about the supplier, receiver, property and GST amount
- confirming the contract is proceeding to settlement and re-confirming the GST amount the buyer needs to withhold.

If this process is followed correctly, the seller is entitled to a credit on their next BAS equivalent to the GST amount retained at settlement.

Although the new Legislation requires the buyer to retain the GST amount and pay it to the ATO, the buyer has a full statutory defence from any penalty if they give the seller a bank cheque for the GST amount at settlement (for the seller to promptly forward to the ATO). The REIQ and Queensland Law Society sensibly adopted this position when updating the standard REIQ contract so, under a standard Queensland sale contract, the buyer must provide a bank cheque for the GST amount to the seller at settlement.

This is not the approach adopted in the standard land sale contracts in New South Wales and Victoria where the buyer retains the cheque for the GST amount and must pay it to the ATO. We expect this contractual position may change in the future as the regime progresses. In the interim, a seller in these states should consider negotiating with the buyer to adopt a position where the bank cheque for GST is delivered to the seller at settlement. This position gives greater control to the seller and ensures the GST amount is promptly remitted to the ATO to avoid delays in obtaining a credit on the seller’s next BAS.

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### CONTRACT PRICE

Generally, the GST amount is calculated on the contract price without regard to any 'normal adjustments' such as rates/water adjustments, release of mortgage fees etc. However, price adjustments, including for example increases for furniture packages, are not included as normal adjustments. In these cases, if the seller has already given the buyer a notice for the original contract price, the seller needs to give a new notice after the price adjustment.

### REFUNDS FOR INCORRECTLY PAID AMOUNTS

A current grey area with the regime is refunds to sellers for GST amounts which are incorrectly withheld and paid to the ATO by the buyer (perhaps due to a seller giving notice to the buyer to withhold GST then later discovering the supply is a non-taxable supply).

The ATO's Law Companion Ruling (LCR) is clear that in the case of GST exclusive contracts a buyer (and not the seller) can apply for the refund and the ATO will consider each application for refund on a case by case basis (which in fact contradicts the position taken by the government in the explanatory memorandum released with the legislation). But, on a stringent reading of the legislation, there is no statutory provision permitting the buyer to apply for a refund. Also, the examples used in the LCR only relate to GST exclusive contract and the LCR is silent about the ATO's position for GST inclusive contracts. As GST inclusive contracts are commonplace for the sale of new residential property, we expect the LCR will be updated to clarify this position as the regime progresses.

### ADDITIONAL ADMINISTRATIVE COSTS

The ATO Form 1 requires the buyer to complete approximately 25 different details about the transaction. As the regime is still in its early stages, the ATO forms we have received from buyers to date often contain errors. These errors can only be corrected by cancelling the original form and lodging a new correct form.

It is prudent, particularly for developers or those conducting large numbers of transactions, to factor in this expense when determining the cost or assessing the financial viability of a transaction.

### NEXT STEPS?

Our Real Estate lawyers can answer any queries you may have about how this new regime impacts your transactions.