

# ***LCR 2018/4 - Purchaser's obligation to pay an amount for GST on taxable supplies of certain real property***

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## **Purchaser's obligation to pay an amount for GST on taxable supplies of certain real property**

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### **Relying on this Ruling**

*This publication is a public ruling for the purposes of the Taxation Administration Act 1953.*

*This Ruling describes how the Commissioner will apply the amendments in Schedule 5 of the Treasury Laws Amendment (2018 Measures No. 1) Act 2018.*

*If you rely on this Ruling in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the Ruling if it does not correctly state how a relevant provision applies to you.*

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### **What this Ruling is about**

1. This Ruling is about GST notification and withholding requirements for vendors and purchasers of residential premises and potential residential land.
2. Schedule 5 to the *Treasury Laws Amendment (2018 Measures No. 1) Act 2018* (the Act) amends Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to require the purchaser of certain types of real property to pay the Commissioner an amount relating to the GST payable by the vendor. As a consequence of this payment, the purchaser no longer has a liability to the vendor for that amount.
3. The purchaser's liability arises if they are the recipient of a taxable supply by sale or long-term lease of new residential premises, or potential residential land. Some exclusions apply (see paragraphs 17 to 22 of this Ruling).
4. The vendor is then entitled to a credit for the amount paid to the Commissioner by the purchaser. The credit arises when the vendor's net amount is assessed on their GST return.
5. This Ruling explains how the amendments apply, including:
  - the types of supplies for which purchasers are required to pay
  - when a purchaser is required to pay
  - the amount the purchaser is required to pay
  - the requirement for a vendor to provide a notice to the purchaser, and
  - the penalties that may apply to vendors and purchasers.

### **Meaning of terms used in this Ruling**

6. Unless otherwise stated, all legislative references in this Ruling are to Schedule 1 to the TAA 1953 (as amended by the Act where the context requires).
7. The 'GST Act' is a reference to the *A New Tax System (Goods and Services Tax) Act 1999*.
8. This Ruling uses the term 'vendor' as a reference to the entity making the supply and the term 'purchaser' as a reference to the 'recipient' of the supply.
9. 'GST withholding obligation' and 'GST withholding payment' refer to the purchaser's obligation to pay an amount under section 14-250.

### **Application of the amendments**

10. The Act applies to supplies for which any of the consideration (other than consideration provided as a deposit) is first provided on or after 1 July 2018. It applies whether a contract for the supply was entered into before, on or after commencement of the measure.

### **Transitional rule**

11. However, the Act does not apply if:
  - (a) the contract was entered into before 1 July 2018, and
  - (b) consideration for the supply, other than a deposit, is first provided before 1 July 2020.

### **When is a contract 'entered into'?**

12. The time when a contract is 'entered into' is based on general contract law. For example, a contract was entered into before 1 July 2018 if:
  - (a) the contracts were exchanged between the parties before 1 July 2018, or
  - (b) where the contract was entered into by the purchaser and vendor executing two copies of the contract in turn, the acceptance of the offer was communicated to the other party before 1 July 2018.
13. A contract for the sale of property was not entered into before 1 July 2018 if there was only an option in the nature of an irrevocable offer to purchase or sell the property granted before that date. The relevant date for determining whether the measure applies is the date at which the option is exercised.

### **Overview of when a purchaser has a GST withholding obligation**

14. A purchaser has a GST withholding obligation if:
  - (a) they are the 'recipient' of a 'taxable supply'
  - (b) the supply is by way of sale or long-term lease
  - (c) the supply is of
    - (i) new residential premises (apart from some exclusions) – this is explained in paragraphs 17 and 18 of this Ruling, or
    - (ii) potential residential land where particular requirements are met – this is explained in paragraphs 19 to 34 of this Ruling.

15. A purchaser only has a GST withholding obligation when a vendor is making a taxable supply. A vendor will not be making a taxable supply in situations including:

- where the vendor is not registered for GST and not required to be registered for GST as the sale is not in the course or furtherance of an enterprise
- the sale of residential premises is input taxed because they are not 'new residential premises' (refer to paragraph 18 of this Ruling), or
- the sale is a GST-free supply, for example as part of a GST-free supply of a going concern or GST-free farmland.

16. We consider that 'sale', in this context, similar to the GST Act, includes transfers for monetary or non-monetary consideration.<sup>1</sup>

### **Purchaser liability for taxable supplies of new residential premises**

17. A purchaser may have a GST withholding obligation under section 14-250 for acquisitions of 'new residential premises'. The term 'new residential premises' has the meaning given by the GST Act.<sup>2</sup> Section 14-250, however, does not apply to:

- (a) a supply of new residential premises that have been created through substantial renovations, or
- (b) a supply of 'commercial residential premises'.<sup>3</sup>

18. This Ruling does not deal with the definition of these terms as they are covered by other Rulings:

- 'new residential premises' – Goods and Services Tax Ruling GSTR 2003/3 *Goods and services tax: when is a sale of real property a sale of new residential premises?*
- 'residential premises' – Goods and Services Tax Ruling GSTR 2012/5 *Goods and services tax: residential premises*
- 'commercial residential premises' – Goods and Services Tax Ruling GSTR 2012/6 *Goods and services tax: commercial residential premises.*

### **Purchaser liability for taxable supplies of potential residential land**

19. A purchaser may have a GST withholding obligation under section 14-250 if each of the following requirements are satisfied:

- the property is 'potential residential land'
- the property is included in a 'property subdivision plan'
- the property does not contain any building that is in use for a commercial purpose, and
- the purchaser is not registered for GST, or is registered but does not purchase the property for a creditable purpose.

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<sup>1</sup> See, for example, Goods and Services Tax Ruling GSTR 2009/2 *Goods and services tax: partitioning of land* at paragraphs 102 to 109.

<sup>2</sup> See section 40-75 of the GST Act.

<sup>3</sup> See paragraph 14-250(2)(a).

20. A purchaser who is registered and purchases potential residential land under the margin scheme is not making a creditable acquisition.<sup>4</sup> However, they may still be acquiring the property for a creditable purpose. If so they will not have a GST withholding obligation in those circumstances.

21. A purchaser acquires the potential residential land for a creditable purpose if they have a creditable purpose to any extent. That is, if a purchaser acquires the potential residential land for a partly creditable purpose they do not have a GST withholding obligation.<sup>5</sup>

22. Whether a supply is of potential residential land included in a property subdivision plan is determined at the time of settlement of the contract.

### **Meaning of potential residential land**

23. The GST Act defines 'potential residential land' as 'land that it is permissible to use for residential purposes, but that does not contain any buildings that are residential premises'.<sup>6</sup>

24. It is permissible to use land for residential purposes if the land use and planning laws that apply to the land allow residential use of the land. It is not permissible to use land for residential purposes if the land use and planning laws that apply to the land prohibit residential use of the land. Where the land use and planning laws permit a number of uses for the land, one of which is residential use, then the land will be potential residential land.

25. Land use and planning laws typically categorise land by zones. These define the potential uses of the land and say what the land may be used for.

26. For example, residential zonings typically allow 'dwelling use', meaning the land may be used for residential purposes. Commercial or business zoning may also permit use of land for residential purposes. Similarly, agricultural or rural zoning may allow use of land for a residential purpose like a residence on farmland. On the other hand, land may be zoned for industrial use which may prohibit, or not permit, use of the land for residential purposes.

27. Whether it is permissible to use land for residential purposes is not determined by any restrictions imposed by a land owner, for example, by way of a permitted use under a lease or covenant.

28. Land will still be permissible to use for residential purposes even if that use is subject to local government requirements, such as obtaining approval or a permit. For example, it may be necessary to obtain local government development approval before a particular dwelling can be constructed. Despite the requirement for development approval, the residential zoned land is still land that is permissible to use for residential purposes.

29. 'Residential purposes' is not defined in the GST Act. It covers potential use of land for a residence or for residential accommodation. While 'residence' may suggest permanent or long-term occupation, 'residential accommodation' means living accommodation which does not require any degree of permanence of occupation.<sup>7</sup>

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<sup>4</sup> Section 75-20 of the GST Act.

<sup>5</sup> For extent of creditable purpose refer to Goods and Services Tax Ruling GSTR 2006/4 *Goods and services tax: determining the extent of creditable purpose for claiming input tax credits and for making adjustments for changes in extent of creditable purpose* and Goods and Services Tax Ruling GSTR 2009/4 *Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose* at paragraphs 23 to 29.

<sup>6</sup> Section 195-1 of the GST Act.

<sup>7</sup> See *South Steyne Hotel Pty Ltd v. Commissioner of Taxation* [2009] FCA 13 at [35]-[39] and GSTR 2012/5 at paragraphs 74 and 75.

30. The definition of 'potential residential land' excludes land 'that contains any buildings that are residential premises'. In addition, section 14-250 does not apply where the land contains any building that is in use for a commercial purpose. What will be a 'building' depends on statutory purpose and context. Whether or not something is a 'building' which may satisfy subparagraph 14-250(2)(b)(ii) is a matter of fact and degree. To be a 'building' there must be a substantial structure having a roof, floor and walls which provides protection from the elements. It must be of sufficient permanence, and be installed on and integrated to the site in question. Prefabricated and transportable structures may qualify, but a common metal shed without more does not meet these requirements.

31. A building must also be 'in use for a commercial purpose'. This means that there must be a current, actual and ongoing 'use' established as a matter of fact, and that the use demonstrated is objectively 'for a commercial purpose' taking all the circumstances into account. If the building is not in use for a commercial purpose, section 14-250 may apply. Further assistance and guidance on these issues may be sought from the ATO on a case-by-case basis.

### **Meaning of property subdivision plan**

32. The GST Act defines 'property subdivision plan' as a plan:<sup>8</sup>

- (a) for the division of real property, and
- (b) that is registered (however described) under an Australian law.

Note: Examples are strata title plans and plans to subdivide land.

33. State and Territory laws provide for registration of plans relating to subdivision of land.<sup>9</sup> These plans may be referred to as a survey plan or plan of survey, which in some jurisdictions is referred to as a deposited plan once registered. Plans like strata plans and community plans may also be registered. Broadly, a new plan is required if the division or physical description of a parcel of land is changed, for example, because of subdivision.

34. A parcel of land is 'included in a property subdivision plan' if it is described or identified in a registered plan of this kind. When the plan was registered or its purpose is not relevant. For example, if an entity is developing a parcel of land by subdividing the land into a number of smaller lots, those smaller lots will be 'included in a property subdivision plan' when the plan describing the newly subdivided lots is registered.

### **Determining kinds of supplies to which the GST withholding obligation does not apply**

35. The Commissioner may determine by legislative instrument that the requirement to make a payment does not apply to certain kinds of supplies of new residential premises or potential residential land. Where the Commissioner makes a determination the vendor will be liable to pay GST in the ordinary way.

<sup>8</sup> Section 195-1 of the GST Act.

<sup>9</sup> For example, see *Land Title Act 1994* (Qld) Division 3; *Conveyancing Act 1919* (NSW) Part 23 Division 3; *Land Titles Act 1925* (ACT) section 64; *Transfer of Land Act 1958* (Vic) sections 95 and 97; *Land Titles Act 1980* (Tas) sections 11, 17A and 162; *Real Property Act 1886* (SA) Part 19AB Division 2; *Transfer of Land Act 1893* (WA) section 166 and *Planning and Development Act 2005* (WA) section 146; *Land Title Act* (NT) Part 4 Division 3.

36. It is expected that the need for any determination will emerge from the practical application of the new provisions to diverse factual circumstances across different statutory regimes. To be consistent with the statutory purpose, it would only be appropriate to exclude kinds of supplies if there is no risk of 'phoenixing'. Two situations where this might arise are under government affordable housing schemes where the purchaser may make small annual payments over many years that are not known at the time of settlement, or where certain development arrangements involve only non-monetary consideration.

### **When the GST withholding amount must be paid**

37. The purchaser must pay the GST withholding amount to the ATO on, or before, the day on which any of the consideration is first provided for the taxable supply.<sup>10</sup> In most cases this is on, or before, the day of settlement.

38. There is an exception to this rule where a supply is between associates for no consideration, in which case the payment must be made on, or before, the day on which the supply is made. The Commissioner may determine a different day for payment in a legislative instrument. The determination may also provide for amounts to be paid in instalments.<sup>11</sup>

### **Deposits**

39. A purchaser does not have to pay a GST withholding amount at the time when they pay a genuine deposit.<sup>12</sup>

40. In addition, the purchaser does not have a GST withholding obligation if the deposit is forfeited.

41. If the deposit is not a genuine deposit, it will be treated as part of the consideration for the supply. This means the purchaser may be required to pay a GST withholding amount on, or before, paying the deposit to the vendor.

42. Otherwise the GST withholding obligation arises on the first payment of any consideration other than a deposit. If no other consideration has been provided, the purchaser usually has to pay on or before settlement, when they pay the balance of the purchase price.

### **Instalment contracts**

43. Other than a genuine deposit, the first payment under an instalment contract is the first day on which the purchaser pays any of the consideration for the supply. Therefore, the purchaser must pay the GST withholding amount on, or before, the day they provide this first instalment payment.

### **GST withholding amount to be paid**

44. The GST withholding amount to be paid by the purchaser is generally 1/11<sup>th</sup> of the 'contract price'. However, there are some situations where the amount is different. These are summarised in the following table.

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<sup>10</sup> Subsection 14-250(4).

<sup>11</sup> Subsection 14-250(5).

<sup>12</sup> The Commissioner explains the meaning of a genuine deposit for the purposes of Division 99 of the GST Act in Goods and Services Tax Ruling GSTR 2006/2 *Goods and services tax: deposits held as security for the performance of an obligation*.



<b>If:</b>	<b>Then the amount to be paid by the purchaser is:</b>
None of the following circumstances in this table apply (that is, the <b>general rule</b> )	1/11 <sup>th</sup> of the 'contract price' or 'price' <sup>13</sup>
The <b>margin scheme</b> applies to the supply <sup>14</sup>	7% of the 'contract price' or 'price' <sup>15</sup>
The supply is between <b>associates</b> and is without consideration or is for consideration that is less than the GST-inclusive market value of the supply <sup>16</sup>	10% of the GST-exclusive market value of the supply <sup>17</sup>
(a) The supply is only <b>partly a supply of new residential premises or potential residential land to which section 14-250 applies</b> , and (b) it is practicable to ascertain the portion of the consideration that relates to the supply of new residential premises or potential residential land to which section 14-250 applies when consideration is first provided	A 'reduced amount', which is the proportion that relates to the supply to which section 14-250 applies of the amount otherwise determined in the relevant circumstance of this table
There are <b>multiple recipients</b> (not joint tenants)	For each recipient, the proportion of the supply that is deemed to be made to them of the amount otherwise determined in the relevant circumstance of this table <sup>18</sup>

### **'Contract price' compared to 'price'**

45. The law simplifies the calculation of the GST withholding amount<sup>19</sup> to be paid by a purchaser in most circumstances by avoiding the need for the parties to take certain 'normal adjustments' into account.

### **Use of 'contract price'**

46. The calculation is based on the 'contract price' if

- (a) the contract between the parties 'specifies an amount', that is, it expresses a dollar amount, and
- (b) that amount is the 'price' for the supply disregarding 'normal adjustments that apply on completion of transactions of that kind', regardless of whether those adjustments occur.

47. The contract does not specify an amount if it identifies non-monetary consideration without stating an amount for the GST-inclusive market value of that non-monetary consideration.

<sup>13</sup> Paragraph 14–250(6)(b) and subsection 14–250(7).

<sup>14</sup> The requirements of the margin scheme are set out in Division 75 of the GST Act. Generally, the supplier and purchaser must have agreed in writing that the margin scheme is to apply on or before making the supply.

<sup>15</sup> Paragraph 14–250(6)(a) and subsection 14–250(7). This percentage may be varied to a percentage between 7% and 9% by the Minister making a legislative determination under subsection 14-250(8).

<sup>16</sup> There are special rules for determining the value of a taxable supply between associates in Division 72 of the GST Act. The amount the purchaser is required to pay under section 14-250 reflects the operation of the special rules in the GST Act.

<sup>17</sup> Subsection 14–250(9).

<sup>18</sup> Subsection 14-250(11). See paragraph 56 of this Ruling for further information.

<sup>19</sup> See the table in paragraph 44 of this Ruling.

48. If the amount (the price) stated in the contract when it was entered into is varied by a later written agreement between the parties, the contract will specify a new amount. This new amount becomes the 'contract price'. A vendor may need to give a new notice in these circumstances (see paragraph 67 of this Ruling).

49. 'Price' has the meaning given by section 9-75 of the GST Act. Price is a GST-inclusive amount. If a contract specifies a GST-exclusive amount, but it is clear from the contract that GST is to be added, it is accepted that the contract 'specifies an amount that is the price', which is the GST-inclusive amount.

50. The phrase 'normal adjustments that apply on completion of transactions of that kind' refers to the kinds of adjustments that usually apply to sales of real property at settlement. These include rates, taxes and water adjustments calculated to the date of settlement.<sup>20</sup> These normal adjustments include those provided for under the standard form contracts for the sale of land prepared by the law societies or institutes and real estate institutes in Australia.

51. Adjustments that apply before completion (including variations or discounts) are not considered 'normal adjustments that apply on completion of transactions of that kind'. Examples include variations relating to the finish of an apartment that apply before completion and discounts following a building report that are negotiated and apply before completion. These types of adjustments are not disregarded in calculating the GST withholding amount. When they occur by written agreement between the parties they do not require the GST withholding amount to be calculated based on 'price'; rather the varied 'contract price' is used.

#### *Use of 'price'*

52. If the contract does not explicitly state a 'price', the GST withholding amount will be calculated based on the 'price' as defined in the GST Act (GST-inclusive). This includes all monetary and non-monetary consideration for the supply.

53. For example, a sale of an operating retirement village including new residential premises may specify an amount in the contract which, in certain circumstances, may not be the 'price' of the supply. This is because the 'price' includes a 'repayment benefit' that may not be included in the amount stated in the contract.<sup>21</sup> The amount the purchaser is required to pay in these circumstances is 1/11<sup>th</sup> of the price including the repayment benefit, not 1/11<sup>th</sup> of the amount stated in the contract (although this example may also be a case where it is necessary to consider whether the supply is only partly a supply to which section 14-250 applies).

#### **Apportionment**

54. If a supply is only partly a supply to which section 14-250 applies, the parties should take all reasonable steps to apportion the consideration for the supply.<sup>22</sup>

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<sup>20</sup> Note that for GST purposes these types of settlement adjustments are taken into account by the supplier in determining the consideration for the supply (see Goods and Services Tax Determination GSTD 2006/3 *Goods and services tax: are settlement adjustments taken into account to determine the consideration for the supply or acquisition of real property?*)

<sup>21</sup> See Goods and Services Tax Ruling GSTR 2011/1 *Goods and services tax: development, lease and disposal of a retirement village tenanted under a 'loan-lease' arrangement.*

<sup>22</sup> For guidance on apportioning a supply see Goods and Services Tax Ruling GSTR 2001/8 *Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts.*

### **Options**

55. An amount paid as consideration for an option to acquire new residential premises or potential residential land is not consideration for the supply to which section 14-250 applies. An amount of this nature does not need to be taken into account in determining the amount payable by the purchaser.<sup>23</sup>

### **Multiple purchasers**

56. Where there are multiple purchasers, each is deemed to be the recipient of a separate proportional supply. Each purchaser must pay a proportional amount for their proportional supply.<sup>24</sup> For example, two individuals acquiring a property as tenants in common in equal shares are each required to pay 50% of 1/11<sup>th</sup> of the contract price. However, a single payment can be made for the separate liabilities in these circumstances. Joint tenants are treated as a single purchaser and are jointly and severally liable.

### **Non-monetary consideration**

57. A purchaser must make a payment even though the consideration for the supply is made up of non-monetary consideration, whether wholly or in part.

### **Vendor notification requirements**

58. A vendor of residential premises or potential residential land must give a written notice to the purchaser before making the supply.<sup>25</sup> The notice must state whether the purchaser is required to make a payment under section 14-250 in relation to the supply.

59. This requirement applies to all vendors of residential premises and potential residential land, not only those who are registered or required to be registered for GST. If the vendor is not registered or required to be registered for GST, they simply state that the purchaser is not required to make a payment.

60. This notice is not required for:

- (a) a supply of commercial residential premises
- (b) a supply of potential residential land where the purchaser is registered for GST and is acquiring the property for a creditable purpose to any extent.<sup>26</sup>

61. This means that a vendor of potential residential land will need to know whether the purchaser is registered for GST and acquiring the land for a creditable purpose. The vendor can check whether the purchaser is registered for GST by searching the Australian Business Register ([abr.business.gov.au/](http://abr.business.gov.au/)) and can rely on a copy of the search on the day of the supply, or up to seven days before the day of the supply, as evidence that the purchaser was registered. The vendor can rely either on written correspondence from the purchaser or a statement in the relevant contract regarding whether the purchaser is acquiring the land for a creditable purpose.

62. If the purchaser is required to make a payment, the vendor's notice must also state:

- the vendor's name and ABN

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<sup>23</sup> See Goods and Services Tax Determination GSTD 2014/2 *Goods and services tax: where real property is acquired following the exercise of a call option, does the call option fee form part of the consideration for the acquisition for the purposes of subsection 75-10(2) of the A New Tax System (Goods and Services Tax) Act 1999?*

<sup>24</sup> Subsection 14-250(11).

<sup>25</sup> Subsection 14-255(1).

<sup>26</sup> Subsection 14-255(2). 'Creditable purpose' is defined in section 195-1 of the GST Act and relevantly has the meaning given by section 11-15 of the GST Act.

- the dollar amount to be paid by the purchaser under section 14-250
- when the amount must be paid by the purchaser (for example, when the consideration is first provided at settlement)
- the GST-inclusive market value of any non-monetary consideration
- any other matters specified in the regulations.<sup>27</sup>

63. The vendor may give the notice as part of the contract for sale. When this is done, the notice must be easy to identify as a notice for the purpose of section 14-255. Alternatively it may be given as a separate document.

64. The vendor may need to determine certain things when giving the notice, for example, whether the land will be 'new residential premises' or 'potential residential land' at the time of settlement.

65. If there are multiple vendors or multiple purchasers, the notice requirement can be met as part of a single contract or single notice. Any proportions would need to be made clear, for example, if two vendors making separate taxable supplies of their 50% tenants in common interests in a property enter into a single contract, they need to advise the respective amounts to be paid by the purchaser under section 14-250.

66. If a contract allows for a purchaser to be substituted for another purchaser, or if a purchaser is a nominee, the Commissioner will accept that the notification requirements have been met if the notice is provided to the entity listed on the transfer documents and is based on information they have about the recipient's registration and creditable purpose which they reasonably believe is correct.

67. If a notice has been given and then the required information (as outlined in paragraphs 58 and 62 of this Ruling) changes, a new notice must be given.

68. Even if a vendor fails to comply with the notification requirements, the purchaser still has a GST withholding obligation if section 14-250 applies, as described in paragraphs 14 to 34 of this Ruling.<sup>28</sup> In these circumstances, the purchaser should withhold and make a payment based on the information that is known. If the purchaser believes that the supply is a taxable supply to which section 14-250 applies, and there is no agreement between the parties to apply the margin scheme, then generally the purchaser should withhold 1/11<sup>th</sup> of the contract price or price. If there is an agreement between the parties to apply the margin scheme, then the purchaser should withhold 7% of the contract price or price.

### **Purchaser forms**

69. Purchasers are required to notify the Commissioner of the amount in the approved form, on or before the day on which the amount is due to be paid, if they are required to make a payment under section 14-250.<sup>29</sup> The relevant approved forms, including information on how to complete them, are on the ATO website ([ato.gov.au](http://ato.gov.au)).

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<sup>27</sup> At the time of publication of this Ruling there are no regulations.

<sup>28</sup> Subsection 14-255(3).

<sup>29</sup> Subsection 16-150(2).

### **Penalties for vendors who fail to give notice**

70. A vendor may have a penalty imposed for failure to give a notice to the purchaser as required. There are two types of penalty:

- a strict liability offence<sup>30</sup> (there is a defence for this penalty if the vendor's failure to give the notice is a mistake of fact)
- an administrative penalty.<sup>31</sup>

71. The administrative penalty will not apply for a failure to meet the additional notification requirements that apply under paragraph 14-255(1)(b) if a purchaser is required to make a payment, if the vendor reasonably believed they were not required to meet those requirements. The administrative penalty will not be payable if a prosecution is instituted for the strict liability offence.<sup>32</sup>

### **Penalties for purchasers who fail to pay the GST withholding amount**

72. A purchaser may have an administrative penalty imposed for failing to pay the GST withholding amount.<sup>33</sup> The penalty is equal to the amount that the purchaser was required to pay under section 14-250. There are two specific circumstances where the penalty will not apply.

#### ***Exception 1: reasonable reliance on a notice given to them by the vendor***

73. The penalty for failure to pay the GST withholding amount does not apply if:

- the purchaser received a taxable supply of new residential premises (other than commercial residential premises)
- the purchaser was given a notice either<sup>34</sup>
  - stating that the premises are not new residential premises, or
  - indicating that they were not required to pay an amount under section 14-250 for the supply
- at the time the purchaser first provides consideration for the supply, there was nothing in the contract for the supply or any other circumstances relating to the supply that made it unreasonable for the purchaser to believe that the statement or indication was correct.<sup>35</sup>

74. The vendor is required to indicate in the notice whether the purchaser will be required to make a payment under section 14-250 in relation to the supply. As part of giving this notice, the vendor might also state that the premises are not new residential premises. In this situation, a purchaser may consider the indication or statement in light of the contract and circumstances relating to the supply.

75. It would be unreasonable for a purchaser to believe the correctness of a notice indicating they do not have to make a payment if it is clear that the vendor is making a taxable supply of new residential premises. For example, if a purchaser enters into an 'off-the-plan' contract for newly constructed premises from a developer who is registered for GST, and there is a statement in the contract that the purchaser does not have to make a payment under section 14-250 because the premises are not new residential premises.

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<sup>30</sup> Subsection 14-255(4).

<sup>31</sup> Subsection 14-255(6).

<sup>32</sup> Section 8ZE of the TAA 1953.

<sup>33</sup> Section 16-30.

<sup>34</sup> Section 14-255.

<sup>35</sup> Subsection 16-30(2).

**Exception 2: vendor fails to pass on a bank cheque payable to the Commissioner**

76. The penalty for failure to pay the GST withholding amount does not apply if the purchaser gives the vendor a bank cheque payable to the Commissioner for the amount the purchaser is required to pay, on or before the day consideration is first provided.<sup>36</sup> This ensures that a purchaser is protected from penalty if the vendor fails to send the bank cheque to the ATO. A purchaser should keep evidence that they provided the bank cheque to the vendor. Suitable evidence includes a photocopy of the cheque and other evidence from the purchaser's bank that the cheque has been drawn, the purchaser's direction to pay the bank cheque to the ATO, a settlement statement, directions from the vendor and correspondence from the vendor showing receipt of the bank cheque. Evidence that merely shows what was intended by the parties before settlement, and does not show that the purchaser actually gave the bank cheque to the vendor, would not be sufficient.

77. A vendor is entitled to a credit if another entity makes a GST withholding payment in relation to the supply.<sup>37</sup> If the vendor sends the bank cheque to the ATO this will still be a payment made by the purchaser. The bank cheque is being sent by the vendor at the direction of the purchaser. The vendor is acting as an agent for the purchaser in giving the bank cheque, which is given to discharge the purchaser's liability. It gives rise to a credit for the vendor only after the ATO receives it for the purchaser's liability. The bank cheque is not the vendor's money and cannot be used to meet the vendor's other liabilities to the Commissioner.

78. Practically speaking, the vendor and purchaser may agree, as a matter of contract, how the payment will be made by the purchaser. However, a purchaser is not required by the law to give the vendor a bank cheque made out to the Commissioner as part of satisfying the payment obligation. Alternatively, the payment may be made directly to the ATO. The purchaser's liability to make the payment under section 14–250 remains until the payment is made to the ATO, even if a bank cheque has been provided to the vendor.

**Amounts incorrectly paid to the ATO by the purchaser**

79. Generally, if a purchaser incorrectly pays an amount to the ATO in purported compliance with section 14-250, the vendor may apply to the Commissioner for a refund in the approved form.<sup>38</sup> This must be done no later than 14 days before GST must be paid on the supply. We consider this means that the application must be made 14 days before the vendor's GST return must be given for the tax period to which the relevant supply is attributable, which is when assessed net amounts, calculated taking into account GST on supplies, are payable under Division 33 of the GST Act. If a refund is made, no credit is available under section 18-60 to the vendor.

80. The Commissioner is only required to refund an amount to a vendor if satisfied that it would be fair and reasonable to do so. The Commissioner is unlikely to be satisfied that it is fair and reasonable to refund an amount to the vendor if a purchaser incorrectly made a payment in respect of a non-taxable supply where the amount paid to the vendor under the contract was GST-exclusive (the contract included a GST gross-up clause) and the purchaser has paid an amount additional to the contract price to the Commissioner in purported compliance with section 14-250. The vendor will not be entitled to a credit but the purchaser may be entitled to a refund. The Commissioner will consider repayment requests by purchasers on a case-by-case basis.

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<sup>36</sup> Subsection 16-30(3).

<sup>37</sup> Section 18-60.

<sup>38</sup> Section 18-85. This section uses the term 'recipient' to identify the entity entitled to the refund, that is, the vendor. This terminology in the law is consistent with other provisions of Subdivision 18-B dealing with refunds of withheld amounts. It should not be confused with the 'recipient' of a supply for GST purposes, that is, the entity described as the purchaser in this Ruling.

### **Examples**

81. The Explanatory Memorandum to the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018 contains examples which demonstrate the intended application of the law. The examples that follow address some further aspects of the law.

#### **Example 1 – new residential premises with purchaser payment**

82. Scott enters into a contract to purchase a house from Property Co for \$770,000. Scott is not registered for GST and the sale is not made under the margin scheme. Scott pays a 10% deposit with the balance due at settlement. Property Co notifies Scott in the contract that he is required to pay \$70,000 (1/11<sup>th</sup> of the contract price) on or before the day of settlement to the ATO.

83. Scott pays \$70,000 to the ATO and notifies the ATO of the payment. Scott is not required to pay Property Co the \$70,000 despite the contract stating that the price is \$770,000 including GST. Property Co will get a credit for \$70,000 when it lodges its activity statement for the tax period.

#### **Example 2 – potential residential land with purchaser payment**

84. Development Co discovers that the local council has recently changed its by-laws to allow for smaller lots in the area. To take advantage of the by-law change, Development Co purchases a vacant block of land, zoned to allow residential use and without any buildings, with the intention to subdivide it into two lots. They carry out their plan, have the plan of subdivision registered and proceed to make taxable supplies of both lots of vacant land.

85. Development Co enters into a contract to sell one lot to Emma for \$350,000. The sale is not under the margin scheme. Emma is not carrying on an enterprise. Emma pays a 10% deposit with the balance due at settlement. The contract of sale includes the required notice advising Emma to make a payment to the ATO of an amount under section 14-250. Development Co also informs Emma that she must make a payment of \$31,818 to the ATO, which is 1/11<sup>th</sup> of the contract price of \$350,000, on or before settlement takes place.

#### **Example 3 – potential residential land with no notification and no purchaser payment**

86. Continuing with Development Co's facts from Example 2, Development Co then enters into a contract with Razer Property Group to sell the other subdivided lot of vacant land for \$330,000. Razer Property Group is registered for GST, carrying on an enterprise and acquiring the land for a creditable purpose. Razer Property Group provides warranties confirming each of these things in the contract.

87. Development Co does not need to notify Razer Property Group. This is because the land is potential residential land and Razer Property Group is registered for GST and acquiring the land for a creditable purpose. Razer Property Group does not make a GST withholding payment when purchasing this property.

#### **Example 4 – instalment contract sale with first payment a deposit**

88. Hillside Co enters into a contract with Farm Co to buy vacant land. Both entities are registered for GST and the land is potential residential land. Hillside Co plans to construct residential premises on the land and make them available for rent (not for a creditable purpose).

89. *The contract price is \$33 million, which is inclusive of GST, and is payable as a deposit of \$3 million on entry into the contract, with the balance to be paid in quarterly instalments of \$6 million. Hillside Co has been notified by Farm Co that they must make a payment of 1/11<sup>th</sup> of \$33 million, which is \$3 million, to the ATO.*

90. *Hillside Co is not required to make any payment to the ATO when it pays the deposit of \$3 million to Farm Co. However, when Hillside Co pays the first instalment (of five instalment payments due under the contract) of \$6 million, Hillside Co is also required to pay \$3 million to the ATO. This is because this is when Hillside Co first provides any consideration to Farm Co.*

#### **Example 5 – instalment contract sale with first payment not a deposit**

91. *Assume Hillside's facts from Example 4, except that \$15 million is to be paid at entry into the contract, and is not a genuine deposit, with the balance to be paid in three semi-annual instalments of \$6 million.*

92. *The first payment is a part-payment of the instalment contract and Hillside Co is required to pay \$3 million to the ATO and \$12 million to Farm Co.<sup>39</sup>*

#### **Example 6 – section 14-250 only partly applies**

93. *Fisher Property Holdings Pty Ltd constructs a new building comprising residential and commercial premises. On completion they sell the building to Abby with payment due at settlement. The supplies of both the commercial premises and new residential premises are taxable supplies.*

94. *The contract of sale for the new premises includes the required written notification providing relevant details to allow Abby to make a payment to the ATO. The amount of the contract price that is for the new residential premises has been determined by the parties. The amount that Abby is required to pay is expressed in the notification. Abby pays 1/11<sup>th</sup> of the proportion of the contract price that is for the supply of new residential premises to the ATO.*

#### **Date of effect**

95. This Ruling is a public ruling, effective for those who rely on it in good faith from 1 July 2018.

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**Commissioner of Taxation**

27 June 2018

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<sup>39</sup> Section 16–20 discharges the purchaser from liability to pay the supplier for the amount paid to the Commissioner.



**References**

<p>ATOlaw topic(s)</p>	<p>Goods and services tax ~~ Property ~~ Premises ~~ New residential premises  Goods and services tax ~~ Property ~~ Other  Goods and services tax ~~ Taxation Administration Act 1953 ~~ Other  Withholding tax ~~ Other</p>
<p>Legislative references</p>	<p>ANTS(GST)A 1999  ANTS(GST)A 1999 9-75  ANTS(GST)A 1999 11-15  ANTS(GST)A 1999 Div 33  ANTS(GST)A 1999 40-75  ANTS(GST)A 1999 Div 72  ANTS(GST)A 1999 75-10(2)  ANTS(GST)A 1999 75-20  ANTS(GST)A 1999 Div 99  ANTS(GST)A 1999 195-1  TAA 1953  TAA 1953 8ZE  TAA 1953 Sch 1  TAA 1953 14-250  TAA 1953 14-250(2)(a)  TAA 1953 14-250(2)(b)(ii)  TAA 1953 14-250(4)  TAA 1953 14-250(5)  TAA 1953 14-250(6)(a)  TAA 1953 14-250(6)(b)  TAA 1953 14-250(7)  TAA 1953 14-250(8)  TAA 1953 14-250(9)  TAA 1953 14-250(11)  TAA 1953 14-255  TAA 1953 14-255(1)  TAA 1953 14-255(1)(b)  TAA 1953 14-255(2)  TAA 1953 14-255(3)  TAA 1953 14-255(4)  TAA 1953 14-255(6)  TAA 1953 16-20  TAA 1953 16-30  TAA 1953 16-30(2)  TAA 1953 16-30(3)  TAA 1953 16-150(2)  TAA 1953 18-60  TAA 1953 Subdiv 18-B  TAA 1953 18-85  Treasury Laws Amendment (2018 Measures No. 1) Act 2018 Sch 5</p>

	<p>Land Title Act 1994 (Qld)          Conveyancing Act 1919 (NSW)          Land Titles Act 1925 (ACT)          Transfer of Land Act 1958 (Vic)          Land Titles Act 1980 (Tas)          Real Property Act 1886 (SA)          Transfer of Land Act 1893 (WA)          Planning and Development Act 2005 (WA)          Land Title Act (NT)</p>
Related Rulings/Determinations	<p>GSTR 2001/8          GSTR 2003/3          GSTR 2006/2          GSTR 2006/4          GSTR 2009/2          GSTR 2009/4          GSTR 2011/1          GSTR 2012/5          GSTR 2012/6          GSTD 2006/3          GSTD 2014/2</p>
Case references	<p>South Steyne Hotel Pty Ltd v. Federal Commissioner of Taxation [2009] FCA 13; 2009 ATC 20-090; (2009) 71 ATR 228</p>
Other references	<p>Explanatory Memorandum to the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018</p>
ATO references	<p>1-D4MLK70</p>
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