

What Are the Changes?

From 1 July 2018, purchasers of most newly constructed residential properties and residential land subdivisions will withhold the goods and services tax (GST) component from the sale price and remit that GST directly to the Australian Tax Office (ATO) as part of the settlement process under new rules given effect through the Treasury Laws Amendment (2018 Measures No. 1) Act 2018. The changes also impose obligations on vendors to notify purchasers of certain GST information to allow them to comply with their withholding obligations.

Who Is Affected by the Changes?

Vendors and purchasers of residential property or potential residential land in Australia, as well as their financiers, lawyers and conveyancers.

What Do You Need to Do?

Property developers and vendors need to review their existing contracts to ensure their GST clauses satisfy the new withholding and notification obligations and adequately protect their GST positions. The standard land sale contracts in some states have been updated for the new rules; however, these are unlikely to adequately protect property developers and vendors and special conditions dealing with the rules are required.

Developers and landowners will need to review and likely amend their development agreements to cater for the new rules.

Developers will need to implement administrative changes to satisfy their notification obligations, to track sales under the current and new rules and resolve any uncertainties about the application of the new rules to their sales.

Purchasers and their lawyers will need to apply a “reasonableness” test to the notification provided by the vendor and other information available to determine whether to withhold GST. In practice, this means they will need to make enquiries of the vendor when the notification states that no withholding is required.

Why the Changes?

These changes are intended to reduce “phoenix” activity, whereby property development companies are liquidated before they remit GST to the ATO. As of November 2017, the government had written off more than AU\$1.8 billion in lost GST revenue and identified 3,731 entities that engaged in “phoenix” activity.

How Will the Changes Work?

Where a sale of new residential property or residential land subdivision (such as a house and land package) occurs after 1 July 2018, the purchaser of the property will withhold and remit the GST directly to the ATO as part of the property settlement process. However, there are transitional provisions that cover contracts entered before 1 July 2018, so long as the sale price is paid before 1 July 2020 (which would generally be on settlement). There is some uncertainty over the scope of the transitional rules. For example, if a contract is entered into before 1 July 2018 and the contract is then varied after that date, it is not clear if the new withholding rules apply.

The amount to be remitted by the purchaser to the ATO is 1/11th of the sale price, unless the margin scheme applies, in which case it is 7% of the sale price (unless varied). Purchasers will be required to split the withheld amount from the total purchase price and pay this directly to the ATO via a disbursement on or before settlement. The GST-exclusive purchase price would be paid by the purchaser to the vendor in the normal way.

The vendor must issue a written notice to the purchaser setting out whether withholding is required and other prescribed information. Heavy penalties apply for vendors who fail to deliver a written notice to the purchaser (on a strict liability basis).

In practice, vanilla property sales undertaken via electronic conveyancing will be relatively straightforward. However, the position for developers that continue to use a manual settlement process is more complicated. This is because developers will only receive a credit of the withheld amount where the amount is actually remitted by the purchaser to the ATO, so developers will generally only proceed with settlement where they are certain the GST amount has been or will be paid to the ATO. Further, advice will need to be sought regarding any arrangements that are more complicated, such as those involving substantial renovations, bare trusts and nominees, multiple vendors or purchasers, GST registered purchasers, mixed supplies and partition arrangements.

The new rules will come into effect from 1 July 2018 and are likely to cause significant practical, administrative and financial issues, particularly in the short term. Developers and other vendors of residential property will need to prepare for new rules.

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