GSTR 2000/28A3 - 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 take account of the High Court decision in *Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; 2008 ATC 20-028; (2008) 68 ATR 158 in relation to a deposit held as security for the performance of an obligation under a standard land contract and the application of Division 99 of the *A New Tax System Goods and Services Tax) Act 1999* to such deposits.

GSTR 2000/28 is amended as follows:

1. Paragraph 9

After Note 2, insert:

> Note 3: The Addendum to this Ruling that issued on 24 June 2009 explains the Commissioner's view of the law as it applied 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 14

At the end of the paragraph (inside the parenthesis), insert:

> *; Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; 2008 ATC 20-028; (2008) 68 ATR 158 *(Reliance Carpet)* at paragraphs 22 to 27

3. Paragraph 27

At the end of the first sentence, insert the footnote:

> [9A] The deposit must be a 'security deposit' as defined and explained in GSTR 2006/2 Goods and services tax: deposits held as security for the performance of an obligation in order to qualify for treatment under Division 99 of the GST Act.

4. Paragraph 30

Omit the first sentence; substitute:

> Where the forfeiture of a deposit to you as vendor under a standard land contract is consideration for a supply, and, which, if all the other requirements of section 9-5 are met, is a taxable supply, you attribute the GST payable to the tax period during which the deposit is forfeited.

5. Paragraph 54

After the paragraph, insert:

> 54A. In *Reliance Carpet* the High Court considered the forfeiture of a deposit pursuant to the terms and conditions of a standard contract for the sale of real estate in Victoria. With respect to the existence of an invoice and attribution of the deposit received by the vendor, the High Court said at paragraph 9:
>
> > Division 29 lays down rules for the attribution to a tax period of the GST payable on a taxable supply. The general rule (section 29-5) is that the supplier becomes liable to pay GST on the earlier of two events, namely the receipt by the supplier of any of the consideration for the taxable supply, and the issue of an invoice relating to that supply; in the present case no invoice was issued by the taxpayer and the only relevant event was the receipt of the alleged consideration.

6. Footnote 20

Omit the text; substitute:

> Refer to GSTR 2006/2 Goods and services tax: deposits held as security for the performance of an obligation.

7. Paragraph 61

After the third sentence, insert:

> In *Reliance Carpet* the High Court observed at paragraph 39 with respect to the application of section 99-10 to a forfeited security deposit under a contract for the sale of land:
>
> > ...But, as section 99-10 makes plain, the GST was attributable to the tax period within which the forfeiture occurred.

8. Paragraph 63

After 'agreed),', insert the footnote:

> [21A] Refer to GSTR 2006/2 Goods and services tax: deposits held as security for the performance of an obligation at paragraphs 72 to 87 regarding what is a reasonable amount for a deposit.

9. Paragraph 64

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

10. Paragraph 65

(a) Omit 'dual '.

(b) Insert after the paragraph:

> 65A. In *Reliance Carpet* the High Court noted at paragraphs 22 to 27 that the term 'deposit' has 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.

11. Paragraph 66

At the end of the first sentence, insert the footnote:

> [23A] Refer to GSTR 2006/2 Goods and services tax: deposits held as security for the performance of an obligation, in particular paragraph 20, for a full explanation of the requirements of a 'security deposit' for the purposes of Division 99 of the GST Act.

12. Paragraph 68

Omit the first sentence, substitute:

> This means at the time that the deposit is paid upon entering into a standard land contract, the deposit is neither consideration received by the vendor for any supply nor consideration provided by the purchaser for any acquisition.

13. Paragraph 79

Omit 'for the supply of land' (first occurrence); substitute 'for a supply'.

14. Paragraph 95

Omit the subheading; substitute:

> ***Taxable, GST-free or input taxed supplies***

15. Paragraph 97A

Omit the paragraph.

16. Paragraphs 97C and 97D

Omit the paragraphs; substitute:

97C. 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 ATC 2206; (2006) 63 ATR 1001 that there is a supply made by a vendor upon entering into a standard contract for the sale of real estate. The Court, in considering the definition of supply in section 9-10, said at paragraphs 37 and 38:

> …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…
>
> 38. Further, as indicated earlier in these reasons, and within the meaning of par (d) of s9-10(2) as extended by the definition of 'real property', there was upon exchange of contracts the grant by the taxpayer to the purchaser of contractual rights exercisable over or in relation to land, in particular of the right to require in due course conveyance of the land to it upon completion of the sale.

97D. 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:

> First, as to the consideration. 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 paragraph 9-15(1)(a) of the Act. That connection is readily seen from the circumstance that, with the receipt of the written notice of the exercise of the option by the purchaser, and by force of cl 5 of the Option Agreement, 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. But, as to the requirement for 'consideration' that is not the end of the matter.

17. Paragraph 97E

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

18. Paragraph 97F

Omit the paragraph; substitute:

> 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 and is not otherwise GST-free or input taxed.
>
> 97G. A supply contemplated to be made under a standard land contract may meet the description of a supply that is GST-free or input taxed. A security deposit is paid in relation to the contract. If the deposit is forfeited, it is consideration for a supply the vendor 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 standard land 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.
>
> **Example of where a forfeited deposit is consideration for a supply that would have been input taxed**
>
> 97H. Chuck enters into a standard land contract for the sale of residential property to Tanya. The property is not new residential property and the sale will be treated as an input taxed supply. Pursuant to the terms of the contract Tanya pays a deposit of 10% of the agreed purchase price.
>
> 97I. Subsequently, Tanya defaults and the deposit is forfeited to Chuck. Upon forfeiture, the deposit is treated under section 99-5 as consideration for Chuck's earlier supply of a right to receive a supply of residential premises. As the forfeited deposit is consideration for a supply of a right to receive a supply of residential premises that would have been input taxed, paragraph 9-30(2)(b) operates to ensure that the supply of rights made by Chuck upon entry into the contract is also input taxed.

19. Paragraph 99

Omit 'under paragraphs 97A to 97F'; substitute 'referred to in paragraph 97F of this Ruling'.

20. Paragraph 106

Omit:

Taxable supplies 95

Substitute:

Taxable, GST-free or input taxed supplies 95

Insert:

Example of where a forfeited deposit is consideration for a supply that would have been input taxed 95H

21. Related Rulings/Determinations:

Omit 'GSTD 2000/1'; substitute 'GSTR 2006/2'.

22. Legislative references:

Insert:

- ANTS(GST)A99 9-10
- ANTS(GST)A99 9-10(2)(d)
- ANTS(GST)A99 9-10(2)(g)
- ANTS(GST)A99 9-15(1)(a)
- ANTS(GST)A99 9-30(1)(b)
- ANTS(GST)A99 9-30(2)(b)
- ANTS(GST)A99 29-5

23. Case references

Insert:

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

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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