A Bill was introduced into Parliament on 7 February 2018 to give effect to a GST withholding regime aimed at addressing 'phoenixing' tax evasion in the residential property development industry.

The withholding regime imposes a radical change on the manner in which residential developers collect, process and remit GST on their sales. From 1 July 2018, and subject to transitional arrangements, developers will no longer “collect and hold” GST before remitting it to the ATO - purchasers of residential property will pay the GST component directly to the ATO at settlement. The developer will then need to deal with the ATO to make sure that the correct GST is paid overall (via an ATO credit mechanism).

Purchasers will withhold a GST amount from the purchase price at settlement and pay that to the ATO in recognition of the vendor’s GST liability. The developer will then subsequently claim a credit (and in some cases a refund) for that withheld GST.

These measures are focussed on cash collection/revenue protection - they do not alter the tax base, margin scheme regime or GST calculations.

These measures were announced by the Government in the May 2017 Federal Budget. The Bill contains some changes from the exposure draft issued for consultation in November 2017. However the broad operation of the proposed law has not changed.

**Why are these measures considered necessary?**

Under current law, the developer/vendor of “new residential premises” (as defined) has a GST liability on that taxable supply. GST is included (either implicitly or as an express additional amount) in the purchase price paid to the developer by the purchaser. The developer then includes the GST liability in its subsequent GST return/Business Activity Statement (BAS) and pays the ATO.

The Government has suggested that billions of dollars of GST revenue is at risk from unscrupulous developers who have deliberately not met their GST liability reporting and payment obligations (and will have claimed input tax credits on development costs).

The proposed measures address this revenue risk, by inverting the payment obligation. The purchaser will withhold 1/11th of the purchase price (e.g. a full 10% GST amount), or 7% if the margin scheme has been applied, and pay that directly to the ATO. The developer then includes its actual GST liability in the BAS in the ordinary fashion, but receives a credit for the GST already withheld and paid to the ATO.
The Detail

Because these are cash collection/revenue protection measures rather than GST technical measures, they appear in the Taxation Administration Act withholding provisions, rather than the GST Act. They do not effect any changes to the developer’s GST liability, simply how and when that liability is paid to the ATO.

For any GST taxable sale of “new residential premises” or land in a residential subdivision (where the recipient is not registered or not making a creditable acquisition):

► The developer must notify purchaser before settlement that purchaser must withhold GST and notify the developer’s ABN so that the ATO can cross-match. It will be an offence not to give this notice to purchasers.

► The GST withholding amount will be either:
  ▶ Non-margin scheme sale - 9.09% (1/11th) of contract price or 10% of the GST-exclusive price; or
  ▶ Margin scheme sale – 7% of the contract price.

► In a change from the Exposure Draft, the withholding amount will be based on the contract price, so there will be no need to adjust the withholding amount for settlement adjustments.

► The purchaser will have a statutory obligation to withhold the GST amount from the purchase price and pay it to the ATO on the day on which any part of the consideration for the sale is first paid. This will usually be at settlement (deposits are disregarded), but may be earlier under some instalment contracts.

► The explanatory memorandum (EM) suggests that the withholding will generally be performed on behalf of the purchaser by the conveyancer handling the sale and often via electronic conveyancing platforms such as PEXA but can be satisfied by providing a bank cheque in favour of the ATO to the developer.

► Notwithstanding that a GST amount has been withheld from the purchase price, the developer remains liable for GST on the sale under the GST Act in the ordinary manner.

► The developer will therefore include its GST liability on the sale in the subsequent BAS as it currently does.

► Provided that the purchaser has in fact paid the ATO (and irrespective of whether the GST amount is withheld from the purchase price), the developer is allowed a credit for the withheld amount.

► As a result, where the actual GST payable on the sale by the developer is 1/11th of the purchase price (i.e. a ‘full scheme’ sale), the developer’s GST obligations will be limited to any settlement adjustments as its liability on the contract price is offset by the credit.

► Where the margin scheme is applied, the withholding amount will only be 7% of the contract price. The developer will still need to calculate its actual GST payable. As a result, the developer may have:
  ▶ a credit that will reduce the amount otherwise due to the ATO for that BAS (or result in a refund depending on the other matters reported on the BAS); or
  ▶ an additional GST liability which will be due to the ATO on the BAS.

► The Bill contains a mechanism that allows developers to reclaim GST from the ATO in the event of an error.

► However, the mechanism in the Exposure Draft that allowed a quarterly taxpayer to reclaim credits outside the normal BAS process has been removed.

► There are special rules for non-monetary consideration and mixed supplies of residential premises and other things.

Application and transition

The measures are slated to apply to sales of new residential premises where any part of the consideration (other than a deposit) is provided on or after 1 July 2018.

However, there are transitional rules for existing contracts. If the contract was entered into before 1 July 2018, then these new measures do not apply (and current rules continue to apply) where the consideration is first provided before 1 July 2020. So there is some relief for extended term contracts.

After much input from industry and the professions, the measures acknowledge the prevalence of Project Delivery Arrangements (PDAs) for long term developments. The measures include a provision to the effect that where a GST amount is withheld by a purchaser, there is no further obligation for a GST amount to be paid (e.g. under the proceeds “waterfall”) to the Landowner.
Issues to be considered

Whilst the Government has listened to a number of concerns raised by the industry, it resisted calls to make significant changes to the exposure draft, such as exempting large developers with a good compliance history.

As with any law change, there are a number of legal, practical and tax issues that developers will need to work through to ensure that they can comply with their GST obligations, including:

- Drafting of contracts to take the withholding obligations and notifications into account.
- Detailed thought will need to be given to the PDA transition arrangements, including the interaction of the legislation with contractual agreements.
- How settlement and conveyancing procedures will need to change to reflect these new obligations.
- How the ATO’s involvement could impact the settlement process (e.g., proof of payment).
- How withheld amounts will be recorded and reported in accounting systems and GST compliance procedures.
- How the withheld GST amount will be communicated by the ATO and ultimately shown in the BAS.
- Cashflow implications for developer, and impact on any funding arrangements or banking conventions.
- Transitional rules for existing contracts and impact of any contractual amendments may have on these rules.

How EY can help

EY has significant experience in the GST aspects of property development and can work with you to make sure that you are in a position to implement the new rules.

We are currently conducting briefings and workshops with clients to ensure that they are prepared for the changes.

Please contact our GST Property specialist Rhys Penning or your local EY GST team.

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