



The AARTA was Not Satisfied the Taxpayer Met His Burden of Proof - Are You in the Property Business?

There are huge tax consequences of being in a property business. You can hold a property for many years and the ATO can still claim that you purchased it with the intention of resale at a profit. So subject to income tax, no 50% CGT discount and with new or substantially renovated properties 1/11th of the sale proceeds go to the ATO in GST. There is a further risk that you will not be entitled to claim GST input credits on the construction costs or utilise the margin scheme.

A recent ARTA decision RPKC 28th January 2026 https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/95.html?context=1;query=taxation;mask_path=&utm_source=sfmc&utm_medium=email&utm_campaign=TaxVine+3+-+2026&sfmc_id=1646325 found that even if the dominant purpose was to earn rent, it was still part of the plan to sell the properties at some future date ie when rental return was not good enough. As a consequence the sale of the property was part of the business operations not the sale of a capital asset.

“76. The Applicant knew that sale was possible at the outset, and his actions demonstrated that he was prepared to sell. While he said he did not *plan* to sell

properties when he acquired them, he knew it might be prudent to sell those properties in future”

When you think about the low rent return on properties in Sydney they cannot be justified as an investment without an expectation of one day selling at a profit.

The only points of difference here that may help the average investor was that the taxpayer had 30 odd properties and did not have a day job. This appeared to be influential but not crucial. More relevant was the amount of time the business took up and the fact that the rents barely broke even, so he would have to be anticipating regular sales of properties to fund his lifestyle.

The ATO only won by the skin of their teeth, the AARTA member stating that “this case is not entirely clear cut, and via Mr Spierings the Applicant put forward persuasive arguments. However, on balance, I am not satisfied that the Applicant has met his burden of proof”.

It should be noted that the taxpayer sold some 24 properties over the years. The majority were held as rentals for considerable time before being sold. The three properties in question were different from the others. They were never rented out and the taxpayer constructed them after subdividing land. The taxpayer argued that he had intended to hold the properties as long term rentals, it was only due to needing funds to make a divorce settlement that he sold them. The ARTA member pointed out that the taxpayer’s marriage broke down in 2014 and he only started building the properties in 2015.

It is normally just a question of being able to prove the intention was to hold them as a rental but due to unforeseen circumstances they had to be sold. The onus of proof is on the taxpayer not the ATO and it can be difficult to prove your thoughts when your actions contradict this. The unsettling part of the RRKC case was that the ARTA member looked at the level of activity and did not see the properties held for rent as passive investments.

“ 66. I am satisfied that he carried on a business that involved acquiring properties, sometimes subdivision and construction of properties (with all the associated activities, property design, seeking approvals, permits and the like), sometimes basic renovation, and rental (for most but not all properties). This happened more than 30 times (per the Appendix to this decision). I am satisfied that the Applicant did these activities with an intention or purpose to profit.

73. Thirdly, even if sale is not the main focus of the business, the case law is to the effect that where property is rented and then sold, sale can be concluded to form part of the business operations. Sale can be part and parcel of business operations without needing to be a dominant purpose. Of itself, renting out property may not be enough to conclude that a property is held on capital account where there is a sale of that property. Rental is not a shield. Of course, it must be acknowledged that there is case law that goes the other way, and which suggests that even where there is a pattern of

sale, sale can still merely comprise the realisation of capital assets. It all depends upon the facts.”

It stands that as this was the sale of new properties by a business that was registered for GST, GST applies. By the time this case got to court the 4 year amendment period allowed to claim back the GST input credits on the construction costs had expired. Fortunately, the ATO did allow some input credits to be claimed when it amended the BAS. Just imagine the cost of having to pay GST on a full 1/11th of the sale proceeds yet not being able to claim the input credits back on the construction costs.

Another consequence of the delay is that the opportunity to put a margin scheme clause in the contract has passed. The margin scheme would have allowed the taxpayer to only have to pay GST on 1/11th of the difference (margin) between the original price of the land and the selling price. So high are the penalties for getting it wrong that we recommend applying to the ATO for a ruling.

It was not clear why the taxpayer was registered for GST after all residential rents are input taxed so do not count in the \$75,000 turnover test when a business is required to register for GST. This is another area where defining what you are in the business of is so important. The GST threshold to register is a turnover test so if you are not in the business of selling properties the sale of a property is merely the sale of a capital asset, not part of your turnover so doesn't require you to register. On the other hand if selling properties are part of your business then they count as part of your turnover. Now if the property you are selling is not new or substantially renovated then it is input taxed and again excluded, like the rents, from the turnover test. But if the property is new or substantially renovated its sale is not input taxed, it is subject to GST and if you are in the business of selling and renting properties then the sale will push your turnover over the threshold and require you to register. For more about this <https://www.bantacs.com.au/Jblog/do-not-let-your-conveyancer-talk-you-into-registering-for-gst/#more-948>

Even more punishing than the GST consequences was the fact that the properties will be taxed on revenue account, no 50% CGT discount and rightly so, they were constructed to sell. The divorce reason for selling lost its power when you consider that the marriage breakdown began in 2014 and the construction of these 3 homes did not start until 2015. Nevertheless, there is a very concerning precedent here that the older rental properties may not be allowed the CGT discount either because of the number of properties and activities in relation to them. The case looked at the operation as a whole and found it was a business, not investing.

The taxpayer did have a little win in that the ATO was arguing to amend the BAS from the wrong period for at least one of the houses and possibly two. As a result the ATO were out of time to amend the correct period. This may be enough to encourage the taxpayer not to appeal the decision to a higher court. Which is a shame because the outcome has got us all wondering whether, if you have too many rental properties, you could lose the CGT 50% discount.

The following comment from the case gives you an idea of what it is like trying to sort out issues with the ATO.

57. However, alongside the wrong periods being assessed which is discussed below, it is fair to say this sort of administration from the Commissioner dismays the Tribunal. It can confuse taxpayers, and can cause problems for the Tribunal with Applications for Review, as will be seen below.

It is not the first time I have seen a comment like this in an ARTA case and shows just how chaotic it can be to sort out your affairs with the ATO. It reinforces the value in having audit insurance.

Further reading:

<https://www.bantacs.com.au/Jblog/why-does-it-matter-whether-you-are-an-investor-or-in-business/#more-871>

<https://www.bantacs.com.au/Jblog/do-not-let-your-conveyancer-talk-you-into-registering-for-gst/#more-948>

<https://www.bantacs.com.au/Jblog/fully-taxable-profit-or-50-cgt-discount/#more-810>

<https://www.bantacs.com.au/Jblog/small-developments/#more-248>

<https://www.bantacs.com.au/Jblog/building-a-duplex/#more-222>

<https://www.bantacs.com.au/Jblog/10-myth-busters-for-renovators/#more-205>