Decision impact statement

Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and Commissioner of Taxation

Court citation(s):	[2022] AATA 4436
Venue:	Administrative Appeals Tribunal
Venue reference no:	2021/3014
AAT member name:	Senior Member R Olding
Judgment date:	23 December 2022
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice

The ATO is reviewing the impact of this decision on related advice and guidance products.

Summary

This Decision impact statement outlines the ATO's response to this case, which concerns whether the sale of residential property was input taxed on the basis of having been used for the making of rental supplies for 5 years, and if so, whether goods and services tax (GST) had been passed on.

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

Brief outline of facts

Domestic Property Developments Pty Ltd as trustee for the DALS Property Trust (DALS), a property developer, rented 2 units in a newly-constructed development to tenants before selling the units. DALS remitted amounts of GST, calculated under the margin scheme, on both sales. DALS subsequently claimed that was an error as the sales were input taxed and sought a refund of the GST amounts it argued were mistakenly remitted.

DALS received certificates of occupancy for both units (Units 1 and 3) on or about 28 October 2011. DALS sought to sell one of another of the units in the development at auction on 5 November 2011, however it failed to sell. Subsequently, DALS offered Units 1 and 3 for lease.

Less than 5 years later (on 15 October 2016), DALS offered Unit 1 for sale. DALS submitted that Unit 1 continued to be available for lease during the sales campaign. DALS granted the purchaser a licence to occupy the unit following entry into the contract for sale, until settlement occurred in February 2017. DALS argued that the

marketing of the unit for sale should not be regarded as a separate use and therefore the unit had only been used for making rental supplies for at least 5 years.

The Tribunal noted[1] that the parties agreed Unit 3 was an input taxed supply, having been used for making rental supplies for at least 5 years. The issue was whether GST had been passed on by DALS for the purposes of section 142-10.

Issues decided by the Tribunal

The paragraph 40-75(2)(a) issue

The Tribunal addressed 2 constructional issues related to paragraph 40-75(2)(a), specifically focusing on the requirement that the premises 'have only been used' for making certain input taxed supplies (rental supplies) 'for the period of at least 5 years'.

Is marketing the premises for sale a 'use'?

Having considered the ordinary meaning of the term 'used', the Tribunal found[2] that actively marketing the premises for sale in the course of a developer's enterprise is a 'use' for the purposes of paragraph 40-75(2)(a). The Tribunal preferred to interpret the term 'used' according to its ordinary meaning as opposed to the Commissioner's submission that it should be interpreted consistently with the defined term 'apply' in the context of Division 129.[3]

The 5-year period

The Tribunal found[4] that paragraph 40-75(2)(a) requires a continuous period of at least 5 years.

The Tribunal also found[5] that Unit 1 had not 'only been used' for making rental supplies due to the property being actively marketed for sale during the 5-year period.

The Tribunal noted[6] that the parties agreed the units became 'new residential premises' when the certificate of occupancy was issued.

While not determinative in this matter, the Tribunal noted that for the supply of Unit 1 to be an input taxed supply, the unit must have only been used for making rental supplies for the period of at least 5 years since the issue of the certificate of occupancy.[7] The Tribunal's reasoning did not address why the 5-year period commenced from the date the certificate of occupancy issued as opposed to a date commencing after the certificate issued.

The 'passing on' issue

This issue was whether DALS is denied a refund by the provisions of Subdivision 142-A because any overpaid amount of GST was passed on to the purchaser. DALS submitted that excess GST was not passed on in respect of either unit.

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[1] *Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and Commissioner of Taxation* [2022] AATA 4436 *(Dals)* at [4].
[2] *Dals* at [47].
[3] *Dals* at [43–44].
[4] *Dals* at [49].
[5] *Dals* at [48].
[6] *Dals* at [22, footnote 9].
[7] *Dals* at [22(a)].

The Tribunal applied the principles from *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29[8] to find that GST was incorporated into the sale price of the units. The Tribunal also noted that where excess GST had been passed on and not reimbursed, it was Parliament's intention that any windfall would result to the revenue, and not the supplier.

The Tribunal stated that[9]:

> …because the applicant sold the units at prices that ensured they exceeded their costs (including substantial amounts erroneously understood to be payable as GST), it faces a difficult challenge in proving it has borne the burden of the excess GST itself

and found[10] that DALS did not prove that excess GST was not recovered in the selling prices of the units.

In drawing this conclusion, the Tribunal made the following observations:

- The Tribunal did not accept that the contractual terms prevented the supplier from passing on the GST to the purchaser, as the excess GST may have been recovered in the agreed price.[11] However, the mere inclusion of standard contractual terms referencing GST does not necessarily mean that the parties have turned their mind to whether GST was considered to be payable.[12]
- The Tribunal did not accept that if the sales were input taxed, there was no GST payable to pass on to the purchaser. The Tribunal observed that Subdivision 142-A is about passing on an amount that was *incorrectly treated* as if it were GST.[13]
- The Tribunal observed that the absence of a tax invoice on the facts carried little weight in relation to the passing on issue for 2 reasons[14]
  - a tax invoice is not required if GST is calculated under the margin scheme, and
  - section 142-5 provides that passing on may occur even if a tax invoice is not issued.
- The Tribunal observed that the Applicant's error in reporting the GST amounts in its business activity statements could be inferred to be a deliberate reporting that was later found to be mistaken.[15]

[8] These principles were also considered and applied in the Tribunal's decisions in *M3K Services Pty Ltd and Commissioner of Taxation* [2021] AATA 4416 and *WYPF and Commissioner of Taxation* [2021] AATA 3050.
[9] *Dals* at [99].
[10] *Dals* at [100].
[11] *Dals* at [77–78].
[12] *Dals* at [80–81].
[13] *Dals* at [79].
[14] *Dals* at [87].
[15] *Dals* at [92–93].

ATO view of decision

The paragraph 40-75(2)(a) issue

Is marketing the premises for sale a 'use'?

The Tribunal's decision confirms the Commissioner's view that marketing the premises for sale is a 'use' of the premises for the purposes of paragraph 40-75(2)(a). This outcome is consistent with the Commissioner's views as set out in Goods and Services Tax Ruling GSTR 2009/4 *Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose*[16] whereby actively marketing a property for sale would be both an application for Division 129 purposes and a use for the purposes of paragraph 40-75(2)(a).

The Tribunal preferred[17] an interpretation of 'used' that follows the ordinary meaning of the word in the context in which it appears in paragraph 40-75(2)(a), rather than an interpretation that seeks to be consistent with 'apply' in Division 129.[18] The Commissioner accepts that the term 'used' is to be interpreted by reference to its ordinary meaning within the statutory context of the GST Act. While there will be an overlap between the ordinary meaning of the term 'used' in the statutory context of the GST Act and the defined term 'apply', the Commissioner will consider what changes are required to be made to GSTR 2009/4 to clarify this position.

Despite a slightly different approach in reasoning to the Commissioner, the Tribunal nonetheless concluded[19] that 'used' in paragraph 40-75(2)(a) includes 'being applied by a developer, through active marketing, as premises for sale in the course of the developer's enterprise'. The Commissioner considers that actively marketing a property for sale would also be an application for Division 129 purposes and the Tribunal's conclusion is therefore considered consistent with the Commissioner's views as set out in GSTR 2009/4. Further, notwithstanding the Tribunal's preferred interpretation, it noted that 'used' is capable of embracing the holding or application of premises for the purposes of sale.[20]

The 5-year period

The Tribunal[21] confirms the Commissioner's view, contained in Goods and Services Tax Ruling GSTR 2003/3 *Goods and services tax: when is a sale of real property a sale of new residential premises?* and GSTR 2009/4, that paragraph 40-75(2)(a) requires a continuous period of 5 years.

The Commissioner has held the long-standing view that when applying paragraph 40-75(2)(a), the 5-year period can be *any* continuous period of at least 5 years between when the premises would otherwise have first become new residential premises and when they are sold.[22] The Commissioner considers this interpretation is open on the wording of paragraph 40-75(2)(a) which provides that:

> …if, for the period of at least 5 years since … the premises first became residential premises … the premises have only been used for making supplies that are input taxed supplies because of paragraph 40-35(1)(a).

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[16] See paragraph 138 of GSTR 2009/4.
[17] *Dals* at [44–46].
[18] See GSTR 2009/4 at [132–135].
[19] *Dals* at [47].
[20] Dals at [46].
[21] Dals at [49].
[22] See paragraph 90 of GSTR 2003/3 and paragraph 133 of GSTR 2009/4.

That is, the 5-year period can commence from any date after (that is, since) the premises first became residential premises.

The Commissioner acknowledges that the paragraph can be interpreted to require the 5-year period to commence from the date from which the premises first become residential premises. However, the paragraph does not explicitly require the 5-year period to commence from that date. Given that the Tribunal's decision did not provide the reasoning for its position regarding the date from which the 5-year period commences, the Commissioner will maintain the position in GSTR 2003/3 and GSTR 2009/4 and seek to clarify this issue at the first available opportunity before the Tribunal or Federal Court.

The 'passing on' issue

The Tribunal's findings provide further support for the Commissioner's 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* in relation to the operation of Division 142.

Implications for impacted advice or guidance

The Commissioner will review GSTR 2003/3 and GSTR 2009/4.

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:	27 September 2023
Due date:	27 October 2023

Legislative references

ANTS(GST)A 40-35(1)(a)
ANTS(GST)A 40-75(2)(a)
ANTS(GST)A Div 129
ANTS(GST)A Subdiv 142-A
ANTS(GST)A 142-5
ANTS(GST)A 142-10

Case references

Avon Products Pty Ltd v Commissioner of Taxation [2006] HCA 29; 2006 ATC 4296; 62 ATR 399; (2006) 230 CLR 356

M3K Services Pty Ltd and Commissioner of Taxation [2021] AATA 4416; 2021 ATC 10-599; 113 ATR 995

WYPF and Commissioner of Taxation [2021] AATA 3050; 2021 ATC 10-587; 113 ATR 724

Other references

GSTR 2003/3

GSTR 2009/4

GSTR 2015/1

ATO references
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