



## COMMISSIONER'S PRACTICE

### DA 36.1

## DUTIES – TREATMENT OF GOODS AND SERVICES TAX ('GST')

This Commissioner's practice outlines the treatment of GST for the purposes of assessing transfer duty.

### Background

#### *Duties Act*

Under section 26 of the *Duties Act 2008* ('Duties Act'), transfer duty is generally chargeable by reference to the *dutiable value* of a *dutiable transaction*<sup>1</sup> that relates to *dutiable property*,<sup>2</sup> *new dutiable property*<sup>3</sup> or *special dutiable property*.<sup>4</sup>

Section 27 of the Duties Act provides that, unless otherwise specified, the dutiable value of a dutiable transaction is:

- (a) the *consideration*<sup>5</sup> for the dutiable transaction; or
- (b) the *unencumbered value*<sup>6</sup> of the dutiable property if:
  - (i) there is no consideration for the transaction; or
  - (ii) the consideration cannot be ascertained when liability on the transaction arises; or
  - (iii) the unencumbered value is greater than the consideration for the transaction.

Section 5 of the Duties Act provides that, in ascertaining the value of anything or the consideration for anything, there is to be no discount for the amount of GST payable on the supply of that thing.

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<sup>1</sup> Duties Act s 11.

<sup>2</sup> Duties Act s 15.

<sup>3</sup> Duties Act s 17.

<sup>4</sup> Duties Act s 18.

<sup>5</sup> *Consideration* means the amount of monetary consideration or the value of non-monetary consideration (Duties Act s 3). The consideration for a dutiable transaction includes the amount of any liabilities assumed under the transaction, including an obligation, whether contingent or otherwise, to pay any unpaid purchase money payable under an agreement for the transfer of dutiable property and the amount of value of any debt to the extent it is released or extinguished under the transaction (Duties Act s 30).

<sup>6</sup> Section 36 of the Duties Act describes how the *unencumbered value* of property is to be determined.

## **Goods and Services Tax**

GST is a broad-based tax that is usually applied at one-eleventh of the sale price for a taxable supply.

When the GST was introduced, it was recognised that a business that sells real property which it had held for some time might have to pay GST on the increase in property values. Special rules were included to allow businesses a choice to pay GST on the difference between the selling price and either the purchase price paid by the vendor or the value of the real property at 1 July 2000 ('the margin scheme'). When the vendor sells property using the margin scheme, the GST is one-eleventh of the 'margin' rather than one-eleventh of the sale price.

If GST is applied to a sale of property by the vendor, the contract will usually include either a clause that recognises the contract price is inclusive of GST or a clause that requires the purchaser to pay GST in addition to the contract sale price ('GST gross-up clause'). If the GST has been determined by the margin scheme, the contract should also include a clause that specifies this.<sup>7</sup>

### **Commissioner's Practice**

#### **Transactions Subject to GST**

1. Where a transaction is subject to GST, the amount of GST should be embedded in the market value of the property and included in the purchase price.<sup>8</sup>
2. Where the vendor chooses to use the margin scheme on the sale of property, the lodging party is required to provide written details regarding the amount of GST that is payable on the property under the margin scheme and the reasons supporting this amount.

#### **GST Gross-up Clauses**

3. Where a contract for the sale of property requires the purchaser to pay GST in addition to the sale price, the parties may claim GST is not payable despite the gross-up clause. In these circumstances, the value or consideration will be ascertained without the addition of an amount of GST if the Commissioner of State Revenue ('Commissioner') is satisfied GST is not payable.
4. To satisfy the Commissioner that GST is not payable despite a GST gross-up clause, at the time the transaction record is lodged for duty endorsement both parties (or their agents) are required to make a statement providing:
  - 4.1 that to the best of their knowledge and belief, GST is not payable on the transaction the subject of the transaction record; and

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<sup>7</sup> <https://www.ato.gov.au/general/property/in-detail/gst/property-contract-and-tax-invoice---gst-questions>.

<sup>8</sup> See, eg, *Tomago Aluminium Company Ltd v Valuer-General* [2010] NSWLEC 4; *Storage Equities Pty Ltd v Valuer-General* [2013] NSWLEC 137.

4.2 advice as to whether a ruling has been obtained or sought from the Australian Taxation Office on the transaction. If a ruling has been obtained a copy should be provided. If a ruling has not yet been obtained, the parties must give an indication of when the ruling is expected to be made and an undertaking to provide the Commissioner with a copy as soon as the ruling is available. If a ruling will not be obtained, the statement should include:

4.2.1 the basis on which it is claimed that no GST is payable making reference to all relevant facts, legislative provisions, rulings and authorities; and

4.2.2 where the supply would be GST free if conditions or requirements specified in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) are or will be satisfied, a declaration by the parties that those conditions or requirements are or will be met.

### Date of Effect

This Commissioner's practice takes effect from 30 October 2015.

Nicki Suchenia  
COMMISSIONER OF STATE REVENUE

30 October 2015

**SUPERSEDED**

### Commissioner's Practice History

Document	Issued	Dates of effect	
		From	To
Revenue Ruling DA 4.0	July 2008	July 2008	29 October 2015
DA 36.1	30 October 2015	30 October 2015	31 December 2018