



GST withholding laws passed for property transactions

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In November 2017 we released an update about draft Federal legislation proposing to shift the responsibility for paying GST on new residential premises from Developers to Purchasers (“GST Withholding law”).

These amendments have now passed through parliament. The *Treasury Laws Amendment (2018 Measures No. 1) Bill* was approved with the changes to come into effect from **1 July 2018** onwards.

The effect of the new GST Withholding laws will be to require a purchaser to pay the required GST amount directly to the ATO on or before the date the purchase price is paid. This new regime will affect a wide range of residential property sales so it is important for those involved in real estate transactions to be prepared for this change.

Affected Transactions

The changes will apply to the sale or “long-term lease” of:

- new residential premises (other than those created through “substantial renovation” and “commercial residential premises”); and
- subdivisions of “potential residential land” where the subdivision does not contain any buildings used for a commercial purpose.

Process

For the transactions mentioned above, **both** developers/sellers and purchasers have new responsibilities.

Purchasers:

- Purchasers are required to withhold and pay to the ATO either:
 - One-eleventh of the “contract price”; or
 - 7% of the “contract price” if the GST margin scheme applies (GST Withholding amount);
- These are fixed percentages applied to the stated contract price and settlement adjustments are not taken into account;
- Where multiple buyers acquire land as tenants in common, the GST withholding liability is apportioned according to their interest in the property. This however does not apply to joint tenancies;
- A purchaser must pay the GST Withholding amount to the ATO on or before the settlement date;
- Failure by the Purchaser to withhold the GST Withholding amount will incur an administrative penalty equal to 100% of the amount of GST required to be withheld. This penalty will not apply in instances where the Purchaser has relied on a notice from the Seller and there was nothing in the circumstances in the supply or in the contract of sale that made it unreasonable for the Purchaser to believe the notice was correct.

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Developers/Sellers:

- Sellers must give notice to residential purchasers in writing as to whether the transaction is of a type subject to GST Withholding;
- Should GST Withholding apply the Seller must provide to the purchaser details regarding the amount of GST Payable and when it is to be paid to the ATO;
- The requirement to issue notice is not limited to transactions where the GST Withholding applies and must be done for **all** transactions of residential property;
- Failure to issue a notice, or the issuing of a false notice, will constitute an offence by the Seller. A maximum penalty of \$21,000 applies for individuals and \$105,000 for corporations;
- The Seller remains liable for the GST on a taxable supply that is subject to GST Withholding, however once the Purchaser has paid the GST Withholding to the ATO the Seller will receive a 'withholding credit' equal to the GST Withholding amount to offset the GST liability reported on the Seller's BAS.

Impact and Effects

The new withholding regime will apply to transactions entered on or after **1 July 2018**. Contracts entered into prior to that date are excluded provided that the property transaction settles before 1 July 2020.

Purchasers of residential property will need to ensure they have made the appropriate arrangements for payment of the GST Withholding amount to the ATO.

Sellers and suppliers of new residential property will need to be aware of their obligations under the new regime such as the obligation to provide a notice to the Purchaser.

Developers and financiers will need to adjust to the commercial impacts of the GST Withholding regime as this will effectively mean that they will not have access to the GST component of the contract price.

Within development agreements or 'joint venture' agreements there may be an agreed distribution or 'waterfall' payment arrangement which can 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. Under the new regime where the purchaser has already withheld GST from its payment then these arrangements may not be necessary.

The new GST Withholding laws contain particular provisions relating to development agreements and 'joint venture' agreements entered into before **1 July 2018** which apply transitional relief.

However these provisions will only apply to arrangements entered into before 1 July 2018 so it is important that arrangements not yet entered into are reconsidered to ensure they have the intended outcome for both parties.

We anticipate the introduction of this regime will have a significant effect on real property transactions, to the extent that the Contract of Sale and settlement process may both need to be reevaluated.

For further information regarding these proposed changes, please contact [Paul O'Dea](#) of ClarkeKann's Property and Projects team.

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