


***GSTD 2012/1A1 - Addendum - Goods and services tax: what are the goods and services tax consequences following the sale of residential premises that are subject to a lease?***

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## Addendum

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### Goods and Services Tax Determination

Goods and services tax: what are the goods and services tax consequences following the sale of residential premises that are subject to a lease?

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Determination GSTD 2012/1 to refer to the High Court's decision in *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49, which is concerned with the goods and services tax consequences following the sale of residential premises that are subject to a lease.

#### **GSTD 2012/1 is amended as follows:**

**1. Paragraph 4**

Omit the paragraph.

**2. Paragraph 5**

Omit the paragraph; substitute:

5. Following a sale of residential premises that are subject to a lease, the purchaser makes a supply of the premises by way of lease, which is an input taxed supply under section 40-35.

**3. Paragraph 8**

Insert at the end of the paragraph:

When determining the proportion of non-creditable use in calculating the amount of any Division 135 adjustment, the price of the purchaser's intended supply of the residential premises by way of lease includes the rent to be paid under the lease.

# GSTR 2012/1

Page 2 of 5

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## 4. Paragraph 11

Omit the paragraph; substitute:

11. *No GST is payable by Young Pty Ltd in relation to the leases because Young Pty Ltd does not make taxable supplies of the leases. Young Pty Ltd is not entitled to input taxed credits in respect of the purchases of the apartments because it makes an input taxed supply of the apartments by way of lease after the sale. Additionally, Young Pty Ltd is not entitled to input tax credits for acquisitions associated with the purchases of the apartments, such as legal services, or for any acquisitions concerning the supply of the apartments by way of lease, such as management services, insurance and maintenance.*

## 5. Paragraph 12

Insert after the paragraph:

12A. *When determining the proportion of non-creditable use as part of calculating any Division 135 adjustment, the price of the input taxed supplies of residential premises that Young Pty Ltd intends to make by way of lease includes the rent to be paid under the existing leases. If Young Pty Ltd only intends to make input taxed supplies of residential premises by way of lease through the enterprise it acquired, the amount of any Division 135 adjustment it has would be one tenth of the price of the supply of the going concern.*

## 6. Paragraphs 17 to 25

Omit the paragraphs; substitute:

17. In *Commissioner of Taxation v. MBI Properties Pty Ltd (MBI)*<sup>7</sup> the High Court found that, in addition to a supply arising when a lease is granted, on purchasing leased residential premises the purchaser assumed the vendor's obligation under the lease to provide the lessee with use and occupation of the premises.<sup>8</sup> The High Court concluded that as a result of assuming and observing this obligation, the purchaser made an input taxed supply of the residential premises by way of lease to the lessee progressively during the remaining lease term.<sup>9</sup>

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<sup>7</sup> [2014] HCA 49; 2014 ATC 20-474; (2014) 92 ATR 241.

<sup>8</sup> *MBI* at [40].

<sup>9</sup> *MBI* at [36] and [40].

**GST consequences*****Input taxed treatment following the sale of leased residential premises***

18. The *MBI* decision confirms that, following the sale of leased residential premises, the purchaser makes a supply of the residential premises by way of lease to the lessee, which is input taxed under section 40-35.

19. Accordingly, the purchaser of a reversion in residential premises is not liable for GST in respect of the rent it receives.

**7. Paragraphs 28 to 32**

Omit paragraphs 28 to 32; substitute:

28. Paragraph 11-15(2)(a) provides that an acquisition is not for a creditable purpose to the extent that the acquisition relates to making supplies that would be input taxed.<sup>15</sup> A supply of residential premises by way of lease is an input taxed supply under section 40-35.

29. As decided in *MBI*, the purchaser of leased residential premises makes an input taxed supply of the premises by way of lease. Acquisition of the leased residential premises and acquisitions relating to the continuing lease of the premises, - like management services, repairs and maintenance, - have a sufficient relationship with the making of a supply that is input taxed for the purposes of paragraph 11-15(2)(a).<sup>16</sup>

30. Consequently, the purchaser of the reversion in residential premises is not entitled to input tax credits for acquisition of the reversion or acquisitions relating to the continuing supply of the residential premises by way of lease.

**8. Paragraph 36**

Omit the paragraph; substitute:

36. In the absence of contrary evidence, the fact that residential premises are acquired subject to an ongoing lease indicates that the purchaser intends to make a supply of the premises by way of lease.<sup>17</sup>

<sup>15</sup> 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*, sets out the Commissioner's view on section 11-15 in more detail.

<sup>16</sup> *HP Mercantile Pty Ltd v. Commissioner of Taxation* [2005] FCAFC 126; (2005) 143 FCR 553; 2005 ATC 4571; (2005) 60 ATR 106; per Hill J at [35]-[39] and [73]. See also *Rio Tinto Services Ltd v. Commissioner of Taxation* [2015] FCA 94; 2015 ATC 20-489 at [26].

<sup>17</sup> *MBI* at [40].

# GSTR 2012/1

## 9. Paragraph 37

Omit the paragraph.

## 10. Paragraph 38

(a) Omit the first sentence; substitute:

Since the supply of residential premises by way of lease is input taxed, it is neither a taxable supply nor a GST-free supply.

(b) After the paragraph; insert:

39. When determining the proportion of non-creditable use in calculating the amount of an adjustment under subsection 135-5(2), the price of a purchaser's intended input taxed supply of residential premises by way of lease, includes the rent to be paid under the lease.<sup>18</sup>

40. Where the purchaser only intends to make input taxed supplies through the enterprise related to the going concern or farm land it has acquired, the proportion of input taxed supplies expressed as a percentage calculated on the basis of the prices of those supplies (that is, the proportion of non-creditable use), is 100%. In these circumstances, the increasing adjustment under Division 135 is one tenth of the price of the supply of the going concern or farm land.

## 11. Related Rulings/Determinations

Insert 'GSTD 2000/10'.

## 12. Case references

Insert:

- Commissioner of Taxation v. MBI Properties Pty Ltd [2014] HCA 49; 2014 ATC 20-474; (2014) 92 ATR 241
- MBI Properties Pty Ltd v. Commissioner of Taxation [2013] FCAFC 112; 2013 ATC 20-420; (2013) 92 ATR 184
- Rio Tinto Services Ltd v. Commissioner of Taxation [2015] FCA 94; 2015 ATC 20-489

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<sup>18</sup> *MBI* at [45]. The price, or, consideration within the meaning of section 9-15, for a supply of premises by way of lease will ordinarily include, and may for residential premises be limited to, the rent to be paid under the lease. However, depending on the circumstances, payments other than rent may also be consideration for the supply. See for example Goods and Services Tax Determination GSTD 2000/10 *Goods and services tax: are outgoings payable by a tenant under a commercial property lease part of the consideration for the supply of the premises?*

### 13. Other references

Omit:

- Crossen, S 1996, Tax Law Design and Drafting vol. 1, Thuronyi V, Ch 7, International Monetary Fund, Washington D.C.

Insert:

- Decision Impact Statement MBI Properties S90/2014

This Addendum applies on and from its date of issue.

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### Commissioner of Taxation

22 July 2015

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ATO references

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