

WYPF and Commissioner of Taxation -

Decision Impact Statement

WYPF and Commissioner of Taxation

Citation:	[2021] AATA 3050
Venue:	Administrative Appeals Tribunal
Venue reference no:	2020/3713-3714
AAT member name:	Senior Member Olding
Decision date:	25 August 2021
Appeals on foot:	No
Decision outcome:	Partly favourable to the Commissioner

Impacted advice



This decision has no impact on any related advice or guidance.

Précis

This Decision impact statement outlines the ATO's response to this case, which considers whether building works are consideration for the acquisition of land under subsection 75-10(2) of the *A New Tax System (Goods and Services Tax) Act 1999*.¹ This case also considers the operation of section 142-10.

Summary of facts

A developer (the taxpayer) and an Australian Capital Territory (ACT) government entity (the government entity) entered into a development lease arrangement, requiring the taxpayer to complete preparatory works before the ACT would supply the land to the taxpayer. The supply of the land was by way of the grant of several long-term Crown leases (consequent leases). The consequent leases were conditional on certain building works being completed, including construction of residential apartments, on the land within 48 months. The taxpayer risked forfeiture of the consequent leases if they failed to complete the building works.

On completion of the building works, the taxpayer sold the residential apartments and applied the margin scheme under subsection 75-10(2). The goods and services tax (GST) payable is 1/11th of the 'margin' between the consideration for the taxable supply of the apartment and the consideration for the acquisition of the related land. To the extent the taxpayer provided non-monetary consideration for acquisition of the land, this would reduce the margin and the GST payable on its taxable supplies of the apartments.

¹ All legislative references in this Decision impact statement are to the *A New Tax System (Goods and Services Tax) Act 1999*.

It was common ground that the monetary payment and the preparatory works were consideration for acquisition of the land. The taxpayer, however, contended that the building works were also non-monetary consideration for the land.

The performance of preparatory works was a taxable supply by the taxpayer to the government entity. The taxpayer issued an invoice requesting payment of the GST amount for that taxable supply. The government entity was not contractually liable to pay that amount, and it was unpaid at the time of the hearing.

Part way through the period in which the taxpayer set prices for its apartment sales, the taxpayer received private rulings confirming that the preparatory works were non-monetary consideration for the acquisition of land. The taxpayer remitted GST on taxable supplies of apartments without taking the preparatory works into account. This means there was excess GST included in the relevant net amounts under section 142-10.

Issues decided by the Tribunal

The following issues were before the Tribunal:

- whether the building works were consideration for acquisition of the land by the taxpayer under subsection 75-10(2)
- whether the GST amount in the outstanding invoice issued for the preparatory works affects the consideration for acquisition of the land
- whether the taxpayer passed on the excess GST to purchasers of the apartments under section 142-10, and
- if the taxpayer did pass on excess GST, did section 142-15 apply so that section 142-10 should be treated as never having applied?

Building works issue

The Tribunal held at [45–46] that the building works were not consideration for the taxpayer's acquisition of the land. There was no sufficient nexus between the building works and acquisition of the land by way of the consequent leases. While undertaking the building works was a condition of the consequent leases, the Tribunal held at [37] that it was not a condition of the grant of the consequent leases.

The Tribunal held at [32–35] that the requirement to undertake the building works was not part of a 'single, integrated and indivisible' transaction, as described by the High Court in *Commissioner of State Revenue v Lend Lease Development Pty Ltd* [2014] HCA 51 (*Lend Lease*) at [62].

The Tribunal at [44] concluded that although construction of the apartments may be consistent with the statutory objectives of the government agency, it did not follow that the building works were a supply made by the taxpayer or consideration for acquisition of the land. The Tribunal also held at [48] that the building works were not carried out to obtain the consequent leases, but for the taxpayer's own business objectives reflecting the commercial and practical reality of the development.

Invoice issue

The Tribunal held at [54] that there was no current basis for the GST amount in the unpaid invoice to reduce the value of the preparatory works as non-monetary consideration for the land. The Tribunal also observed at [53] that, if the GST amount was paid, it would probably trigger an adjustment event for that supply. However, it would not change the value of the preparatory works as consideration for the land.

Passing on issue

The Tribunal held at [76] that the taxpayer had not passed on the excess GST relating to the taxable supplies of the apartments. The Tribunal accepted that the taxpayer had remitted the excess GST despite knowing it was not payable. The Tribunal concluded that the taxpayer set its prices in a market, where other developers were taking into account the value of the preparatory works and remitting the correct lower amount of GST (at [75]).

Section 142-15

Having decided the building works and passing on issues, the section 142-15 issue did not need to be decided. However, the Tribunal made some observations about whether or not section 142-15 confers a discretion at [86].

ATO view of decision

Building works

The Tribunal's decision confirms the Commissioner's view that satisfying the building works requirements in an ACT long-term Crown lease is not consideration for the supply of the land by way of that long-term Crown lease.

The Tribunal's conclusions at [44] and [48] are consistent with the Commissioner's view, at paragraph 7 of Goods and Services Tax Determination GSTD 2021/1 *Goods and services tax: development works in the Australian Capital Territory*, that building works requirements in ACT long-term Crown leases do not provide the government entity with something of measurable economic value and are not non-monetary consideration for supply of the land.

The Commissioner accepts that whether a particular development lease arrangement is a 'single, integrated and indivisible' transaction consistent with *Lend Lease* is a relevant factor in determining if a particular payment, act or forbearance satisfies nexus requirements and is consideration for an acquisition (or supply).

The Tribunal observed at [31] that in *Lend Lease* it was held that '... all of the various payments, development works and other undertakings, moved the conveyance of the development land to Lend Lease'. The Commissioner does not consider that *Lend Lease* supports the proposition that all of a developer's obligations in such an arrangement are consideration for the land for GST purposes.

In *Lend Lease*, the dispute was not about whether certain obligations were payments, as both parties agreed that the payments had **been made** by *Lend Lease*.² The High Court was only asked to consider if the agreed payments had the required nexus to transfer of the land. In particular, the High Court did not conclude that *Lend Lease*'s primary obligation in the arrangement – to perform building works on *Lend Lease*'s own land – was consideration for that land.³

² Being all the monetary payments made by *Lend Lease* under the arrangement and *Lend Lease*'s undertakings to complete works (*Lend Lease* at [76]) on Victorian Urban Development Authority land (non-monetary consideration) (*Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2013] VSCA 207 at [100], [165] and [185]).

³ *Lend Lease* at [9] and *Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2013] VSCA 207 at [14]. It was only the monetary payment by *Lend Lease* to the Victorian Urban Development Authority of a share of gross revenue on the sale of those buildings that was held to be consideration for the land; refer *Lend Lease* at [9], [17], [24], and [35].

Invoice issue

The Commissioner accepts that, where a government entity has no contractual liability to pay an additional amount under a development lease arrangement, that unpaid amount does not affect the market value of the development services that are consideration for the acquisition of the land.

The Tribunal's observations about the potential GST implications if the unpaid amount were paid refers to a future hypothetical situation. The Commissioner would consider the particular facts and circumstances determine the GST implications, if this issue properly arises in the future.

Passing on issue

The Commissioner considers that, once the Tribunal made certain findings of fact about how the taxpayer and the broader market factored GST into their pricing at [70–71] and [74], it was then open for the Tribunal to conclude that in the 'particular circumstances' this was one of the 'rare instances' where the taxpayer had not passed on the excess GST (at [74]).

The Commissioner takes the view in Goods and Services Tax Ruling GSTR 2015/1 *Goods and services tax: the meaning of the terms 'passed on' and 'reimburse' for the purposes of Division 142 of the A New Tax System (Goods and Services Tax) Act 1999* that whether excess GST has been passed on is a question of fact and must be determined on a case-by-case basis, taking into account the particular circumstances of each case. The Tribunal's findings in this matter reflect this approach and do not warrant any change to the Commissioner's view as set out in GSTR 2015/1. This includes the Commissioner's view that many observations made about passing on in sales tax situations, such as *Avon Products Pty Limited v Commissioner of Taxation* [2006] HCA 29, are equally relevant in considering whether excess GST has been passed on.

Section 142-15

As the Tribunal did not make a decision on the operation of section 142-15, the Commissioner's view, consistent with paragraphs 20 and 21 of GSTR 2015/1, is that section 142-15 confers a discretion.

Implications for impacted advice or guidance

The decision in relation to building works is consistent with the ATO views expressed in Goods and Services Tax Ruling GSTR 2015/2 *Goods and services tax: development lease arrangements with government agencies* and GSTD 2021/1 and no changes are required.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	21 October 2021
Due date:	19 November 2021
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Related Rulings/Determinations

GSTR 2015/1
GSTR 2015/2
GSTD 2021/1

Legislative references

ANTS(GST)A 1999
75-10(2)
142-10
142-15

Case references

Avon Products Pty Limited v Commissioner of Taxation [2006] HCA 29; 230 CLR
356; 80 ALJR 1161
Commissioner of State Revenue v Lend Lease Development Pty Ltd [2014] HCA 51
Lend Lease Development Pty Ltd v Commissioner of State Revenue [2013] VSCA
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