

GSTR 2006/2A2 - Addendum - Goods and services tax: deposits held as security for the performance of an obligation

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Addendum

Goods and Services Tax Ruling

Goods and services tax: deposits held as security for the performance of an obligation

This Addendum amends Goods and Services Tax Ruling GSTR 2006/2 to take account of the High Court decision in *Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 2008 ATC 20-028; (2008) 68 ATR 158 in relation to a deposit held as security for the performance of an obligation and the application of Division 99 of the *A New Tax System (Goods and Services Tax) Act 1999* to such deposits.

GSTR 2006/2 is amended as follows:

1. Paragraph 6

After the note, insert:

Note 2: The Addendum to this Ruling that issued on 24 June 2009 explains the Commissioner's view of the law as it applies both before and after its date of issue. You can rely upon the Addendum on and from its date of issue for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

2. Paragraph 19

After the paragraph, insert:

19A. In *Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 2008 ATC 20-028; (2008) 68 ATR 158 (*Reliance Carpet*) the High Court noted at paragraphs 22 to 27 of the decision that the term 'deposit' had several aspects. These aspects include that a deposit: could be counted towards the payment of the purchase price; be brought into account in assessment of damages; be a token provided by the purchaser as 'an earnest to bind the bargain'; and provide a form of security for performance by the purchaser.

3. Paragraph 33

Omit 'two'; substitute 'a number of'.

4. Paragraph 109

Omit the paragraph.

5. Paragraph 110

Omit 'However, in'; substitute 'In'.

6. Paragraph 111

After the paragraph, insert:

111A. In *Reliance Carpet* the High Court considered the proposition that a deposit held as security for the performance of a purchaser's obligations under a contract when forfeited for failure of the purchaser to perform its obligations is a payment in the nature of damages. The Court stated at paragraph 24:

The argument fails at proposition (i). Subject to the possibility of a successful application by the purchaser under s49(2) of the Property Law Act[16], a deposit may be forfeited by a purchaser irrespective of the vendor having sustained any loss sounding in damages for breach of contract...

7. Paragraph 121

Omit the last two sentences (including the footnote).

8. Paragraphs 123 and 124

Omit the paragraphs, substitute:

123. In *Reliance Carpet* the High Court endorsed comments made earlier by the Administrative Appeals Tribunal in *Reliance Carpet Company Pty Ltd v. Federal Commissioner of Taxation* [2006] AATA 486; (2006) 2006 ATC 2206; (2006) 63 ATR 1001 that there is a supply made by a vendor upon entering into a contract for the sale of land. The Court said at paragraph 37:

The AAT correctly applied that definition to the Contract as follows:

In the circumstances it may fairly be said that upon execution of the contract the applicant made a supply in that, in terms of s9-10(2)(g) of [the Act], it 'entered into an obligation' to do the things it was bound to do under the contract...

124. The High Court reasoned that the payment of the deposit by the purchaser was in connection with the supply made by the vendor. The High Court said at paragraph 33:

The payment of the deposit by the purchaser to the taxpayer was 'in connection with' a supply by the taxpayer, within the meaning of the definition of 'consideration' in s9-15(1)(a) of the Act...the payment of the deposit obliged the parties to enter into the mutual legal relations with the executory obligations and rights laid out in the Contract. Those legal relations were directed to the completion of the Contract by conveyance of the property to the purchaser by the taxpayer upon payment by the purchaser...

124A. The Commissioner is of the view that the High Court's reasoning in *Reliance Carpet* is equally applicable to cases involving the forfeiture of deposits on contracts for the provision of goods and services generally.

9. Paragraph 125

After the word 'treated' (first occurrence), insert 'where appropriate'.

10. Paragraph 126

Omit the paragraph; substitute:

126. 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 and is not otherwise GST-free or input taxed.

126A. A supply contemplated to be made under a contract may meet the description of a supply that is GST-free or input taxed. A security deposit may be paid in relation to the contract. If the deposit is forfeited, it is consideration for a supply the supplier makes when it enters into a contract consisting of the obligations it undertakes and the consequent rights it grants. The Commissioner considers that paragraphs 9-30(1)(b) and 9-30(2)(b) would be applicable in a case where a security deposit is forfeited in relation to a contract where the contemplated supply would have been GST-free or input taxed. Broadly those provisions state that a supply consisting of a right to receive another supply that would be GST-free or input taxed is also GST-free or input taxed, as the case requires.

11. Paragraph 127

Omit the heading; substitute:

Example 13: Purchase contract – forfeiture of a deposit on a supply that would have been GST-free

12. Paragraph 128

Omit the paragraph; substitute:

128. *The supply of beef would have been a GST-free supply. Upon forfeiture, the deposit is treated as consideration for a supply of a right to receive a supply of beef under the contract. This supply is a GST-free supply because it involves the supply of a right to receive a supply of beef which would have been GST-free.*

Example 13A: Purchase contract – forfeiture of a deposit on a supply that would have been a taxable supply

128A. *If the local supplier had instead contracted to supply cardboard boxes to Joanne the supply of the boxes would have been a taxable supply. Upon forfeiture by Joanne, the deposit she paid is treated as consideration for a taxable supply by the local supplier of a right to receive the supply of boxes. The supplier attributes GST payable of \$10 on this taxable supply in the tax period in which the deposit is forfeited.*

Example 13B: Purchase contract – forfeiture of a deposit on what would have been a mixed supply

128B. *Assume the local supplier would have made a mixed supply consisting of both beef and cardboard boxes under a single contract for which Joanne paid a single deposit. Upon forfeiture of the deposit the supplier would determine on a reasonable basis the amount of the forfeited deposit relevant to the supply of a right to Joanne to receive the cardboard boxes under the contract. The supplier would attribute GST payable on this portion of the forfeited deposit. The supplier would not attribute any GST for that portion of the forfeited deposit applicable to the contemplated GST-free supply of beef.*

13. Paragraph 131

- (a) Omit 'a new or separate supply'; substitute 'the supplier's entry into obligations upon the hire arrangement being made'.
- (b) Omit 'paragraphs 121 to 128'; substitute 'paragraphs 121 to 128B of this Ruling'.

14. Paragraph 138

Insert at the end of the paragraph ' *The initial hire charge was a taxable supply by Stan.*'

15. Paragraph 139

Omit the paragraph, substitute:

139. *The forfeited deposit is consideration for Stan's entry into obligations at the time the hire arrangement was made. The forfeited deposit is consideration for a taxable supply. The GST payable is attributable to the tax period in which the deposit is forfeited.*

16. Footnote 61

Omit the text; substitute:

Note that to the extent an entity is in receipt of the deposit different rules under subsection 29-5(2) apply if the taxpayer accounts on a cash basis.

17. Paragraph 162

Omit the first sentence; substitute:

Assume the facts from Example 13A at paragraph 128B of this Ruling where the contemplated supply is a taxable supply of cardboard boxes.

18. Paragraph 170

Omit:

Example 13: Purchase contract – forfeiture of deposit 127

Substitute:

Example 13: Purchase contract – forfeiture of a deposit on a supply that would have been GST-free 127

Example 13A: Purchase contract – forfeiture of a deposit on a supply that would have been a taxable supply 128A

Example 13B: Purchase contract – forfeiture of a deposit on what would have been a mixed supply 128B

19. Related Rulings/Determinations references

Omit:

GSTR 2001/4

20. Legislative references

Omit:

- ANTS(GST)A 1999 9-10(2)(e)
- ANTS(GST)A 1999 9-10(2)(h)

- ANTS(GST)A 1999 29-5(2)

Insert:

- TAA 1953 Sch 1 105-60
- ANTS(GST)A 1999 9-15(1)(a)
- ANTS(GST)A 1999 9-30(1)(b)
- ANTS(GST)A 1999 9-30(2)(b)

21. Case references

Omit:

- Hoobin, Re; Perpetual Executors and Trustees Association of Australia Ltd v. Hoobin [1957] ALR 932; [1957] VR 341
- Lowe v. Hope [1969] 3 All ER 605

Insert:

- Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd [2008] HCA 22; (2008) 246 ALR 448; (2008) 2008 ATC 20-028; (2008) 68 ATR 158
- Reliance Carpet Company Pty Ltd v. Federal Commissioner of Taxation [2006] AATA 486; (2006) 2006 ATC 2206; (2006) 63 ATR 1001

22. Other references

Omit:

- Carter, JW 1991, Breach of Contract, 2nd edn, The Law Book Company Limited, Sydney
- Contract Law in Australia, Carter and Harland 4th edition, Cheshire
- Fifoot's Law of Contract, Seddon and Ellinghaus, 8th Australian edition
- Mann, G and McMahon, J 'GST: real property, real issues: Part III Security needed on security deposits', Taxation In Australia, 2005, issue 39, No. 9, April 2005
- Rossiter, CJ 2003, Principles of Land Contracts and Options in Australia, Chapter contributed by Harley, DJ, Lexis Nexis Butterworths, Australia
- Rowe, S 'Liquidated damages, terminated leases and forfeited deposits – Part II', Australian GST Journal, 2004, vol. 4, issue 9

This Addendum explains the Commissioner's view of the law as it applies both before and after its date of issue. You can rely upon this Addendum on and from its date of issue for the purpose of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

Commissioner of Taxation

24 June 2009

ATO references

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