GSTR 2000/28 - Goods and services tax: attributing GST payable or an input tax credit arising from a sale of land under a standard land contract

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Goods and Services Tax Ruling

Goods and services tax: attributing GST payable or an input tax credit arising from a sale of land under a standard land contract

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Preamble

This document is a ruling for the purposes of section 37 of the ***Taxation Administration Act 1953.*** *You can rely on the information presented in this document which provides advice on the operation of the GST system.*

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]

What this Ruling is about

1. This Ruling is about attribution of Goods and Services Tax ('GST') payable or input tax credits under the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act') arising from a sale of land under a standard land contract. All legislative references in this Ruling are to this Act unless otherwise stated.

2. The Ruling explains when to account for GST payable or input tax credits on the sale of land under a standard land contract. The Ruling also briefly examines the GST consequences of a deposit that is forfeited under a standard land contract.

3. While this Ruling is concerned primarily with the sale of freehold land it is not limited to sales of freehold title. It applies where the parties are dealing with the maximum interest in land that the Crown has alienated and, therefore, includes the sale of land in the form of long term leases and pastoral leases. It also applies to sales of strata units.

4. The Ruling only applies to a sale of land that is made under a standard land contract as defined in paragraph 10 below. It applies equally to standard land contracts that are unconditional or conditional.

5. The Ruling does not address attribution of GST payable or input tax credits in respect of the sale of any separate interest attaching to the land or that may be severed from the land, for example, easements, profits à prendre or leases.

6. This Ruling does not cover a sale of land on terms or by instalment, whether under a standard land contract or otherwise. Generally, under a contract for a sale of land on terms or by instalment the purchaser is entitled to possession of the land or the receipt of rents and profits before becoming entitled to a transfer or conveyance of land. The specific terms of such contracts need to be examined to determine the GST consequences.

7. This Ruling does not address issues about whether there is a taxable supply or creditable acquisition arising from a sale of land under a standard land contract. This Ruling only looks at how to account for GST payable or input tax credits where there is a taxable supply or creditable acquisition arising from such a sale. However, it is noted that in certain circumstances a sale of land under a standard land contract is not a taxable supply or a creditable acquisition. These are briefly outlined at paragraphs 22 and 23.

8. The Commissioner does not propose to make a determination under section 29-25 in relation to supplies and acquisitions made under a standard land contract subject to conditions precedent to performance. This Ruling explains the reasons for this decision.

Date of effect

9. This Ruling applies on and from 8 July 1999 (the date of Royal Assent to the GST legislation).

Note: The Addendum to this Ruling that issued on 5 April 2006 applies on and from 1 July 2000.

Definitions

10. This Ruling uses the term **'standard land contract'**. This term refers to the standard contract for the sale of land as prepared by the various law societies or institutes and real estate institutes in Australia,[1] with the features mentioned in paragraph 13 below.

[1] For example, see: New South Wales – *Contract for the sale of land – 1992 edition* (copyright of the Law Society of New South Wales and the Real Estate Institute of New South Wales);
Victoria – *Contract of Sale of Real Estate* (copyright of Law Institute of Victoria and the Real Estate Institute of Victoria)
Queensland – *Contract For Lots in a Community Titles Scheme* and *Contract For Houses and Land* (copyright of Real Institute of Queensland);
South Australia – REISA *Contract* (copyright of Real Estate Institute of South Australia);

11. For the purposes of this Ruling, this term also covers contracts for the sale of land similar to those prepared by the law societies or institutes and real estate institutes where the contracts include the features mentioned in paragraph 13.

12. Where the terms of a contract for the sale of land vary one or more of the features in the following paragraph, it will not be treated as a standard land contract for purposes of this Ruling and this Ruling will not apply to that contract.

13. For purposes of this Ruling, a standard land contract is a written contract for the sale of land that provides for:

- the payment of a deposit that is either to be forfeited if the purchaser defaults or applied as consideration on settlement; and
- the payment of the balance of the purchase price upon settlement.

14. A **'deposit'** under land law is an earnest given to bind the bargain; it is a guarantee that the purchaser means business; and on completion, it becomes part payment of the purchase price (see *Howe v. Smith* (1884) 27 Ch D 89 at 101; *Brien v. Dwyer and Another* (1978) 141 CLR 378 at 392).

15. '**Settlement**' refers to that stage in the completion of a standard land contract where the transfer in the purchaser's favour and certificate of title are exchanged for the purchase price. It is at this stage that the purchaser (or the purchaser's agent) obtains:

- unconditional possession of a registrable instrument of transfer; or
- an instrument of transfer that would be registrable once stamped.

Context of attribution

16. Attribution is the term used in the GST law to describe the way you account for GST payable, input tax credits and adjustments in order to work out your net amount of GST for a tax period. GST payable, input tax credits and adjustments are attributed to tax periods rather than being remitted or refunded, as the case may be, each time a taxable supply, creditable acquisition or adjustment is made.

Western Australia – *Joint Form of General Conditions for the Sale of Land* 1998 revision (copyright of The Law Society of Western Australia and The Real Estate Institute of Western Australia); and
Tasmania – *Contract for Sale of Real Estate (not for use for sale on terms)* (copyright of the Law Society of Tasmania).

17. The basic attribution rules that apply to attribute GST payable on taxable supplies and input tax credits for creditable acquisitions are explained in Goods and Services Tax Ruling GSTR 2000/29.[2]. However, we summarise below the basic rules for working out when you pay GST on taxable supplies or claim input tax credits for creditable acquisitions.

18. If you do not account for GST on a cash basis, you attribute all the GST payable on a taxable supply to the earlier of the tax periods when:

- any of the consideration for the supply is received; or
- an invoice is issued for the supply.[3]

19. Provided you have a tax invoice at the required time,[4] you attribute all of an input tax credit for a creditable acquisition to the earlier of the tax periods in which:

- you provide any of the consideration; or
- an invoice is issued for the acquisition.[5]

20. If you account for GST on a cash basis, you attribute GST payable on a taxable supply to the tax period when the consideration for the supply is received, but only to the extent that the consideration is received in that tax period.[6]

21. Provided you have a tax invoice at the required time,[7] you attribute an input tax credit to the tax period in which you provide consideration for the acquisition, but only to the extent that you provided the consideration in that tax period.[8]

22. In certain circumstances a sale of land under a standard land contract will not be a taxable supply or a creditable acquisition because the supply is GST-free or input taxed. A sale of residential

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[2] Goods and Services Tax Ruling GSTR 2000/29 Goods and Services Tax: attributing GST payable, input tax credits and adjustments.

[3] Subsection 29-5(1).

[4] You must hold a tax invoice when you lodge your Business Activity Statement ('BAS') for the tax period to which the input tax credit is attributable. Otherwise, you attribute the input tax credit to the first tax period for which you have a tax invoice when you lodge your BAS. There is no requirement to hold a tax invoice if the value of the taxable supply to you was $50 or less: subsections 29-10(3) and 29-80(1). See GSTR 2000/17 as to what is a tax invoice for GST purposes.

[5] Subsections 29-10(1) and (3).

[6] Subsection 29-5(2). This means that if, in a particular tax period, you receive only part of the consideration for a supply, you attribute only that same part of the total GST payable to that tax period.

[7] Refer to footnote 4.

[8] Subsections 29-10(2) and (3). This means that if, in a particular tax period, you have paid only part of the total consideration for an acquisition, you are entitled to only that same part of the input tax credit for the acquisition.

premises that is not new is input taxed under section 40-65. Supplies of the following kind may be GST-free:

- a supply of land as part of a going concern - refer section 38-325;
- a supply of subdivided farm land - refer section 38-475; and
- a supply of farm land for farming - refer section 38-480.

23. Also, it is noted that an acquisition of a freehold interest in land, a stratum unit or a long term lease is not a creditable acquisition under section 75-20 if the supply of the interest, unit or lease was a taxable supply under the margin scheme (refer Goods and Services Tax Ruling GSTR 2000/21).[9]

24. An examination of the provisions referred to in paragraphs 22 and 23 is outside the scope of this Ruling.

Ruling

25. When you make a taxable supply of land under a completed standard land contract, you attribute the GST payable to the tax period in which settlement occurs. This applies if you account for GST on a cash basis or if you do not account for GST on a cash basis.

26. If you hold a tax invoice, you attribute an input tax credit for a creditable acquisition of land under a completed standard land contract to the tax period in which settlement occurs. This applies if you account for GST on a cash basis or if you do not account for GST on a cash basis.

27. Division 99 applies to a deposit paid under a standard land contract. As a result, the payment of a deposit under a standard land contract will not trigger attribution of GST payable or input tax credits at the time the deposit is paid. This is the case if you account for GST on a cash basis or if you do not account for GST on a cash basis.

28. If, under section 27 of the *Sale of Land Act 1962* (Victoria), the stakeholder[10] releases the deposit to the vendor prior to completion of the standard land contract (refer to paragraph 86 below for the conditions under which such a release may occur), Division 99 continues to apply to that deposit. Attribution of GST payable or

[9] Goods and Services Tax Ruling GSTR 2000/21 Goods and Services Tax: the margin scheme for supplies of real property held prior to 1 July 2000.
[10] A stakeholder is a person who holds a deposit not as agent for the vendor but for both the vendor and purchaser until it is decided who is entitled to the deposit.

input tax credits is not triggered by the release of the deposit in these circumstances.

29. A standard land contract is not an invoice for GST purposes. This means that entering into a standard land contract will not trigger attribution of GST payable or input tax credits where you do not account for GST on a cash basis.

30. Where you make a taxable supply upon a deposit being forfeited to you as a vendor under a standard land contract, you attribute the GST payable to the tax period during which the deposit is forfeited. This applies if you account for GST on a cash basis or if you do not account for GST on a cash basis.

31. Where you make a creditable acquisition upon a deposit being forfeited by you as a purchaser under a standard land contract and you hold a tax invoice, you attribute the input tax credit to the tax period during which the deposit is forfeited. This applies if you account for GST on a cash basis or if you do not account for GST on a cash basis.

32. The Commissioner does not propose to make a determination under section 29-25 in relation to the attribution of GST payable and input tax credits for supplies and acquisitions made under a standard land contract subject to conditions precedent to performance.

Explanation

33. This Ruling deals with taxable supplies and creditable acquisitions of land in its entirety. It is concerned with the absolute interest in land under a standard land contract. While recognising, both at law and in equity, that property consists of bundles of rights, this Ruling is concerned with the supply of full and complete ownership of land, that is, the maximum interest which the Crown has alienated – whether it be freehold or leasehold.

34. Any supply and acquisition of any contractual or equitable interest upon entering into a standard land contract is ancillary to the eventual supply and acquisition of the legal property at settlement and is not a separate supply.

35. In a New Zealand case, *Case L67* (1989) 11 NZTC 1391 Barber J rejected an argument based on the idea that a contract for the sale of land can be severed into the acquisition of an equitable interest first and legal interest later for GST purposes. He said:

> 'I consider it specious to endeavour to sever the sale of land, for GST purposes, into a chose in action and (later) legal title, even though the vendor is not capable of actually supplying title at the auction date.'

36. This Ruling is not concerned with the sale of any separate interest attaching to the land or that may be carved out or severed from the land, for example, easements, profits à prendre, or leases.

37. A sale of land under a standard land contract usually involves the following stages:

- the parties enter into a standard land contract either by the exchange of contracts or by both parties signing one contract;
- a deposit is paid to the stakeholder by the purchaser at the time of entering into the contract;
- the deposit is held by a stakeholder until it is applied to the vendor's benefit at settlement;
- the vendor will execute a transfer in favour of the purchaser;
- at settlement the transfer in the purchaser's favour and certificate of title are exchanged for the purchase price; and
- the purchaser (or purchaser's mortgagee) registers the transfer upon the certificate of title.

Attribution of GST payable or input tax credits arising from the sale of land under a standard land contract.

If you do not account for GST on a cash basis

Taxable supplies and creditable acquisitions

38. Under subsection 29-5(1) the GST payable by you on a sale of land under a standard land contract that is a taxable supply is attributable to:

- the tax period in which any of the consideration is received for the supply; or
- if, before any of the consideration is received, an invoice is issued relating to the supply – the tax period in which the invoice is issued.

39. Under subsection 29-10(1) the input tax credit to which you are entitled for a creditable acquisition under a standard land contract is attributable to:

- the tax period in which you provide any of the consideration for the acquisition; or

- if, before you provide any of the consideration, an invoice is issued relating to the acquisition – the tax period in which the invoice is issued.

40. However, under subsection 29-10(3) if you do not hold a tax invoice for a creditable acquisition when you lodge your Business Activity Statement ('BAS')[11] for the tax period to which the input tax credit (or any part of the input tax credit) on the acquisition would otherwise be attributable:

- the input tax credit (including any part of the input tax credit) is not attributable to that tax period; and
- the input tax credit (or part) is attributable to the first tax period for which you have a tax invoice when you lodge your BAS.

41. It follows that for attribution purposes it is necessary to determine first whether or not:

(i) a standard land contract is an *invoice* for attribution purposes; or

(ii) the payment of a deposit under a standard land contract is consideration received for the supply of land or consideration provided for the acquisition of land.

Is a standard land contract an invoice for attribution purposes?

42. An invoice is defined under section 195-1 as 'a document notifying an obligation to make a payment'.

43. We consider that this definition is designed to capture the essence of a commercial invoice. There is support for this proposition in the New Zealand and Canadian GST jurisdictions.

44. The New Zealand definition of invoice for GST purposes is very similar to the definition in the Australian GST Act: 'a document notifying an obligation to make payment'.[12]

45. The leading case in New Zealand on what is an invoice for GST purposes, *Shell NZ Holding Company Ltd v. CIR*,[13] supports the proposition that the definition of invoice for GST purposes is designed to capture the essence of a commercial invoice.

46. In that case there were two documents competing as invoices for GST purposes: an import entry form and a deferred duty statement. The taxpayer was seeking to deduct credits on imported petroleum goods before GST payments were made to Customs. The

[11] Your GST return is part of your BAS.
[12] Section 2 of the *Goods and Services Tax Act 1985* (NZ).
[13] (1994) 16 NZTC 11,163.

taxpayer's argument was based on the import entry form being an invoice for GST purposes. The Commissioner of Inland Revenue argued that the input tax credit was not deductible until Customs had sent the taxpayer a deferred duty statement requiring payment. The Commissioner argued that the deferred duty statement was an invoice for GST purposes, not the earlier import entry form.

47. The New Zealand Court of Appeal held that the import entry form was an invoice for GST purposes. In reaching this decision the court commented as follows:

> 'Invoices are rendered in commercial transactions where goods are supplied or work is done by one party for another. Invoices record what was done and the charge. It may be a cash or credit transaction and in the latter case it is common for a monthly or other periodic statement to be issued subsequently. Whether payable on delivery or under the credit arrangement the invoice states the price or charge involved. And it is both unnecessary and uncommon in practice for commercial invoices to specify the time for payment.
>
> In our view the GST obligation is in the same position. The statutory definition of "invoice" recognises that it is not a commercial two party transaction. It uses the central feature of an invoice which is "a document notifying an obligation to make payment". The time for payment is not part of the definition. "Notify" has its ordinary dictionary meaning of "to give notice to -, to inform". Certainly when completed by the Customs officer it is the Customs document and a copy is furnished to the importer. It is the signing of the document by the Customs officer which under the statute is the entry of the goods. It is that act which constitutes the duty as a debt due to the Crown. At that point the document is notice to the importer of the obligation to make payment.'[14]

48. Thus the New Zealand Court of Appeal considered that the GST obligation is in the same position as that of the obligation in commercial invoices, capturing the central feature of a commercial invoice which is a notice of an obligation to pay.

49. The Canadians have an inclusive definition of invoice for GST purposes: 'invoice includes a statement of account, a bill and any other similar record, regardless of its form or characteristics, and a cash register slip or receipt'.[15] Revenue Canada explains this definition as follows: 'An invoice is a document which either notifies a recipient of the obligation to pay or records payment'.[16] Obviously

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[14] *Shell NZ Holding Company Ltd v. CIR* (1994) 16 NZTC 11,163 at 11,168.
[15] Subsection 123(1) of the *Excise Tax Act* (Can).
[16] Paragraph 6 of Canadian GST Memorandum 300-6-3 in the Time of Liability sub-series.

the second part ('records payment') has no relevance to our definition of invoice, but it is significant that their explanation of what an invoice does ('notifies a recipient of the obligation to pay') reflects the very words used in our definition.

50. The definition of invoice in the GST Act only refers to an 'obligation'. It does not refer to a contingent or conditional obligation, consistent with the essence of a commercial invoice. In the New Zealand High Court judgement in the *Shell* case Heron J, when considering the New Zealand definition of invoice, commented that:

> 'The Act does not speak in terms of future obligation or conditional obligation or contingent obligation. It speaks of obligation. It is an obligation to make payment.' [17]

51. The use of the words 'notifying' in the definition of 'invoice' and 'issued' in the attribution rules under the Australian GST Act more typically reflect the commercial invoice environment.

52. Consistent with commercial practice, the issue of an invoice is likely to be proximate to or after the supplier's completion of all that the supplier is required to do to become entitled to payment.

53. A standard land contract does not capture the essence of a commercial invoice as described above. A standard land contract does not notify an obligation to make a payment in the sense that a commercial invoice does. As Deane J pointed out in *Foran v. Wight.*[18]

> 'In the ordinary case of a contract for sale of land, the contractual obligations of the parties to complete the sale are concurrent and conditional in the sense that the vendor is not obliged to convey the land and the purchaser is not obliged to pay the purchase price otherwise than upon concurrent performance by the other party.'

54. Payment of the deposit to the vendor under a standard land contract is conditional upon completion of the contract or if not completed, the breach by the purchaser of an obligation under the contract. Until completion of the contract, the vendor 'has no vestige of right to get that deposit into his hands – he could not control its possession, that is, could not recover it'.[19]

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[17] *Shell NZ Holding Company Ltd v. CIR* (1993) 15 NZTC 10,136 at 10,139. When this case went on appeal to the Court of Appeal the court did not overrule Heron J on this point. The Court of Appeal decided on the facts that the obligation to pay arose upon the issue of an earlier document than that identified by Heron J.

[18] (1989) 168 CLR 385 at 433. See also *McDonald v. Dennys Lascelles Ltd* (1933) 48 CLR 457 at 475-476; *Sunbird Plaza Pty Ltd v. Maloney* (1988) 166 CLR 245 at 253-254; and *Gasparin v. FCT* 94 ATC 4280; (1994) 28 ATR 130.

[19] *Christie v. Robinson* (1907) 4 CLR 1338 per Issacs J at 1355.

55. We consider, therefore, that a standard land contract is not an invoice for GST attribution purposes as it does not notify an obligation to make a payment.

56. It follows that the entry into a standard land contract does not trigger attribution of GST payable under paragraph 29-5(1)(b) or attribution of input tax credits under paragraph 29-10(1)(b).

57. However, it is to be noted that the above analysis does not mean that a contract is never an invoice for GST attribution purposes. A contract may upon execution notify an obligation to make a payment consistent with a commercial invoice. As discussed a standard land contract is not a contract of that kind.

Is a deposit consideration received or provided for attribution purposes? Does Division 99 apply to a deposit held under a standard land contract?

58. Division 99 applies to deposits held as security for the performance of an obligation and has the effect of deferring attribution for these security deposits.[20] The Division also contains a special rule about attribution for these security deposits.

59. Specifically, under subsection 99-5(1) the deposit is not treated as consideration for a supply unless the deposit is forfeited because of a failure to perform the obligation or is applied as all or part of the consideration for a supply.

60. Under subsection 99-10(1) the GST payable on a taxable supply for which the consideration is a deposit that was held as security for the performance of an obligation, is attributable to the tax period during which the deposit is:

- forfeited because of failure to perform the obligation; or
- applied as all or part of the consideration for a supply.

This attribution rule overrides section 29-5 which is about attributing GST for taxable supplies.[21]

61. The heading to section 99-10 refers to 'Attributing the GST relating to deposits that are forfeited etc'. Subsection 99-10(1) refers to the GST payable on a 'taxable supply for which the consideration is a deposit ...'. In the Commissioner's view, in a standard land contract, subsection 99-10(1) operates to attribute the GST payable on the

[20] Refer GSTD 2000/1 Goods and Services Tax determination. Goods and Services Tax : is the scope of Division 99 of the *A New Tax System (Goods and Services Tax) Act 1999* limited to holding deposits?
[21] Subsection 99-10(2).

security deposit. The GST payable on the balance of the consideration is attributable under section 29-5.

62. There are no special attribution rules in Division 99 for input tax credits. The attribution rules in section 29-10 apply to attribute input tax credits for creditable acquisitions.

63. The standard land contracts provide for the payment of a deposit. This is usually 10 per cent of the purchase price (although other amounts may be agreed), payable by the purchaser at the time of entering into the contract. The deposit is retained until completion of the contract or earlier termination of the contract. Broadly, if a purchaser defaults, under the terms of the contract the vendor is entitled to terminate the contract and the purchaser automatically forfeits the deposit, irrespective of whether any damage has been suffered by the vendor.

64. A deposit paid under a standard land contract serves two purposes. If the contract goes through to completion, the deposit goes against the purchase price. But its initial purpose is as security for the performance of the contract. Fry LJ in *Howe v. Smith*[22] makes this plain:

> 'The deposit is not merely a part payment, it is also an earnest to bind the bargain so entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract…That earnest is lost by the party who fails to perform the contract.'

65. The dual purpose of a deposit under a standard land contract is also explained by WD Duncan and Stephen E Jones as follows:

> 'The deposit is expressly stated in the contract to be in part payment of the purchase price. While the payment bears the character of a part payment under an executory contract, it is also expressly stated to be a deposit and liable to forfeiture where the purchaser is in default. A part payment would not be so forfeited.'[23]

66. A deposit under a standard land contract displays the essential ingredients of a Division 99 deposit. That is, the deposit is liable to forfeiture on failure of the recipient of the supply to perform an obligation under the standard land contract for the supply of land. Division 99, therefore, applies to a deposit under a standard land contract.

67. As Division 99 applies, the deposit held under a standard land contract is not treated as consideration for a supply unless the deposit

[22] (1884) 27 Ch D 89 at 101-102.
[23] *Sale of Land in Queensland* (4th ed.), at 88-89.

is either forfeited because of a failure to perform the obligation or applied as part of the consideration for the supply of land.

68. This means that at the time that the deposit is paid upon entering into a standard land contract, the deposit is neither consideration received for the supply of land nor consideration provided for the acquisition of the land. The payment of the deposit does not, therefore, trigger attribution of GST payable or input tax credits at the time it is paid.

69. A deposit under a standard land contract is applied as part of the consideration for the supply of land on settlement. As previously pointed out, on settlement the deposit becomes part payment and is applied for the vendor's benefit. Upon settlement, consideration is received for the supply of land and provided for the acquisition of land, triggering attribution of GST payable and input tax credits.

70. Under subsection 99-10(1), the GST payable on the deposit is attributable to the tax period in which settlement occurs.

71. Under paragraph 29-5(1)(a), the GST payable on the balance of the purchase price of the land is attributable to the tax period in which any of the consideration is received, that is, in the tax period in which settlement occurs.

72. This means that you, as a supplier making a taxable supply of land under a completed standard land contract, attribute the GST payable to the tax period in which settlement occurs.

73. Under paragraph 29-10(1)(a), the input tax credit for a creditable acquisition of land under a completed standard land contract is attributable to the tax period in which any of the consideration is provided, that is, in the tax period in which settlement occurs.

74. This means that if you hold a tax invoice, the input tax credit to which you are entitled for a creditable acquisition of land under a standard land contract is attributable to the tax period in which settlement occurs.

If you account for GST on a cash basis

Taxable supplies and creditable acquisitions

75. Under subsection 29-5(2) if you account for GST on a cash basis, then:

- if, in a tax period, *all* of the consideration is received for a taxable supply – GST on the supply is attributable to that tax period; or

- if, in a tax period, *part* of the consideration is received – GST on the supply is attributable to that tax period, but only to the extent that the consideration is received in that tax period; or
- if, in a tax period, *none* of the consideration is received – none of the GST on the supply is attributable to that tax period.

76. Under subsection 29-10(2) if you account for GST on a cash basis, then:

- if, in a tax period, you provide *all* of the consideration for a creditable acquisition – the input tax credit for the acquisition is attributable to that period; or
- if, in the tax period, you provide *part* of the consideration – the input tax credit for the acquisition is attributable to that tax period, but only to the extent that you provided the consideration in that tax period; or
- if, in a tax period, *none* of the consideration is provided – none of the input tax credit for the acquisition is attributable to that tax period.

77. However, under subsection 29-10(3) if you do not hold a tax invoice for a creditable acquisition when you lodge your BAS[24] for the tax period to which the input tax credit (or any part of the input tax credit) on the acquisition would otherwise be attributable:

- the input tax credit (including any part of the input tax credit) is not attributable to that tax period; and
- the input tax credit (or part) is attributable to the first tax period for which you have a tax invoice when you lodge your BAS.

78. Again, it is necessary to determine first when any consideration is received or provided. The issue of an invoice is not relevant if you account for GST on a cash basis.

79. As previously discussed, we consider that the effect of Division 99 is that a deposit under a standard land contract is not treated as consideration for the supply of land unless the deposit is forfeited because of a failure to perform the obligation or is applied as part of the consideration for the supply of land (refer paragraphs 58 to 68 above).

80. Until either of these events occur, payment of a deposit under a standard land contract does not trigger attribution of GST payable

[24] Your GST return is part of your BAS.

under subsections 29-5(2) or 99-10(1), or input tax credits under subsection 29-10(2).

81. As previously pointed out, under a completed standard land contract attribution is triggered once the deposit is applied as consideration upon settlement (refer paragraph 69 above).

82. Under subsection 99-10(1), the GST payable on the deposit is attributable to the tax period in which it is applied as consideration, that is, to the tax period in which settlement occurs.

83. Under paragraph 29-5(2)(a), the GST payable on the balance of the purchase price of the land under a completed standard land contract is attributable to the tax period in which all of the consideration is received for the sale of the land, that is, when settlement occurs.

84. This means that you, as a supplier making a taxable supply of land under a completed standard land contract, attribute the GST payable to the tax period in which settlement occurs.

85. For completed contracts, attribution of the input tax credit for a creditable acquisition of land under a standard land contract is triggered under paragraph 29-10(2)(a) at settlement when all of the consideration is provided, that is, when the deposit is credited and the balance of the purchase price is paid. This means that if you hold a tax invoice, the input tax credit to which you are entitled for a creditable acquisition of land under a standard land contract will be attributable to the tax period in which settlement occurs.

Standard land contracts in Victoria – early release of deposit

86. In Victoria, section 27 of the *Sale of Land Act* 1962 (Vic) permits the earlier release of deposit moneys by the stakeholder for the vendor's benefit where the contract is not subject to any condition enuring for the benefit of the purchaser, and where the purchaser has accepted title or may be deemed to have accepted title.

87. Although the deposit is released by the stakeholder to the vendor, the deposit retains its character as a deposit until it is forfeited or applied as consideration. Division 99 still applies to such a deposit. The early release of that deposit does not trigger GST payable on the supply or input tax credits for the acquisition before settlement unless the deposit is forfeited. This is the case, irrespective of the basis you use to account for GST.

Summary: how the attribution rules apply to sales of land under standard land contracts

88. Payment at settlement triggers attribution for sales under standard land contracts. This means that you attribute GST payable when you make a taxable supply under a standard land contract to the tax period in which settlement occurs. Provided you have a tax invoice, you attribute an input tax credit for a creditable acquisition under a standard land contract to the tax period in which settlement occurs. This applies if you account on a cash basis or if you do not account on a cash basis.

Example of how the attribution rules apply to sales under standard land contracts

89. Peter owns a number of commercial properties. He is registered for GST, does not account for GST on a cash basis and has one month tax periods. He puts one of his properties on the market through his real estate agent, Maria.

90. Maria finds a purchaser, Marilyn. Marilyn owns a newsagency and is looking for a new outlet. Marilyn is registered for GST, accounts for GST on a cash basis and has three month tax periods.

91. On 14 July 2000 Peter and Marilyn enter into a contract for the sale of the freehold interest in Peter's property. The terms of the contract include the following:

- the purchase price of the property is $330,000 (GST inclusive);
- a deposit of $33,000 is to be paid by Marilyn on entering into the contract;
- the deposit is to be held by Maria as stakeholder for Peter and Marilyn;
- settlement will occur on 30 November 2000; and
- the balance of the purchase price of $297,000 (after adjustments allowed under the contract) will be paid at settlement in exchange for a transfer in Marilyn's name and the certificate of title.

92. Marilyn pays the deposit to Maria on 14 July 2000. Settlement occurs on 30 November 2000: Peter exchanges a transfer in Marilyn's name and certificate of title for Marilyn's payment of the balance of the purchase price (after adjustments allowed under the contract). Peter also gives Marilyn a document that satisfies the requirements for a tax invoice. Maria pays the deposit (after deducting her fees) to Peter. Later Marilyn registers the transfer upon the certificate of title.

93. Peter attributes the $30,000 GST payable (1/11 x $330,000[25]) to the tax period in which settlement occurs. As Peter has one month tax periods, the $30,000 GST payable is attributed to the tax period ending 30 November 2000.

94. Marilyn attributes the $30,000 input tax credit to the tax period in which settlement occurs. As Marilyn has three month tax periods, the $30,000 input tax credit is attributed to the tax period ending 31 December 2000.

Forfeiture of a deposit under a standard land contract

Taxable supplies

95. If a vendor defaults under a standard land contract and the deposit is refunded to the purchaser, there are no GST consequences. There is no taxable supply as neither the purchaser nor the vendor has made a supply for consideration, as required by paragraph 9-5(a). Nor is there a creditable acquisition under section 11-5.

96. There may be GST consequences where the purchaser defaults under a standard land contract and the stakeholder pays the deposit to the vendor. In this case, the vendor has made a supply for consideration and, if the other elements of a taxable supply as defined in section 9-5 are satisfied, there will be a taxable supply by the vendor.

97. [Deleted]

97A. If the vendor exercises a right to forfeit the deposit as a result of a breach of contract by the purchaser, the Commissioner considers that the forfeited deposit has no nexus with the originally arranged or intended underlying supply but is consideration for a different supply.[26] This is because, for the purposes of the GST Act, the deposit is not treated as consideration for a supply until the circumstances in subsection 99-5(1) apply. It has been argued[27] that a forfeited deposit may not be consideration for, or have a nexus with, any supply. The Commissioner's view is that if a deposit is forfeited, it is consideration for a supply.

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[25] Please note that in calculating the GST payable it is assumed that the margin scheme under Division 75 does not apply. See Goods and Services Tax Ruling GSTR 2000/21 for details on the operation of the margin scheme.

[26] Note that in the event that the contract is completed and the deposit is applied as consideration, paragraph 99-5(1)(b) operates to connect the deposit with the supply it is applied against.

[27] Rowe, S 'Liquidated damages, terminated leases and forfeited deposits – Part II', *Australian GST Journal*, 2004, vol. 4, issue 9, at p 248-249.

97B. The term 'supply' is defined broadly in subsection 9-10(1) to mean 'any form of supply whatsoever'.[28] Subsection 9-10(2) without limiting subsection 9-10(1) lists inclusive examples of a supply.

97C. In order to forfeit and retain the security deposit, the supplier must elect to rescind the contract,[29] thereby surrendering some of their rights and/or releasing the other party from some of their obligations, acquired under, or associated with the arrangement.[30] Without limiting subsection 9-10(1), under paragraphs 9-10(2)(b), 9-10(2)(e) and 9-10(2)(g) respectively, a supply includes the supply of services, the surrender of any right and the release from an obligation. When considering subsection 9-10(2), the Commissioner's view is that the forfeited deposit is consideration for the act of rescission, and/or the surrender of rights and/or release from obligations which occur as a result of the rescission, and/or a combination of these supplies under paragraph 9-10(2)(h).

97D. The arrangement between the parties is that the supplier agrees to make an underlying supply, but in the event that this does not proceed in accordance with that arrangement, the parties agree that an amount will be paid (in the form of the forfeited deposit) for a different or substituted supply. By commencing performance of the arrangement, the supplier allocates resources, typically by performing certain services or undertaking tasks. If the original arrangement is completed, this supply forms part of the underlying supply. However, in the event that the underlying supply does not proceed, the forfeited deposit is consideration for the other supply.

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[28] *Shaw v. Director of Housing & Anor (No. 2)* 2001 ATC 4054; (2001) 46 ATR 242 at paragraph 13 and *Saga Holidays Ltd v. FC of T* [2005] FCA 1892 at paragraph 48.

[29] *Hoobin, Re; Perpetual Executors and Trustees Association of Australia Ltd v. Hoobin* [1957] ALR 932; [1957] VR 341 at 347. The law recognises that the supplier can either elect to terminate the performance of the contract and claim damages or elect to go on with the contract notwithstanding the breach. See Carter, JW 1991, *Breach of Contract*, 2nd edn, The Law Book Company Limited, Sydney, p. 242.

[30] These general principles are referred to in *Mayson v. Clouet and Another* [1924] AC 980 at 985, *Lowe v. Hope* [1969] 3 All ER 605 per Pennycuick J at 607-8; 3 WLR 582; *McDonald and Another v. Dennys Lascelles Limited* (1933) 48 CLR 457 at 470 per Starke J. The rights which are surrendered upon termination include the right to sue for the purchase price and right to receive instalments of the purchase price which are not forfeited. See Rossiter, CJ 2003, *Principles of Land Contracts and Options in Australia*, Chapter contributed by Harley, DJ, Lexis Nexis Butterworths, Australia at p. 302. However, some terms of the contract (such as a liquidated damages clause) may survive rescission, as rights that are not divested or discharged which have already been unconditionally acquired may survive rescission. See Dixon J in *McDonald and Another v. Dennys Lascelles Limited* (1933) 48 CLR 457 at 476-7. See also *Contract Law in Australia*, Carter and Harland 4th edition, at 1993; *Cheshire, Fifoot's Law of Contract*, Seddon and Ellinghaus, 8th Australian edition at 21.34; and Carter, JW 1991, *Breach of Contract*, 2nd edn, The Law Book Company Limited, Sydney, p.455.

97E. Furthermore, the intention of Division 99 is in part; to ensure that forfeited deposits are treated as subject to GST when the forfeiture occurs.[31] This interpretation is supported by the words of paragraph 99-5(1)(a) which states that a deposit is not to be treated as consideration for a supply unless it is forfeited. This means that a deposit must be treated as consideration for a supply upon forfeiture.

97F. The supply, for which the forfeited deposit is consideration, constitutes a taxable supply under section 9-5 if it meets the requirements in paragraphs (b) to (d) of that section.

98. Where you make a taxable supply for which the consideration is a deposit that was held as security for the performance of an obligation under a standard land contract, you attribute the GST payable on that supply under paragraph 99-10(1)(a) to the tax period during which the deposit is forfeited because of a failure to perform the obligation. This applies if you account for GST on a cash basis or if you do not account for GST on a cash basis.

Creditable acquisitions

99. A supply under paragraphs 97A to 97F is a taxable supply that is made by the vendor since the forfeiture of the deposit is consideration for that supply (assuming that the other conditions under section 9-5 have been met). Provided that the other requirements of section 11-5 are also met, this supply is a creditable acquisition by the purchaser.

100. Where you make a creditable acquisition upon a deposit being forfeited by you as a purchaser under a standard land contract and you hold a tax invoice, you attribute the input tax credit to the tax period during which the deposit is forfeited. In terms of section 29-10, this will be the tax period in which you provide consideration for the acquisition. This applies if you account for GST on a cash basis or if you do not account for GST on a cash basis.

No determination for particular attribution rules necessary for conditional standard land contracts

101. Under section 29-25 the Commissioner has power to make a determination varying the attribution rules for GST payable on taxable supplies or input tax credits for creditable acquisitions of a specified kind if satisfied that it is necessary to prevent the basic attribution rules under Division 29 and any special rules in Chapter 4 applying in

[31] The EM in paragraph 6.166 indicates that forfeited deposits should be subject to GST. Also, at paragraph 6.169 the EM notes that the GST payable on the forfeited deposit is attributable to the period in which the deposit is forfeited.

a way that is inappropriate in circumstances described in paragraphs (a) to (g) of subsection 29-25(2).

102. Paragraph 29-25(2)(f) refers to circumstances involving 'a supply or acquisition made under a contract that is subject to preconditions'.

103. 'A contract that is subject to preconditions' would include a standard land contract subject to conditions precedent to performance: non-fulfilment of a condition precedent to performance means that the contract can be avoided by the parties. An example of a condition precedent to performance is a subject to finance term where the performance of the contract is subject to the purchaser obtaining approval of a loan to finance the purchase.

104. 'A contract that is subject to preconditions' would not apply to conditions precedent to formation of a contract[32] as there would not be 'a supply or acquisition under a contract' where the formation of the contract itself is subject to a condition.

105. As pointed out in this Ruling, under completed standard land contracts (including those contracts subject to conditions precedent to performance) there is no attribution prior to the tax period in which settlement takes place. This result is consistent both with when property passes and when income is derived for income tax purposes. The Commissioner, therefore, is satisfied that it is not necessary to make a determination under section 29-25 for supplies or acquisitions of land under a standard land contract.

Detailed contents list

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[32] Conditions precedent to the formation of a contract are rare. An example would be a 'subject to contract' condition in correspondence leading to the informal finalisation of an agreement. In this situation no legal obligations are created until entry into a formal contract: see *Masters v Cameron* (1954) 91 CLR 353 at 360 361 (this situation would fall into the second of the three classes outlined by the High Court).

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Subject references:

- acquisitions
- attribution
- business activity statement
- cash basis
- conditional contracts
- consideration
- contracts
- creditable acquisition
- deposit
- GST payable
- input tax credits
- invoice
- land sales
- not on a cash basis
- purchaser
- settlement
- stakeholder
- standard land contract
- taxable supply
- tax invoice

- unconditional contracts
- vendor

Legislative references:

- ANTS(GST)A99 9-5
- ANTS(GST)A99 9-5(a)
- ANTS(GST)A99 9-10(2)(e)
- ANTS(GST)A99 11-5
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- ANTS(GST)A99 Div 29
- ANTS(GST)A99 29-5(1)
- ANTS(GST)A99 29-5(2)
- ANTS(GST)A99 29-10(1)(a)
- ANTS(GST)A99 29-10(1)(b)
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- ANTS(GST)A99 29-10(3)
- ANTS(GST)A99 29-25
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- Sales of Land Act 1962 (Vic) 27

Case references:

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- *Christie v. Robinson* (1907) 4 CLR 1338
- *Foran v. Wight* (1989) 168 CLR 385
- *Gasparin v. FC of T* 94 ATC 4280; (1994) 28 ATR 130
- *Howe v. Smith* (1884) 27 Ch D 89
- *McDonald v. Dennys Lascelles Ltd* (1933) 48 CLR 457
- *Master v. Cameron* (1954) 91 CLR 353
- *Shell NZ Holding Company Ltd v. CIR* (1994) 16 NZTC 11,163; (1993) 15 NZTC 10,136
- *Sunbird Plaza Pty Ltd v. Maloney* (1988) 166 CLR 245

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