GSTD 2012/2 - Goods and services tax: what are the goods and services tax consequences following the sale of commercial premises that are subject to a lease?

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From 1 July 2015, the term 'Australia' is replaced in nearly all instances within the GST, Luxury Car Tax, and Wine Equalisation Tax legislation with the term 'indirect tax zone' by the *Treasury Legislation Amendment (Repeal Day) Act 2015*. The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts. This change was made for consistency of terminology across the tax legislation, with no change in policy or legal effect. For readability and other reasons, where the term 'Australia' is used in this document, it is referring to the 'indirect tax zone' as defined in subsection 195-1 of the GST Act.

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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 commercial premises that are subject to a lease?

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Background

1. This Determination concerns the following goods and services tax (GST) issues:

   (a) the GST liability of the vendor and purchaser in respect of a lease of commercial premises, following the sale of such premises subject to a continuing lease; and

   (b) how any GST liability for such a supply is attributed.[1]

2. In this Determination, when we refer to 'commercial premises' we mean all forms of premises other than residential premises supplies of which are input taxed under sections 40-35 or 40-65 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).[2]

[1] The GST consequences for the purchaser of a reversion in residential premises are addressed in Goods and Services Tax Determination GSTD 2012/1 *Goods and services tax: what are the goods and services tax consequences following the sale of residential premises subject to a lease?*

[2] All legislative references are to the GST Act unless otherwise indicated.

3. In this Determination, the term 'reversion' refers to the freehold interest acquired when commercial premises are sold subject to a lease. It also refers to the interest acquired when a leasehold estate is assigned subject to a sub-lease of commercial premises. Both of these interests are a form of real property as defined in section 195-1.

Ruling

4. Following a sale of commercial premises that are subject to a lease, the purchaser of the reversion is liable for GST relating to the lease where the elements of section 9-5 are satisfied.

5. The purchaser's GST liability is attributed in accordance with the rules in Divisions 29 and 156.

6. The purchaser is entitled to an input tax credit for the acquisition of the premises where the requirements of section 11-5 are satisfied and subsection 75-5(1) (the margin scheme) was not applied to work out the amount of GST payable on the sale of the premises. Further, the purchaser is entitled to input tax credits for acquisitions that relate to the purchase of the premises or to the ongoing lease of the premises where the requirements of section 11-5 are met.

7. The vendor of the commercial premises is not liable for GST relating to the lease where it is no longer in receipt of or entitled to rent or other consideration for the lease following the sale of the reversion.

8. In the following example, all entities are registered for GST and make supplies connected with Australia in the course or furtherance of an enterprise they carry on.

Example – Sale of commercial premises subject to a lease

9. *Grays Pty Ltd, as owner of a shopping centre, entered into a lease to Nation Pty Ltd. The supply of the shopping centre to Nation Pty Ltd under the lease is a taxable supply. Grays Pty Ltd subsequently sold the shopping centre to Ultra Pty Ltd subject to the existing lease to Nation Pty Ltd.*

10. *Grays Pty Ltd is liable for GST payable on the supply of the lease to the extent that rent or other consideration is paid to it in connection with that supply.*

11. *Following the sale by Grays Pty Ltd, Ultra Pty Ltd is liable for GST in respect of the lease to Nation Pty Ltd to the extent that rent or other consideration is paid to it in connection with the lease.*

Date of effect

12. This Determination applies both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
22 February 2012

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Continuing supply of leased commercial premises

13. After the sale of the reversion in commercial premises, no separate or new lease agreement need be entered into between the purchaser (as new owner of the real property) and the existing lessee to ensure the continued operation of the lease. This follows from the operation of property law.[3]

14. The Full Federal Court in *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd*[4] (*Westley Nominees*) held that a purchaser of a reversion in commercial premises 'assumed the obligation [of the vendor] to honour the lease according to its terms and in that sense entered into an obligation to tolerate an act or situation and in consequence, made a 'supply' by virtue of s 9-10(2)(g)'.[5] The fact that such an obligation arose by operation of law did not affect that conclusion.[6] In its decision, the Court also noted that the intention of the legislation is that the purchaser be regarded as continuing to make the supply of the lease.[7]

15. The Full Federal Court in *South Steyne Hotel Pty Ltd v. Commissioner of Taxation*[8] (*South Steyne*) held that 'there is no supply' by the purchaser of a reversion in residential premises and because 'there was none' declined an application for a declaration regarding the status of such a supply.[9] In this regard, Edmonds J was of the view that following the sale of the reversion, there was no new supply by the purchaser, but merely a continuation of the first category of supply, namely the granting of the lease in the residential premises, there being no dispute that that supply was 'by way of lease'.[10] Our view on the GST implications of this decision for the sale of residential premises subject to a lease is explained in GSTD 2012/1.

GST consequences

Taxable supply

16. Liability for GST is founded upon the concept of a 'taxable supply'.[11] Section 9-5 contains the requirements for there to be a 'taxable supply'. Paragraph 9-5(a) requires that an entity makes a supply for consideration. Under section 9-15, consideration includes any payment in connection with a supply and any payment in response to or for the inducement of a supply.

17. Consistent with the decision in *Westley Nominees*, we consider that, following the sale of the reversion in commercial premises, there is a continuing supply by the purchaser to the lessee. Provided the other conditions in section 9-5 are met, this supply is a taxable supply.

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[3] This is further explained at paragraphs 14 to 16 of GSTD 2012/1.
[4] [2006] FCAFC 115; (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682.
[5] *Westley Nominees* at [22].
[6] *Westley Nominees* at [22].
[7] *Westley Nominees* at [20].
[8] [2009] FCAFC 155; (2009) 180 FCR 409; 2009 ATC 20-145; (2009) 74 ATR 41.
[9] *South Steyne* per Emmett J at [32], Finn J at [2] and Edmonds J at [76].
[10] *South Steyne* per Edmonds J at [76].
[11] Sections 7-1 and 9-40.

18. The purchaser receives consideration within the meaning of section 9-15 for that supply being the rent or other consideration payable under the lease, and paragraph 9-5(a) is thereby satisfied. If all of the other requirements of section 9-5 are met, the purchaser is liable for GST in respect of the lease.

19. The vendor of the commercial premises is not liable for GST relating to the lease following the sale of the reversion. As the entitlement to rent payable under the lease passes from vendor to purchaser, following the sale the vendor no longer makes a supply to the lessee for consideration.[12]

Attribution

20. Subsection 29-5(1) provides that GST payable on a taxable supply is attributable to the tax period in which any of the consideration is received for the supply, or to the period in which an invoice is issued relating to the supply if this occurs before consideration is received.

21. However, under subsection 29-5(2), if an entity accounts for GST on a cash basis, GST is attributable to a tax period to the extent consideration is received in that tax period.

22. Under subsection 156-5(1), GST payable on a taxable supply made for a period or on a progressive basis and for consideration to be provided on a progressive or periodic basis, is attributed in accordance with subsection 29-5(1) as if each progressive or periodic component of the supply were a separate supply.[13]

23. Subsection 156-5(1), and Division 156 more broadly, generally apply only to entities that account for GST on a basis other than cash.

24. By spreading the liability for GST and availability of input tax credits over the period during which payments are made, Division 156 produces a similar result for these entities, as for entities that account for GST on a cash basis.

25. For the purposes of subsection 156-5(1), section 156-22 treats a supply or acquisition by way of lease as a supply or acquisition that is made on a progressive or periodic basis for the period of the lease.

26. By entering into an obligation to tolerate the continuation of the lease, the purchaser of a reversion in commercial premises makes a supply to the lessee for a period, in connection with which rent is periodically paid.

27. Noting the comments of the Court in *Westley Nominees* that the legislation discloses an intention that the purchaser of the reversion be regarded as continuing the supply of the lease,[14] there is no reason to read section 156-22 as being confined to supplies made only by the grant of a lease in commercial premises occurring before the reversion in those premises is sold.[15]

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[12] *Westley Nominees* at [13] and [21]. See also section 117 of the *Property Law Act 1974* (Qld), section 117 of the *Conveyancing Act 1919* (NSW), section 141 of the *Property Law Act 1958* (Vic), section 77 of the *Property Law Act 1969* (WA), section 10 of the *Conveyancing and Law of Property Act 1884* (Tas), section 124 of the *Real Property Act 1886* (SA), section 130 of the *Law of Property Act 2000* (NT) and section 113 of the *Land Titles Act 1925* (ACT).

[13] Goods and Services Tax Ruling GSTR 2000/35 *Goods and services tax: Division 156 – supplies and acquisitions made on a progressive or periodic basis*, further explains the Commissioner's view on the application of Division 156.

[14] Discussed at paragraph 14 of this Determination.

[15] *Westley Nominees* at [20].

28. Additionally, as subsection 156-5(1) applies to all taxable supplies, its application is not conditional on the operation of section 156-22.

29. Consequently, where all of the other requirements of section 9-5 are satisfied, following the sale of leased commercial premises a purchaser to whom Division 156 applies is required to account for GST as if a separate supply is made for each tax period the lease remains in place.[16] Each such supply will, in accordance with subsection 156-5(1), be regarded as a component of the actual supply made.

30. GST payable relating to each component is, in absence of an invoice being issued, attributed under paragraph 29-5(1)(a) to the tax period in which payment for that component is received. Where an invoice for a particular component is issued prior to payment, GST in respect of that component is attributed under paragraph 29-5(1)(b) to the tax period in which the invoice is issued.[17]

[16] See also paragraph 12 of GSTR 2000/35.
[17] See also paragraph 61 of GSTR 2000/35.

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 2000/35; GSTD 2012/1; TR 2006/10

Subject references:

- goods and services tax
- GST commercial residential premises
- GST lease and real property
- GST real property
- GST residential premises
- tax invoices

Legislative references:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 7-1
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-5(a)
- ANTS(GST)A 1999 9-10(2)(g)
- ANTS(GST)A 1999 9-15
- ANTS(GST)A 1999 9-40
- ANTS(GST)A 1999 11-5
- ANTS(GST)A 1999 Div 29
- ANTS(GST)A 1999 29-5(1)
- ANTS(GST)A 1999 29-5(1)(a)
- ANTS(GST)A 1999 29-5(1)(b)
- ANTS(GST)A 1999 29-5(2)
- ANTS(GST)A 1999 40-35
- ANTS(GST)A 1999 40-65
- ANTS(GST)A 1999 75-5(1)
- ANTS(GST)A 1999 Div 156
- ANTS(GST)A 1999 156-5(1)
- ANTS(GST)A 1999 156-22
- ANTS(GST)A 1999 195-1
- TAA 1953
- Conveyancing Act 1919 (NSW) 117
- Conveyancing and Law of Property Act 1884 (Tas) 10
- Land Titles Act 1925 (ACT) 113
- Law of Property Act 2000 (NT) 130
- Property Law Act 1958 (Vic) 141
- Property Law Act 1969 (WA) 77
- Property Law Act 1974 (Qld) 117
- Real Property Act 1886 (SA) 124

Case references:

- South Steyne Hotel Pty Ltd v. Federal Commissioner of Taxation [2009] FCAFC 155; (2009) 180 FCR 409; 2009 ATC 20-145; (2009) 74 ATR 41
- Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd [2006] FCAFC 115; (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682

ATO references

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