

GST WITHHOLDING ON NEW RESIDENTIAL PREMISES

Treasury Laws Amendment (2018 Measures No. 1) Bill 2018 (**the Bill**) was introduced to Parliament on 7 February 2018 and when enacted will change the GST law to require purchasers of new residential property to withhold GST on the purchase price and pay that amount to the ATO.

The Bill has made a number of significant changes from exposure draft legislation released for comment in late 2017.

KEY POINTS

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New rules	<p>The recipient (purchaser) of the <i>new residential premises</i> or a subdivision of <i>potential residential land</i> by way of sale or long term lease is required to make a withholding payment of part of the consideration to the ATO directly. That payment is to be made prior to or at the time consideration is first provided for the supply.</p> <p>If there is more than one recipient for the supply e.g. purchasers as tenants in common, then each recipient is to be treated as being the recipient of a separate supply. The amount of GST withholding would need to be apportioned.</p> <p>However, joint tenants are to be treated as a single recipient.</p>
Commencement	<p>Subject to the transitional rules (discussed below), the new rules apply in relation to supplies for which any of the consideration is first provided on or after 1 July 2018, whether a contract for the supply was entered into before, on or after the commencement of the new rules.</p> <p>The exception to this general rule is where the contract for supply was entered into before 1 July 2018, and consideration for the supply is provided before 1 July 2020, providing a two year transitional period for pre-existing contracts.</p>
Notice	<p>Suppliers (vendors) of residential premises or potential residential land must provide an entity that receives the supply with a notification before making the supply. The notice must state whether or not the purchaser is required to make a payment.</p> <p>A purchaser will not be liable to withhold where the purchaser has been given a notice required by law by the vendor that indicated that the purchaser did not have to make a withholding payment, and there were no circumstances that existed that made it unreasonable for the purchaser to rely on that notice</p>
When does the purchaser have to make the payment?	<p>The GST on a supply must be paid on or before the day on which any of the consideration is first provided. The concept of what constitutes consideration for a supply is therefore important.</p> <p>Consideration takes its meaning under the GST Act. Usually, consideration (other than a deposit) is provided on the day of settlement of the property. Money that is held as a deposit is generally not treated as consideration (for GST purposes), unless the deposit is forfeited or is applied as consideration for the supply. That means that the withholding obligation would not ordinarily arise on payment of a deposit, rather the obligation should arise on settlement.</p> <p>Unless the Commissioner has made a determination to the contrary, where consideration under a contract is paid by instalments, the intention is that the purchaser instead has to make a payment by the end of the day that they make the first instalment payment, as this will be when consideration is first provided.</p>

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What is the rate of withholding?	<p>Taxable supplies (no margin scheme): 1/11th of the 'contract price' or if the contract does not specify a contract price, the price of the supply.</p> <p>Margin scheme: 7% of the 'contract price' or if the contract does not specify a contract price, the price of the supply. The rate of withholding may be a greater percentage (not exceeding 9%) that has been determined by the Minister in a legislative instrument.</p> <p>The contract price is, effectively, the price set for the supply in the contract, not taking into account any potential adjustments that may occur (regardless of the likelihood of any of these adjustments occurring).</p>
How can the payment be made?	<ul style="list-style-type: none">• Direct to the Commissioner; or• a bank cheque made payable to the ATO for the withholding amount can be given to the seller on settlement.
Impact on the seller	<p>An entity that makes a taxable supply of new residential premises or new subdivisions of potential residential land will be entitled to a credit for the amount of the GST payment made to the ATO by the purchaser.</p> <p>The supplier of new residential premises or a subdivision of potential residential land must remit any GST payable to the ATO after lodging their BAS, taking into account any credit available for the withholding payment made by the purchaser.</p>

EXISTING PROPERTY DEVELOPMENT ARRANGEMENTS

Under certain property development agreements, there may be an agreed distribution or 'waterfall' payment arrangement, which provides for how the consideration is to be distributed amongst the parties to the arrangement. Such an arrangement may provide or contemplate that some funds are to be distributed on the basis that a party to the arrangement will use those funds to discharge their GST liability to the Commissioner. However, because of the GST withholding obligation, it is not necessary to make such a distribution because the purchaser has already withheld GST from its payments to the vendor. In that case, if an existing distribution arrangement is in place, that arrangement may provide for the party to whom the distribution would be made to obtain a windfall gain.

If such an arrangement was entered into **before 1 July 2018**, transitional relief will apply if four application conditions are met. The effect of the transitional relief is that the amount of the GST withholding payment made to the Commissioner by the purchaser is taken, for the purposes of the arrangement, to have been received by the supplier in relation to the supply.

This applies in cases where the supplier either receives the proceeds of sale directly, or is entitled to a distribution of the proceeds of sale from a third party.

First Condition

An arrangement was entered into before 1 July 2018 between a supplier of real property subject to the GST withholding rules and an entity that is supplying (or is to supply) development services in relation to the real property to which the supply relates, and the arrangement deals with the distribution, between the parties to the arrangement, of the consideration for the supply.

Second condition

Under the arrangement:

- (i) an amount is to be distributed to the supplier for the payment of the supplier's liability to GST for the supply (less any relevant entitlements to input tax credits); or
- (ii) distributions of the consideration, between the parties, are to be adjusted to take into account that liability.

Third condition

Were that amount to be distributed under the arrangement, or were the distributions to be so adjusted, the parties would not be in the same position as they would be if an amount were not payable under the GST withholding rules.

Fourth condition

A payment has been made in relation to GST withholding.

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EXAMPLE — PROPERTY DEVELOPMENT AGREEMENT

Hamilton Enterprises owns a large parcel of land that they intend to develop into a multi-staged residential village, consisting of houses, townhouses and high-rise apartments. Hamilton wants to retain control over the land.

On 1 July 2015, Hamilton enters into a PDA with William Developments that outlines the development process and how the money from each of the sales of new properties would be distributed between Hamilton and William. (Condition 1)

The arrangement provides for 20 per cent of the purchase price to be distributed to Hamilton from the trust account as a priority. The balance of the amount is to be distributed to William as a fee for its development services. The distribution between the parties is set in a way that takes into account Hamilton's GST liability. (Condition 2)

If the withholding obligation did not apply, and someone purchased a new apartment from Hamilton for \$1.1 million Hamilton would receive \$220,000 and William would receive \$880,000 under the distribution. In this scenario, Hamilton will have a GST liability of \$100,000 and William will have a liability of \$80,000 for the supply of development services. Hamilton will be eligible to claim an input tax credit of \$800,000 so that its net GST liability is \$20,000.

After GST has been paid, Hamilton receives a net \$200,000 and William receives a net \$800,000. The total GST paid to the ATO is \$100,000.

If withholding did apply, and a purchaser paid \$1,000,000 into the trust account held on behalf of Hamilton and William, the distribution without any modification would be \$220,000 (20 per cent of the purchase price) and \$780,000 respectively.

Hamilton is also entitled to a \$100,000 credit, so is not in the same position as it would have been in had the withholding measure not applied. Similarly, William has received \$100,000 less from the distribution, and is also not in the same position. Accordingly, it is necessary to apply the transitional relief where a withholding payment is made. (Condition 3)

Jade buys a new apartment from Hamilton for \$1.1 million, inclusive of GST. Jade pays \$1.0 million of the purchase price into the trust account held on behalf of Hamilton and William. Jade pays \$100,000 to the ATO as a withholding payment. (Condition 4)

Because Jade has made a payment to the ATO, when amounts are being distributed from the trust account Hamilton is taken to have been distributed the amount of the payment. This means that Hamilton will only receive a further \$120,000 as a distribution, and William will receive \$880,000.

Hamilton will have a GST liability of \$100,000 on the supply of the property and William will have a GST liability of \$80,000 for its development services. Hamilton will be eligible to claim an input tax credit of \$80,000 so that its net GST liability is \$20,000. Hamilton receives a \$100,000 credit for the withholding payment, which entitles it to an \$80,000 refund from the ATO when it lodges its BAS.

At the end, William receives \$800,000, Hamilton receives \$200,000 and the ATO is paid \$100,000. This places the parties in the position they would have been in had the withholding obligation not applied.



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