


GSTR 2000/28A - Addendum - 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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Addendum

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

This Addendum amends Goods and Services Tax Ruling GSTR 2000/28 to explain when GST is payable and an entitlement to an input tax credit arises when a security deposit is forfeited under a standard land contract.

In addition, this Addendum more fully explains the attribution rules and the relationship between section 99-10 and section 29-5 of *A New Tax System (Goods and Services Tax) Act 1999*.

This Addendum also amends the Ruling with respect to the definition of '**Settlement**'.

GSTR 2000/28 is amended as follows:

1. Paragraph 15

Delete the paragraph and substitute:

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.

2. Paragraph 61

Delete the paragraph and substitute:

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

3. Paragraph 97

Delete the paragraph and substitute:

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.¹ 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 argued² 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.

97B. The term 'supply' is defined broadly in subsection 9-10(1) to mean 'any form of supply whatsoever'.³ Subsection 9-10(2) without limiting subsection 9-10(1) lists inclusive examples of a supply.

¹ 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.

² Rowe, S 'Liquidated damages, terminated leases and forfeited deposits – Part II', *Australian GST Journal*, 2004, vol. 4, issue 9, at p 248-249.

³ *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.

97C. In order to forfeit and retain the security deposit, the supplier must elect to rescind the contract,⁴ thereby surrendering some of their rights and/or releasing the other party from some of their obligations, acquired under, or associated with the arrangement.⁵ 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.

⁴ *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.

⁵ 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 Pennycuik 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.

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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.⁶ 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.

4. Paragraph 99

Delete the paragraph and substitute:

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.

This Addendum applies on and from 1 July 2000.

Commissioner of Taxation

5 April 2006

ATO references

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⁶ 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.