

Important things to look out for when entering into property transactions!



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GST AND SALE OF RESIDENTIAL AND COMMERCIAL PROPERTIES



A number of recent cases (2015 and 2016) involving taxpayers and the Tax Office highlight the need to have draft contracts for sale of properties reviewed before they are signed.

To rely on standard form contract available through the Law Institute and or The Real Estate Institute of Victoria does not ensure there will not be a dispute, penalties and or audits. This has been made very obvious on checking three recent cases involving GST and Property.

The lessons or issues that need to be considered include:

1. Should the vendor be registered for GST?
2. Is GST payable?
3. Does the 'Five year rule' apply for new residential property or is it not available?
4. Was there a supply under the margin Scheme; does or could the Margin Scheme apply, and has it been applied correctly?
5. Have any input tax credits (ITC's) been claimed and were they claimed correctly in previous BAS returns?
6. Does the contract clearly specify the GST status of the contract?
7. Is there a GST recovery clause in the contract that will protect the vendor?
8. Does the contract specify how the GST will be calculated?
9. Does the contract carefully and clearly spell out the 'true common intention' of the parties?
10. Whether the principle of rectification might need to be relied upon by the vendor if a common mistake in recording the party's agreement occurs?
11. Is the standard GST clause appropriate and does it reflect the true common intention' of the parties? Standard clauses can be helpful, but can result in costly errors if incorrectly relied upon.
12. For GST-free sales of commercial property where it constitutes the sale of a going concern, has the vendor insisted that a GST indemnity' clause is included in the contract to ensure the vendor can recover the GST of the ATO conducts an audit and disagrees that the supply is GST-free?
13. Has the contract been reviewed by a GST specialist, i.e. an accountant and tax agent who is conversant with GST and property issues prior to the contract being signed? This will ensure the GST clause reflects the intended GST position of the parties. The Tax Office have used this as a reason for applying penalties to a taxpayer who made an error and did not have the sale of property contract checked by a GST property specialist.
14. Have the two contracting parties documented their subjective understanding of the 'true common intention' as to whether the sale price is GST-inclusive or GST-exclusive?

15. Is there consistency in communication between all relevant parties, including the contracting parties, real estate agents, solicitors, auctioneers? Has any advertising been consistent with the intended GST position of the parties?
16. Ensure any tax invoice requirements, if required are met.

Things can go right, but if left to chance a dispute can arise. The above questions are the lessons from these two recent cases that involved disputes between the contracting parties and one GST case involving the Tax office and a vendor.

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