

GSTD 2012/2A1 - Addendum - 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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Addendum

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?

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Determination GSTD 2012/2 to incorporate changes following the decision in *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49; 2014 ATC 20-474, and to also incorporate the ATO view formerly in ATO Interpretative Decision ATO ID 2013/30, which has been withdrawn.

GSTD 2012/2 is amended as follows:

1. Paragraph 1

Omit subparagraph 1(a); substitute:

- (a) the GST liability of the vendor and purchaser on a lease of commercial premises, following the sale of those premises subject to a continuing lease, and

2. Paragraph 8

- (a) Omit 'example'; substitute 'examples'.
- (b) Omit 'Australia'; substitute 'the indirect tax zone^{2A}'.

3. Paragraphs 9 to 11

Omit the paragraphs (including heading); substitute:

Example 1 – Sale of commercial premises subject to a lease

9. *Grays Pty Ltd owns a shopping centre that it has leased to Nation Pty Ltd. The supply of the shopping centre to Nation under the lease is a taxable supply for which the rent is consideration. Grays is liable for GST on that supply. Grays sells the shopping centre to Ultra Pty Ltd subject to the existing lease. Following the sale by Grays, Ultra is liable for GST on the supply of the shopping centre by way of*

^{2A} See section 195-1 of the GST Act for the definition of 'indirect tax zone'.

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lease to Nation. The GST is payable with reference to the price of the supply, which in this case is the rent.

Example 2 – Sale of leased commercial premises where rent has been pre-paid

10. Bench Pty Ltd accounts for GST on a non-cash basis and has leased an office block to Press Pty Ltd for a monthly GST inclusive rent of \$110,000. Bench will sell the office block to Squat Ltd with the lease in place. Settlement will occur on 16 April. The sale contract lets Bench keep any rent paid before settlement, but requires a purchase price reduction to reflect the GST exclusive amount of any prepaid rent Bench receives that relates to the days in the month following settlement.

11. On 1 April, Bench invoices Press for \$110,000, which it pays in full on the same day. Bench is liable for GST of \$10,000 on this prepaid rent. The purchase price is reduced by \$50,000 at settlement for the prepaid rent Bench has received that relates to the days in the month following the sale (that is, a \$50,000 adjustment for 16 to 30 April).^{2B}

11A. The purchase price adjustment decreases the consideration Squat pays for the leased premises and is not consideration for the supply of the office block it will make to Press by way of lease.^{2C}

4. Paragraph 13 heading

Omit the heading; substitute 'Supply of leased commercial premises'.

5. Paragraphs 14 and 15

Omit the paragraphs; substitute:

14. *Commissioner of Taxation v. MBI Properties Pty Ltd*⁴ (*MBI*) was a case concerning the sale of leased residential premises. The High Court found that, in addition to a supply arising when a lease is granted, on purchasing leased premises, the purchaser assumed the vendor's obligation under the lease to provide the lessee with use and occupation of the premises.⁵ The High Court concluded that, as a result of assuming and observing this obligation, the purchaser made a supply of the premises by way of lease to the lessee progressively during the remaining lease term.⁶

15. While the decision in *MBI* concerned leased residential premises, the High Court's conclusions were made in the context of its broader analysis about contracts for the lease of real property generally,⁷ and confirm that the purchaser of a reversion makes a supply to the lessee.

^{2B} ATO Interpretative Decision ATO ID 2013/30 *GST and the sale of commercial premises that are subject to a lease*, previously explained the view, as outlined in Example 2 above, that the vendor of leased commercial premises would be subject to GST on prepaid rent in these circumstances. ATO ID 2013/30 has been withdrawn.

^{2C} See Goods and Services Tax Determination GSTD 2006/3 *Goods and services tax: are settlement adjustments taken into account to determine the consideration for the supply or acquisition of real property?*

⁴ [2014] HCA 49; 2014 ATC 20-474.

⁵ *MBI* at [40].

⁶ *MBI* at [36] and [40].

⁷ *MBI* at [35] – [37].

6. Paragraph 16

Omit the first sentence; substitute:

Liability for GST depends on their being a 'taxable supply'.⁸

7. Paragraphs 17 to 19

Omit the paragraphs; substitute:

17. Consistent with the decisions in *MBI* and *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd*,⁹ following the sale of the reversion in commercial premises, there is a supply made by the purchaser to the lessee, for which the rent paid under the lease is consideration.¹⁰ Provided the other conditions in section 9-5 are met, this supply is a taxable supply and the purchaser is liable for GST on the lease.

18. The vendor of commercial premises is not liable for GST on 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. As the entitlement to rent payable under the lease passes from vendor to purchaser following the sale, the vendor no longer makes any supply to the lessee for consideration.¹¹ Instead, rent paid under the lease following the sale has a connection with the purchaser's supply by way of lease, sufficient to make it consideration for that supply.¹²

8. Paragraph 23

Omit 'generally'.

9. Paragraphs 25 to 30

Omit the paragraphs; substitute:

25. As a result of assuming and observing the obligation to provide the lessee with use and occupation of the premises, the purchaser of a reversion makes a supply to the lessee,¹⁴ for which rent is periodically paid.¹⁵ Based on *MBI*, the supply made to a lessee by the purchaser of a reversion in commercial premises, is by way of lease.

⁸ Sections 7-1 and 9-40.

⁹ [2006] FCAFC 115; (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682.

¹⁰ *MBI* at [45]. See also Goods and Services Tax Determination GSTD 2000/10 *Goods and services tax: are outgoing payments payable by a tenant under a commercial property lease part of the consideration for the supply of the premises?* for explanation on when payments other than rent can be consideration for the supply of commercial premises by way of lease.

¹¹ *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).

¹² *MBI* at [45].

¹⁴ *MBI* at [36] and [40] - [41].

¹⁵ *MBI* at [45].

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26. Section 156-22 confirms that, for the purposes of the special rules in Division 156, a supply by way of lease is to be treated as being made on a progressive or periodic basis, for the period of the lease.

27. 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.

28. 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

This Addendum applies on and from 23 September 2015.

Commissioner of Taxation

23 September 2015

ATO references

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¹⁶ See also paragraph 12 of GSTR 2000/35.

¹⁷ See also paragraph 61 of GSTR 2000/35.