



Decision impact statement

Geocon Land Holdings No. 5 Pty Ltd v Commissioner of Taxation [2025] FCAFC 172

❶ Relying on this Decision impact statement

This publication provides our view on the implications of the court or tribunal decision discussed, including on related public advice or guidance.

Taxpayers can rely on this Decision impact statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Decision impact statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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Venue:	Full Federal Court
Venue reference No:	NSD 49 of 2025
Judgment date:	1 December 2025

Summary of decision

1. This Decision impact statement outlines the ATO's response to this case, which considered whether an amount of excess goods and services tax (GST) had been 'passed on' for the purposes of section 142-10 of the *A New Tax System (Goods and Services Tax) Act 1999*.
2. The Full Federal Court (Court) held that due to insufficient or incomplete facts, it was unable to conclude that the amount of excess GST was passed on and remitted the proceeding to the Administrative Review Tribunal (Tribunal) for redetermination.

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3. All legislative references in this Decision impact statement are to the *A New Tax System (Goods and Services Tax) Act 1999*, unless otherwise indicated.
4. All judgment references in this Decision impact statement are to the judgment in *Geocon Land Holdings No. 5 Pty Ltd v Commissioner of Taxation* [2025] FCAFA 172, unless otherwise indicated.

Overview of facts

5. Geocon Land Holdings No. 5 Pty Ltd as trustee for the Geocon Land Holdings No. 5 Unit Trust (Geocon) acquired a Crown Lease in the Australian Capital Territory (ACT) from the ACT Land Development Agency (LDA). Under a Project Delivery Agreement, Geocon agreed to provide development services in connection with the construction of residential units for sale.
6. Geocon sold the residential units under the margin scheme. Geocon marketed the units using a price list set by reference to market conditions, after ensuring its internal rate of return was met, rather than by reference to underlying costs, including GST.¹
7. In calculating the margin under subsection 75-10(2), Geocon did not include the value of the non-monetary consideration provided for the land, despite being entitled to do so under a private ruling issued by the Commissioner of Taxation (Commissioner).² As a result, Geocon overstated its GST liability and overpaid GST for the relevant period.
8. The Commissioner did not refund the overpaid GST on the basis that Geocon had passed on excess GST to the purchasers of residential units. In those circumstances, the Commissioner was not satisfied, for the purposes of section 142-15, that refunding the excess GST would not result in a windfall gain to Geocon.

Issues before the Court

9. The Commissioner was successful in the Tribunal on all 5 issues raised in the review.³ The Court allowed Geocon's appeal on one of the 5 grounds (Ground 4) and remitted the matter to the Tribunal for redetermination.
10. The Commissioner sought special leave to appeal to the High Court of Australia. Special leave was refused on the basis that the application did not raise a question of general principle.⁴
11. The following 5 issues were before the Court:
 - whether GST payable on Geocon's supply of the development services was attributable to the tax period ended 30 September 2015 (Ground 1 – 'attribution' issue)
 - whether there was an amount of excess GST for the purposes of section 142-10 for the tax period ended 30 September 2017 (Ground 2 – 'excess GST' issue)
 - whether the amount of non-monetary consideration for Geocon's acquisition of the units was \$103,145,685 (Ground 3 – 'non-monetary consideration amount' issue)

¹ At [163].

² The private ruling confirmed that Geocon made a supply of the development services to the LDA and that the development services were non-monetary consideration for Geocon's acquisition of the land. The Commissioner was bound to apply the private ruling.

³ *SFQV and Commissioner of Taxation* [2024] ARTA 9

⁴ *Commissioner of Taxation v Geocon Land Holdings No. 5 Pty Ltd as trustee for the Geocon Land Holdings No. 5 Unit Trust* [2026] HCADisp 47.

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- whether there was an amount of excess GST that was ‘passed on’ by Geocon under section 142-10 (Ground 4 – ‘passing on’ issue)
- whether applying section 142-10 would be inconsistent with the principle that excess GST is not to be refunded if this would give an entity a ‘windfall gain’ (Ground 5 – ‘windfall gain’ issue)

Ground 1 – attribution issue

12. Geocon contended that GST was not attributable to the tax period in which the Crown Lease was granted. Instead, it argued that GST was attributable to the tax period in which the unit plan was registered and the unit titles were created.⁵

13. This was rejected.⁶ The Court agreed with the Tribunal that, on the facts, the Crown Lease was⁷:

- capable of constituting consideration for the development services, and
- consideration ‘for’ the supply of those services for the purposes of section 9-5.

Ground 2 – excess GST issue

14. Geocon contended that, if it succeeded on the attribution issue, the Tribunal should have found that there was no excess GST for the tax period ended 30 September 2017.⁸ Geocon argued that section 142-5 should be interpreted as applying to the total amount of GST attributable to a tax period, rather than to amounts of excess GST arising from individual transactions.⁹

15. The Court held that, because Geocon failed on the attribution issue, this issue did not arise for consideration.¹⁰

16. In any event, the Court explained that section 142-5 applies to ‘individual transactions’ and is ‘not a “gateway” provision’.¹¹ Geocon’s aggregation approach to section 142-5 would be ‘directly contrary to the statutory objective’ and ‘would make a nonsense of the operation of s 142-10’.¹²

Ground 3 – non-monetary consideration amount issue

17. Geocon contended that the non-monetary consideration it provided to obtain the Crown Lease – the development services – included the GST charged on those services.¹³

18. The Court rejected this argument.¹⁴ It held that the GST payable on the development services was not consideration provided by Geocon to the LDA for the acquisition of the Crown Lease. While subsection 75-10(2) allowed Geocon to reduce the margin by the value of the development services, it did not allow any reduction for the GST payable on those services.¹⁵

⁵ At [40].

⁶ At [78].

⁷ At [61].

⁸ At [12].

⁹ At [80–82].

¹⁰ At [79].

¹¹ At [80] and [82].

¹² At [82].

¹³ At [84–86].

¹⁴ At [94].

¹⁵ At [92].

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Ground 4 – passing on issue

19. The passing on issue was the central issue before the Court. Geocon contended that section 142-10 did not apply because excess GST was not passed on to the purchasers of the units.

20. The Court allowed Geocon's appeal on the passing on issue, concluding that¹⁶:

The Tribunal distorted the factual inquiry required by Div 142 and the question of whether excess GST had been "passed on", by employing a form of presumption that Geocon had passed on the overpaid GST because it was profitable overall, which it could only negate by showing something out of the ordinary or unusual. This wrong approach led the Tribunal to treat relevant evidence as not to the point and, as a matter of substance, to give the term "passed on" a meaning different to its ordinary meaning.

21. The Court found that:

- the Tribunal had elevated general observations made by the High Court in *Avon Products*¹⁷ to have the status of legal principle or to create hurdles that are not present in Division 142¹⁸
- there is to be no assumption that overpaid GST is passed on¹⁹
- *Avon Products* is not authority for the proposition that a profitable business must be passing on its costs, particularly where overpaid GST was thought not to be payable.²⁰

Ground 5 – windfall gain issue

22. Geocon contended that, even if the excess GST had been passed on under section 142-10, the Commissioner should have applied section 142-15. Geocon argued that paying a refund would not have resulted in a 'windfall gain' under Division 142.

23. The Court found that this issue did not arise because it had not been finally determined whether GST had been passed on.²¹ However, it noted that, where a taxpayer has passed on the economic burden of the excess GST to another party, refunding that GST to the taxpayer will generally result in a windfall gain. This is because the taxpayer would have both shifted the cost of the GST and then been refunded that same amount. By contrast, if the taxpayer has not passed on the economic burden of the excess GST, section 142-10 does not apply, and the refund must be paid.²²

ATO view of this decision

24. The decisions²³ on the attribution, excess GST, non-monetary consideration and windfall gain issues, are consistent with the Commissioner's view on each of those issues.

Development services as non-monetary consideration

25. The Court found in favour of the Commissioner on the attribution of GST on the development services.²⁴ The parties had proceeded on the basis that the development

¹⁶ At [199].

¹⁷ *Avon Products Pty Limited v Commissioner of Taxation* [2006] HCA 29 (*Avon Products*).

¹⁸ At [137].

¹⁹ At [145].

²⁰ At [145–146].

²¹ At [13] and [200].

²² At [212].

²³ Or, where a ground was not actually decided, the Court's comments.

²⁴ At [40–78].

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services constituted non-monetary consideration for Geocon's acquisition of the Crown Lease.²⁵ The Court accepted that the development services were part of what secured or 'moved' the grant of the Crown Lease.²⁶

26. The Commissioner maintains the view set out in Goods and Services Tax Ruling GSTR 2015/2 *Goods and services tax: development lease arrangements with government agencies* and Goods and Services Tax Determination GSTD 2021/1 *Goods and services tax: development works in the Australian Capital Territory*. Our position remains that, in most ACT development lease arrangements, development services are not supplies made to the LDA and do not constitute non-monetary consideration for the acquisition of land in the ACT.

Passing on

27. The Commissioner accepts the findings regarding passing on under Division 142. Consistent with the Court's reasoning, the Commissioner considers that, whether excess GST has been passed on is a question of fact to be determined on a case-by-case basis. It cannot be resolved by reference to general presumptions about profitability or economic expectations.

28. The onus is on taxpayers to demonstrate that an amount of excess GST has not been passed on.²⁷ Accordingly, taxpayers should continue to provide objective evidence of relevant pricing policy and practices in support of contentions that the economic burden of the tax has not been passed on.

29. Taxpayers who have a decision from the Commissioner that they have passed on excess GST may consider that, in light of the Full Federal Court case, the decision is incorrect. Subject to time limits, those taxpayers may have rights of objection under Part IVC of the *Taxation Administration Act 1953* (TAA).²⁸ Any objections lodged will be considered on their merits, having regard to the statutory framework, the objective evidence as a whole and the Full Federal Court case.

30. Where it is determined that excess GST has been passed on, taxpayers may request the Commissioner to make a decision under subsection 142-15(1) to refund the excess GST, provided that the refund would not result in a windfall gain.

31. A decision under subsection 142-15(1) refusing to refund excess GST is a 'reviewable GST decision' for Part IVC of the TAA purposes.²⁹ A taxpayer dissatisfied with a refusal decision may object to that decision in accordance with the requirements of Part IVC.

Implications for affected advice or guidance

32. We are reviewing the impact of this decision on related advice or guidance, including 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*.

²⁵ Under Geocon's private ruling, at [44–45].

²⁶ At [55].

²⁷ At [36], [117], [120], [181] and [186].

²⁸ Section 155-90 of Schedule 1 to the TAA.

²⁹ Table item 53A of subsection 110-50(2) of Schedule 1 to the TAA.

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Comments

33. 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.

Due date: 26 June 2026

Contact officer details have been removed as the comments period has ended.

Commissioner of Taxation

27 May 2026

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References

Related rulings and determinations:

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

Legislative references:

- ANTS(GST)A 1999 75-10(2)
- ANTS(GST)A 1999 Div 142
- ANTS(GST)A 1999 142-5
- ANTS(GST)A 1999 142-10
- ANTS(GST)A 1999 142-15
- ANTS(GST)A 1999 142-15(1)
- TAA 1953 Pt IVC
- TAA 1953 Sch 1 110-50(2)
- TAA 1953 Sch 1 155-90

Cases relied on:

Avon Products Pty Limited v
Commissioner of Taxation [2006] HCA
29; 230 CLR 356; 2006 ATC 4296; 62
ATR 399; 80 ALJR 1161

Cases distinguished:

Geocon Land Holdings No. 5 Pty Ltd v
Commissioner of Taxation [2025]
FCAFA 172; 313 FCR 531; 2025 ATC
20-984
SFQV and Commissioner of Taxation
[2024] ARTA 9; 2024 ATC 10-737
Commissioner of Taxation v Geocon
Land Holdings No. 5 Pty Ltd as trustee
for the Geocon Land Holdings No. 5
Unit Trust [2026] HCADisp 47

ATO references

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