Decision impact statement

Commissioner of Taxation v Landcom

Court citations:	[2022] FCAFC 204 [2022] FCA 510
Venue:	Full Federal Court of Australia Federal Court of Australia
Venue reference no:	VID 315 of 2022
Judge names:	Wigney, Moshinsky and Hespe JJ Thawley J
Judgment date:	22 December 2022 9 May 2022
Appeals on foot:	No
Decision outcome:	Unfavourable to the Commissioner

Impacted advice

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

- Goods and Services Tax Ruling GSTR 2006/6 *Goods and services tax: improvements on the land for the purposes of Subdivision 38-N and Division 75*
- Goods and Services Tax Ruling GSTR 2006/7 *Goods and services tax: how the margin scheme applies to a supply of real property made on or after 1 December 2005 that was acquired or held before 1 July 2000*
- Goods and Services Tax Ruling GSTR 2006/8 *Goods and services tax: the margin scheme for supplies of real property acquired on or after 1 July 2000*

Précis

This Decision impact statement outlines the ATO's response to this case, which concerned:

- whether Landcom was entitled to object to the Commissioner's response to its private ruling request and to appeal against the Commissioner's decision on this objection to the Federal Court, and
- how the margin scheme applied to a supply of land comprising multiple freehold interests.

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

Brief summary of facts

Landcom, a New South Wales (NSW) state-owned corporation that develops and sells real property, held the freehold interests in a number of lots of land which it intended to sell in a single transaction.

As part of the state of NSW, Landcom was not liable for goods and services tax (GST) on this supply of land because of section 114 of the Constitution. Under section 114, the Commonwealth cannot impose tax on State property. As a result, GST is not imposed on supplies of State land (see, for example, section 5 of the *A New Tax System (Goods and Services Tax Imposition—General) Act 1999*).

However, under the *Intergovernmental Agreement on Federal Financial Relations*[1] the Commonwealth, States and Territories, including NSW, agreed that they and their entities would operate as if they were subject to the GST legislation and, in circumstances where other entities would be required to pay GST, would pay an equivalent amount (referred to as notional GST).

Consistent with this agreement, Landcom conducted the sale as if GST applied. Landcom and the purchaser agreed to apply the margin scheme in Division 75 to the sale of the land.

Landcom requested a private ruling from the Commissioner on the application of the margin scheme to the sale. Specifically, Landcom sought the Commissioner's view on whether the sale of multiple freehold interests was a single supply for the purposes of working out if table item 4 of subsection 75-10(3) (Item 4) applied.

The effect of Item 4 is, broadly, that if the Commonwealth, a State or a Territory supplies improved land that contained no improvements at the time of the introduction of the GST and that it held since that time, the margin on which GST will be payable is equal to the difference between the sale price and the value of the land on the day of sale, disregarding any improvements.[2]

The Commissioner ruled that, for the purposes of Item 4, Landcom's supply of multiple freehold interests was a single supply of land. This ruling did not address the question of whether the land or any part of the land in question contained improvements.

Landcom objected to the ruling it had received and the Commissioner disallowed the objection.

Issues decided by the Court

Two issues were considered by Thawley J in the Federal Court at first instance[3]:

- First issue: did the case involve a matter that was within the jurisdiction of the Federal Court, given the issue in dispute related solely to the calculation of notional GST for which Landcom could not be liable under the GST law?
- Second issue: when considering if Item 4 applied to Landcom's sale of land comprising multiple interests, was the sale one supply of the land as a whole or individual supplies of each individual interest?

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[1] See clause A28 of Schedule 1 to the *Intergovernmental Agreement on Federal Financial Relations*. An equivalent commitment was found in clause 17 of its precursor, the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*.

[2] See subsection 75-10(3A).

[3] *Landcom v Commissioner of Taxation* [2022] FCA 510.

Thawley J found for Landcom on both issues.[4]

On the question of jurisdiction, Thawley J concluded[5] that Landcom had a real and not hypothetical interest in determining the amount of its notional GST liability and had validly sought a ruling on provisions that applied to Landcom and were administered by the Commissioner. On this basis, Thawley J decided[6] that Landcom did have appeal rights under Part IVC of the *Taxation Administration Act 1953* and there was a matter on which the Court had jurisdiction.

On the question of the operation of the margin scheme, Thawley J concluded[7] that the better construction of Division 75 when viewed in light of its objects was that the provisions should apply separately to each individual interest that was supplied. This was the case even if supply of the interest formed part of a larger supply of land as occurred in the present case.

The Commissioner appealed to the Full Federal Court in relation to the second issue relating to the operation of the margin scheme.

The Full Federal Court agreed[8] with the conclusions of Thawley J. The Full Court considered that the structure of the GST Act and the statutory language of Division 75 better supported the view that Division 75 applied separately to each individual interest supplied.[9]

ATO view of decision

The Commissioner will administer the law in accordance with Thawley J's conclusion that government entities are entitled to obtain private rulings on matters relating to their notional GST liabilities and have the same review rights in relation to such rulings as non-government entities do for other rulings relating to GST.

The reasoning of Thawley J concerning the jurisdiction issue does not specifically consider the scenario where a government entity objects to an assessment that includes notional GST where the entity is dissatisfied with the amount of notional tax. The Commissioner is considering whether and how Part IVC of the *Taxation Administration Act 1953* applies to disputes relating to such assessments and intends to issue further guidance on this matter.

The Commissioner will administer the law in accordance with the conclusions of the Full Federal Court and Thawley J about the application of the margin scheme to supplies of land consisting of multiple interests.

In many cases, this will not change the overall outcome for non-government taxpayers as the final GST outcome will be largely the same whether liabilities and entitlements are determined collectively or individually for each interest. However, this will not necessarily be the case for government entities. For supplies by such entities, each interest supplied will need to be considered separately when determining whether the supply is a supply of unimproved land to which section 38-445 may apply or a supply of land that contained no improvements at the time of the introduction of GST to which table item 4 of subsection 75-10(3) may apply.

We note that the part of the decision dealing with supplies of land consisting of multiple interests is based specifically on the wording of the provisions in

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[4] *Landcom v Commissioner of Taxation* [2022] FCA 510 at [6].
[5] *Landcom v Commissioner of Taxation* [2022] FCA 510 at [174–179].
[6] *Landcom v Commissioner of Taxation* [2022] FCA 510 at [184–185].
[7] *Landcom v Commissioner of Taxation* [2022] FCA 510 at [194].
[8] *Commissioner of Taxation v Landcom* [2022] FCAFC 204 at [24].
[9] *Commissioner of Taxation v Landcom* [2022] FCAFC 204 at [30–32].

Subdivision 38-N and Division 75. While it provides valuable guidance on the importance of considering terms in their context, we do not consider that it will have broader relevance to the meaning of 'supply' in other contexts in the GST Act.

Implications for impacted advice or guidance

We will review impacted products to ensure they are consistent with the conclusions of the Federal Court in this case.

We also intend to engage with the States and Territories in relation to the agreed notional GST dispute resolution process to consider whether any updates may be appropriate in light of the decision.

Comments

Date issued:	15 March 2023
Contact officer:	Contact officer details have been removed as the comments period has expired.

Amendment history

Date	Part	Comment
5 May 2023	ATO view of decision	Update to fourth paragraph.

Legislative references

A New Tax System (Goods and Services Tax) Act 1999
ANTS(GST)A Subdiv 38-N
ANTS(GST)A 38-445
ANTS(GST)A Div 75
ANTS(GST)A 75-10(3)
ANTS(GST)A 75-10(3A)

A New Tax System (Goods and Services Tax Imposition—General) Act 1999 5

Taxation Administration Act 1953
Part IVC

Case reference

Landcom v Commissioner of Taxation [2022] FCA 510; 114 ATR 639; 2022 ATC 20-827

Related Rulings/Determinations

GSTR 2006/6
GSTR 2006/7
GSTR 2006/8

Other references

Australian Constitution 114
Intergovernmental Agreement on Federal Financial Relations, clause A28 of Schedule 1
Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, clause 17

ATO references

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