BAN TACS NEWSFLASH

National Accountants Group

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This edition of newsflash is on property and GST. Yes, this could apply to you, even on a normal home purchase. One slip up and you are up for the GST over and above the price you paid.

Further from the 1st July 2018 the average Mum and Dad purchasing a new home are going to be dragged into the net. So please spare a few minutes to read these two pages. Note they are only a heads up to convince you that you must seek advice **before you sign** any real estate contract whether you are buying or selling.

Purchasers Withholding 12.5%, 1/11th or 7% of the Price

Buying a property has now become a mine field of tax liabilities for the ill-informed purchaser. If you are required to hold back part of the purchase price to send to the ATO and you don't, you will have to pay the amount to the ATO anyway but out of your own pocket.

ATO Clearance Certificate – All sellers must be able to produce a clearance certificate from the ATO. If they don't and the property is worth more than $750,000, then the purchaser must withhold 12.5%. The clearance certificate is intended to prevent non-resident sellers from taking the money out of the country without paying any CGT. It does not matter even if you are certain the seller is an Australian resident. Regardless you need to see a clearance certificate.

Purchasers Paying the GST on New Houses or Land – To prevent phoenix companies not paying the GST on new house and land packages, new units or newly subdivided vacant residential land. In all contracts signed after 1st July 2018 the purchaser must withhold GST and send it to the ATO. It is then up to the seller to claim it back in their BAS. The amount to be withheld is 1/11th of the purchase price unless the margin scheme applies. Under the margin scheme the amount to be withheld is 7% or the seller can apply to have the ATO determine a lower percentage.

Regardless of whether the seller will ultimately have to pay that much to the ATO or whether GST even applies, the purchaser must withhold, this could cause quite a few problems with mortgagees.

The seller is required to give the purchaser their details but regardless the purchaser must withhold. We recommend that before you go withholding the lesser amount of 7% make sure the seller is actually registered for GST.

Check the contract for any GST Traps

An example of this would be a going concern clause. You might think you are buying a residential property because that is what it looks like on the outside but if it has been used as professional premises the seller may well want to put a going concern clause in the contract so the GST passes to the purchaser. If you buy a property under a contract with a going concern clause and don't use it in a business you then have to pay the ATO another 10% of the purchased price as GST.

Another GST trap to watch out for is whether the price quoted in the contract includes GST or not. There have been quite a few cases before the courts where the contract is not clear because it contradicts itself. So, it is not just enough to see includes GST beside the price. It is important to check the whole contract.

If the contract says GST inclusive then the GST comes out of the selling price but as discussed above if it is a **new** property it is the purchaser who sends it to the ATO. If the contract says plus GST or GST exclusive then the price quoted in the contract is only 10/11ths of the amount of money that needs to be handled over at settlement. Sometimes this is worded “buyer pays the GST”. Either way if the price does not include GST the buyer has to divide the agreed price by 10 and add that to the amount they pay.

Now what about if the contract simply has the three letters GST written in it. Not plus GST or GST inclusive just GST. This is ambiguous and you need something else in writing making it clear.

In A & A Property Developers Pty Ltd v MCCA Asset Management Ltd that is all the contract said, GST. So it was off to the courts to decide what this meant. The first court said it meant that the price included GST and the next court, on appeal said that it meant the price plus GST. Don’t ever assume. Now here is the kicker. The GST in this case was $290,000 - try explaining that to a bank that has just done its valuation.

Margin Scheme Explained

If both the purchaser and the buyer agree in writing and the transaction qualifies, then instead of the GST being 1/11th of the selling price. It can just be 1/11th of the difference (the margin) between the price the seller paid for the property and the price it is sold for. Note if the seller purchased the property before 30th June, 2000 then it is not the price the seller paid for the property but its market value at 30th June, 2000 or when the seller first registered for GST.

The margin scheme can mean a considerable reduction in the amount of GST payable to the ATO with no downside. For the margin scheme to apply the seller can’t have claimed any GST input credits on the purchase of the property. Both parties must agree in writing that the margin scheme applies, this is usually in the contract. The buyer cannot claim any GST input credits on the purchase of the property. The important thing to remember with the margin scheme is it is very difficult to apply after settlement.

The ATO won’t accept wishy washy margin scheme clauses. These are sometimes put in contracts where the solicitor is not even sure if GST applies. The contract needs to clearly state that the buyer agrees. There is an example on this page of a clause that is not good enough.
https://www.ato.gov.au/business/gst/in-detail/your-industry/property/gst-and-the-margin-scheme/?anchor=deciding#deciding

Further Reading - http://www.bantacs.com.au/booklets/Buying_A_Rental_Property.pdf

Latest Askbantacs Questions – http://taxquestions.com.au/when-spouses-sell-one-of-their-homes/
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