

THE APPLICATION OF THE AUSTRALIAN GOODS AND SERVICES TAX TO REAL PROPERTY IN AUSTRALIA

*Fiona Martin**

I INTRODUCTION

The Australian Goods and Services Tax (GST) came into effect on 1 July 2000 with the enactment of *A New Tax System (the Goods and Services Tax) Act 1999* (Cth) (GST Act). The GST is intended to be a broad based indirect tax that is intended to apply to the majority of goods and services consumed in Australia. It is a type of value added tax (VAT) under which tax is paid on the value added to what are defined in the legislation as 'taxable supplies' at each stage of distribution. The core provisions are found in Part 2-1 of the GST Act.

The GST is often referred to as a broad-based consumption tax which is designed to tax private final consumption expenditure on the supply of goods and services in Australia and on goods imported into Australia. It is aimed at catching business transactions, as personal and hobby activities are not covered.¹

Although the GST is usually referred to as a consumption tax, this is not necessarily the most appropriate view. In *Sterling Guardian Pty Ltd v FC of T* the court stated that 'In economic terms it may be correct to call the GST a consumption tax because of the effective burden on the ultimate consumer, as a matter of legal analysis, what is taxed ... is not consumption but a particular form of transaction, namely supply ...'.²

The general approach of the GST is that the entity making a supply (referred to as the 'taxpayer' for convenience) is liable to GST at the rate of 10 per cent on (generally) the value of the taxable supply at each step along the chain of

* Associate Professor, Taxation and Business Law, UNSW Business School, UNSW Australia.

1 *HP Mercantile Pty Limited v FC of T* 2005 ATC 4571, 4573–4574.

2 2006 ATC 4227, 4230.

transactions involving the supply of goods or services. Registered entities will usually receive a credit for the GST they have paid on their inputs (an 'input tax credit').³ In other words they receive a credit for the GST paid on the cost of the goods or services they have acquired in order to create or add value to the item they will on-sell. The costs of making the supply are referred to as being 'creditable acquisitions' and having a 'creditable purpose'.⁴ Generally, this means a business use. If the creditable purpose subsequently changes, the supplier may be required to adjust the amount of credit. Ultimately the consumer or end-user bears the effective incidence of the tax because they cannot claim input tax credits.

A taxpayer, usually a business, is required to register for the GST where it is carrying on an enterprise and its annual turnover exceeds the threshold (\$75,000 for business; \$150,000 for a non-profit body).⁵ For those under the threshold, registration is optional but may be preferable if the entity has a large amount of input tax credits. Registered taxpayers need to maintain supporting documentation in the form of a 'tax invoice' for each individual taxable supply. They must also submit GST returns to the Australian Taxation Office (ATO) with their payment or refund claim. Large taxpayers (those with a current or projected annual turnover of \$20m or above) must lodge their returns and pay the net tax electronically.

II SUPPLIES THAT ARE 'EXEMPT' FROM GST

The GST Act does not however apply to every single supply of a good, service or thing consumed in Australia. Some goods are excluded from the tax due to policy rationales, some things do not fall within the definition of a good consumed or connected with Australia and others are not taxed on their supply because calculation of the tax would be too difficult. These excluded supplies are specifically identified and categorised as either 'GST-free'⁶ or 'input taxed'⁷ under the GST Act. A supply cannot be GST-free or input taxed unless it is specifically provided for in the legislation. A supply is not a 'taxable supply' to the extent that it is GST-free or input taxed.⁸

The word 'exemptions' is used in a very general sense to apply to a group of supplies in the Australian GST legislation and is really used as an umbrella

3 GST Act ss 7-1, s11-1, 11-5, 11-15.

4 GST Act ss 11-5, 11-15.

5 GST Act ss 23-1, 23-5 and 23-15.

6 GST Act s 9-30 and Div 38.

7 GST Act s 9-30 and Div 40.

8 GST Act s 9-5.

heading. The term 'Exemptions' applies to both input taxed and GST-free supplies in Australia. In most other jurisdictions the term 'exempt' refers to a supply that is in Australia referred to as 'input taxed'. In other words, no GST is charged on the supply, but input tax credits cannot be claimed. What is referred to in Australia as 'GST-free' supplies are generally called 'zero-rated' elsewhere.⁹ 'Zero-rated' is exactly what it says – you charge a 0 per cent rate of GST on your supplies and are otherwise treated normally within the GST system (i.e. you are eligible to claim input tax credits in respect of these 'GST-free' supplies).

Part 3–1, Division 38 of the GST Act, sets out the supplies that are GST-free. If a supply is GST-free no GST is payable on the supply (i.e. it is a non-taxable supply) however the supplier is entitled to input tax credits for any 'creditable acquisitions' used to make that supply. Creditable acquisitions are all taxable supplies that were made to make the GST-free supply.¹⁰

III OVERVIEW OF THE TREATMENT OF REAL PROPERTY FOR GST PURPOSES

If we consider the situation from a theoretical perspective, the supply of real property should be taxed and characterised as a creditable acquisition (for both business and private use) and provisions to tax the rental value should also exist. This is because real property is a 'good' within the GST regime that is consumed by consumers through purchase of, licence or rental. Real property is defined very broadly as including any interest in or right over land; a personal right to call for or be granted any interest in or right over land; or a licence to occupy land or any other contractual right exercisable over or in relation to land.¹¹

Australia's treatment of residential premises is however to tax the value of housing consumption in a manner that ensures the taxation (and crediting) of business inputs, while extending an equal benefit to all those supplying accommodation in the form of a residence by exempting these individuals from the burden of GST compliance.¹² The result is that the supply of residential premises

9 UK: *Value Added Tax Act 1994* c23, s 4 states that (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him; (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply. Section 30 provides that no VAT is charged on zero rated supplies but that credit for the VAT can be claimed in respect of this supply; NZ: *Goods and Services Tax Act 1985* s 11 provides for zero rating of supplies.

10 GST Act Div 11 and Div 38.

11 GST Act s 195-1.

12 Explanatory Memorandum, A New Tax System (Goods and Services Tax) Bill 1998 (Cth) 5.164; Explanatory Memorandum, Tax Laws Amendment (2006 Measures No. 3) Bill 2006 and the New

(either sale or lease) will generally be input taxed unless it is a newly constructed property or commercial residential premises.¹³ The policy rationale is to tax the value of housing consumption in a manner that equates the treatment of those who rent their dwellings with owner-occupiers. To realise this objective, residential premises must only be input-taxed to the extent that they are actually used to provide accommodation outside the course of business, and then only to the point that accommodation is comparable with home ownership. To the extent that business-related activity is associated with either the use or supply of premises, housing supplies should be taxable to enable both the commercial supplier and user of premises to claim a tax credit in respect of supply-related acquisitions and hence ensure their immunity to the tax.

The application of the GST Act to real property can be summarised as follows:

- (i) Sale of vacant land: The sale or long-term lease (a lease of 50 years or more¹⁴) is a taxable supply;
- (ii) Supplies of residential premises: Residential premises (that are not either 'new' or 'commercial residential') that are to be used predominantly for residential accommodation and that are leased, hired, licensed or sold are input-taxed. The lease of residential premises is input taxed even if the premises are new residential premises;
- (iii) New Residential Premises: The sale and long-term lease of real property as 'new residential premises' is a taxable supply;
- (iv) Commercial residential premises: The sale and lease of 'commercial residential premises' is also a taxable supply; and
- (v) Supplies of commercial premises: Sale and lease of commercial premises are taxable supplies.

IV THE SALE OF VACANT LAND

*Vidler v Commissioner of Taxation*¹⁵ looked at the question of whether vacant land, which was zoned for residential purposes, could be treated as residential premises and therefore input taxed. The Full Federal Court determined that examining the physical characteristics of the properties, at the time of supply, was

Business Tax System (Untainting Tax) Bill 2006 15.5; Exposure Draft – Goods and Services Tax Treatment of Residential Premises (as amended at 12/04/2006), Explanatory Materials [1.5].

13 GST Act s 40-65.

14 GST Act s 195-1.

15 [2009] FCA 1426.

the relevant test in determining whether the premises were intended to be used predominantly for residential accommodation. In this situation the relevant properties did not contain shelter or basic living facilities and therefore could not qualify as residential premises because they were incapable of being occupied as a residence. Therefore, the Court held that the properties could not be residential premises, no matter what their future intended use might be, and so the supply of each parcel of land was taxable.

V THE SALE OF RESIDENTIAL PREMISES

A The Definition of Residential Premises

Section 195-1 of the GST Act defines what is meant by 'residential premises'. That section provides that the term 'residential premises' refers to any land or building that:

- (a) is occupied as a residence or for residential accommodation; or
- (b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation, regardless of the term of the occupation or intended occupation.

In GSTR 2012/5, the ATO has revised its interpretation of the second limb of the definition of 'residential premises'. In particular, the ATO states that it no longer considers that the subjective intended use of premises is relevant in determining whether the premises is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation. Rather, the ATO has stated that the second limb of the definition of 'residential premises':

is to be interpreted as a single test that looks to the physical characteristics of the property to determine the premises' suitability and capability for residential accommodation...The requirement for residential premises to be used predominantly for residential accommodation does not require an examination of the subjective intention of, or use by, any particular person.¹⁶

The ATO's reasoning appears to be based on the Full Federal Court decision in *Marana Holdings Pty Ltd v Commissioner of Taxation*.¹⁷ In that case, it was held that the intention to occupy premises referred to in the second limb of the 'residential premises' definition is not the subjective intention of any particular

16 ATO GSTR 2012/5 'Goods and services tax: Residential premises' (19 December 2012) [9]-[10].

17 [2004] FCAFC 307.

entity. Rather, the intention referred to is the objective intention with which the particular premises are designed, built or modified.¹⁸

The view supported by the ATO in this ruling as to what constitutes 'residential premises' for GST purposes has the effect of broadening the circumstances in which a supply of residential premises (by way of sale, lease, hire or licence) will be treated as input taxed. For example, premises that have all the trappings of residential premises and which are being sold in preparation for demolition would be input taxed under the new GST ruling. Similarly, the sale of premises which resemble residential accommodation but which are actually being used for commercial purposes (eg a display home that is not zoned for residential purposes) will also be input taxed under this policy.

B New Residential Premises

Unlike other residential premises the sale or long-term lease of 'new residential premises' by a registered entity is taxable. Under this approach, the initial supply of all non-commercial dwellings by a registered entity is taxed, with subsequent sales being exempt without credit, in other words, input taxed. Rather than requiring the registration of all home-owners and landlords as suppliers of housing services and annually deeming the value of imputed rent, taxation on a first supply basis is said to secure a prepayment of tax upon all future housing consumption. As the original purchaser of new premises (and all subsequent acquirers of the used dwelling) will be unable to claim input-tax credits in respect of their property acquisitions, each purchaser will pass this imbedded tax on to the next. This is essentially consistent with fully taxing each supply of premises, except to the extent that the first taxable sale does not fully anticipate all future value increases.

Section 40-65 states that:

- (1) A sale of real property is *input taxed*, but only to the extent that the property is residential premises to be used predominantly for residential accommodation (regardless of the term of occupation).
- (2) However, the sale is *not* input taxed to the extent that the residential premises are:
 - (a) commercial residential premises; or
 - (b) new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.

18 Ibid [61]-[62].

The ATO considers that in order to answer the question of whether or not a premises is residential premises a taxpayer should look at the physical characteristics of the property to determine the premises' suitability and capability for residential accommodation.¹⁹

'New residential premises' is defined to mean residential premises that have not been previously sold as residential premises and have not previously been the subject of a long-term lease.²⁰ Specifically the definition states:

- (1) Residential premises are *new residential premises* if they:
 - (a) have not previously been sold as residential premises (other than commercial residential premises) and have not previously been the subject of a long-term lease; or
 - (b) have been created through substantial renovations of a building; or
 - (c) have been built, or contain a building that has been built, to replace demolished premises on the same land.

Paragraphs (b) and (c) have effect subject to paragraph (a).

This definition is important from the vendor's perspective as, if registered for GST, they will be required to charge GST on the supply of the new residential premises but will also be able to claim input tax credits arising from the construction of the premises in question.

In 2004 the Full Federal Court held that where a motel was converted to residential units, the sale of one residential unit was a sale of 'new residential premises' and, therefore, a taxable supply. Specifically, the Court decided that the sale of a unit, which was previously a room in a motel, was 'new residential premises' and therefore subject to GST.²¹

The Federal Government however amended the GST law to continue the previous tax treatment of real property in this situation. The Federal Government considered that it was more appropriate that supplies involving properties such as serviced apartments and strata units that are leased to hotel operators remain input taxed.

The Explanatory Memorandum to the amendments provides the following explanation:

19 GSTR 2012/5 'Goods and services tax: Residential premises' (19 December 2012) [9].

20 GST Act s 40-75.

21 Marana Holdings [2004] FCAFC 307.

1.4 The interpretation of the GST Act arising from the Marana decision represents a significant change in the GST treatment of affected premises. As such it would create uncertainty as well as advantaging some taxpayers while disadvantaging others. Further, the new view could add to complexity and the compliance burden for taxpayer. In particular:

- Uncertainty would be created in respect of the GST treatment of other forms of accommodation (for example, holiday homes).
- Investors who have purchased affected premises since the introduction of the GST and who were previously denied input tax credits would be advantaged by the change in view...
- GST registered owners of units who purchased premises before the introduction of the GST would be disadvantaged by the change in view...²²

As a result s 40-75 (2AA) was introduced and essentially provides that premises created because of the registration of, for example, a strata title plan, or a plan to subdivide land, may not become new residential premises.

The question of whether or not real property was 'residential premises' or 'new residential premises' has arisen in several other cases often with conflicting outcomes. In *Toyama Pty Ltd v Landmark Building Developments Pty Ltd*²³ even though there was a disused house on a development site, the sale of the development site was found to be a taxable supply as it was not considered residential premises. Although there was an existing residence, the purchaser did not intend to use the land and building for residential accommodation. In this case the purchaser's intention was to demolish the residence.

In coming to the conclusion that the premises were not 'residential premises', Justice White indicated that a prediction as to the future use of the premises was required and that the most important factor in such a prediction was the intention of the future owner or lessee of the property. He also noted that with a lease, the question as to how the property was to be used in the future would be determined by the terms of the lease. Conversely, in the case of a sale, it would depend upon the purchaser's intention, having regard to the objective circumstances such as the physical condition of the premises, the zoning or any restrictive covenants. Whilst his Honour noted that there would be practical difficulties in determining the vendor's liability for GST based on the intention of the purchaser, he thought this

22 Treasury, 'Explanatory Memorandum to Tax Laws Amendment (2006 Measures No 3) Bill 2006' 115.

23 [2006] NSWSC 83.

problem could be adequately resolved by careful drafting of terms in any sale contract to protect the vendor from any unexpected liability.

His Honour's view was that the subjective intentions of the purchaser taken with the objective criteria as a whole should be the applicable test. He therefore concluded in applying that test to the dispute before him, that the premises were not to be used predominantly for residential accommodation and that the supply was therefore taxable.

In the subsequent decision of *Sunchen Pty Ltd v Commissioner of Taxation*²⁴ the Full Federal Court, in the joint judgment of Edmonds and Gilmour JJ, expressly rejected the use of any subjective test in determining whether or not premises were residential premises. In this case Sunchen had purchased a single-storey house with carport in 2006, subject to a residential tenancy. It claimed the GST on the purchase price (\$47,807) as an input tax credit, on the basis that it did not intend to use the premises for residential accommodation but rather intended to develop the property into units for sale.

Their Honours noted that there was nothing in s 40-65 of the GST Act which required a consideration of the vendor's subjective intention or the intention of the future use by the purchaser. They stated that using such a subjective approach would be entirely inconsistent with the fact that GST was imposed on the vendor of the property.²⁵ It would be impossible in a dispute between the vendor taxpayer and the Commissioner of Taxation for a court to determine what this intention was as the purchaser would not be a party to the proceedings. They also held that the definition of residential premises in s 195-1:

[l]ooks to an existing state of fact: whether the land or building is occupied as a residence or for residential accommodation; or is intended to be occupied, and is capable of being occupied, as such. Again, the second, or para (b), limb of the definition, notwithstanding the phrase 'intended to be occupied', is looking to the characteristics or nature of the property, rather than the intention of any person. So much is to be gleaned from the phrase 'and is capable of being occupied'.²⁶

They therefore concluded that the supply was of residential premises and therefore input taxed.

24 [2010] FCAFC 138; Also see *MBI Properties Pty Ltd v Commissioner of Taxation* [2013] FCA 56 at [33].

25 *Sunchen* [2010] FCAFC 138 [32].

26 *Ibid* [43].

As discussed above the ATO follows this view in its 2012 ruling on the GST and residential premises.

C Commercial Residential Premises

The supply of commercial residential premises by sale²⁷ or long-term lease²⁸ is generally subject to the normal GST rules relating to taxable supplies.

The phrase 'commercial residential premises' is defined in s 195-1 to include a hotel, motel, inn, hostel or boarding house, a ship let out on hire or mainly used for entertainment in the course of such a business, a caravan park or camping ground, and accommodation used in connection with a school, or 'anything similar' to these items. As Nicholas J observed in *ECC Southbank Pty Ltd as trustee for Nest Southbank Unit Trust v Commissioner of Taxation*:²⁹

The test to be applied for the purpose of determining whether [the premises] are commercial residential premises involves asking whether [it] is a hotel, motel, inn, hostel or boarding house or whether it is similar to – in the sense that it has a likeness or resemblance to – any of those types of establishment. The application of this test necessarily raises questions of fact involving matters of impression and degree.³⁰

In the subsequent case of *Wynnum Holdings No 1 Pty Ltd & Anor v Federal Commissioner of Taxation*³¹ the Administrative Appeals Tribunal agreed that the question was one of fact and degree. The Presiding Member came to the conclusion that the premises in this case were not commercial residential premises on the basis of a number of factors. These included that the occupants agreed to occupy the units in the residential complex for a 'Periodic Term', often for months or years at a time; a 'condition report' was prepared at the commencement and conclusion of the term of occupation; a cleaning fee was imposed when an occupant left; the occupant could alter the unit, keep pets and separately arranged for and paid for utility services such as gas and electricity.³²

The factors which the ATO takes into account in determining whether premises are 'similar to' a hotel, motel, inn, hostel or boarding house are discussed in the

27 GST Act s 40-65(2)(a).

28 GST Act s 40-70(2)(a).

29 [2012] FCA 715.

30 Ibid [50].

31 2012 AATA 616.

32 Ibid [76]-[77].

2012 ATO ruling 'Goods and Services Tax: Commercial Residential Premises'. In this ruling the ATO states that whether premises are commercial residential premises is a matter of overall impression involving the weighing up of all relevant factors. Factors that may indicate that premises are not a hotel, motel, inn, hostel, boarding house or similar premises include:

- (a) the operator and occupant agree for accommodation to be supplied for a periodic term which may be for a period of months or years at a time), such as in a residential lease;
- (b) the operator and occupant document the condition of the premises under a written contract before the accommodation is initially supplied and when the occupant ceases to occupy premises;
- (c) the operator has the right to impose a cleaning fee on the occupant when the occupant ceases to occupy the premises;
- (d) the occupant is permitted, subject to the terms of the lease or licence, to alter the part of the premises occupied by the occupant, such as by attaching hanging devices on a wall;
- (e) the occupant is permitted, subject to the terms of the lease or licence, to keep pets in the premises;
- (f) the occupant must separately arrange and pay for the connection of a telephone, electricity, or gas service;
- (g) the occupant is responsible for the cleaning and minor maintenance of the premises, such as changing light bulbs in their room;
- (h) the premises are unfurnished; and
- (i) the right to occupy the residential premises is supplied to the occupant in exchange for the occupant loaning an amount to the operator together with other fees.³³

Except for the final paragraph the situation in the *Wynnum Holdings Case* satisfied all the other criteria.

Zou and Huynh state that in working out if accommodation falls within the definition of commercial residential premises 'suppliers of accommodation should consider all characteristics of operating hotels, motels, inns, hostels and boarding

³³ GSTR 2012/6 'Goods and services tax: Commercial residential premises' (20 December 2013) [41].

houses or similar premises as a whole and weigh them up with all relevant factors to draw the final conclusion'.³⁴

GSTR 2012/7 sets out the GST implications of long-term accommodation in commercial residential premises.³⁵ The ruling considers how Div 87 and s 40-35 apply to supplies of long-term accommodation in commercial residential premises. The value of a taxable supply of commercial accommodation that is provided to an individual as long-term accommodation is modified by either s 87-5 or s 87-10, depending on whether the accommodation is provided in commercial residential premises that are predominantly for long-term accommodation.³⁶

Where there is a supply of 'long-term' commercial accommodation to individuals in commercial residential premises that are predominantly for long-term accommodation, s 87-5 of the GST Act applies to reduce by 50% the normal GST inclusive price of the supply.

Long-term accommodation is where 70% of the accommodation supplies are for a continuous period of at least 28 days, and may be taken up by an individual.³⁷ The rationale behind these provisions is that persons who live long term in commercial residential accommodation such as hostels or caravan parks are charged a reduced rate of GST.

Where the premises are not predominantly for long-term accommodation, GST will be imposed under s 87-10 at normal rates for the first 27 days. After this the 50% discount rate will apply to the 28th and following days of the stay.

The following is an example from the ruling which demonstrates how the provisions apply to situations where more than 70% of the occupants are long-term:

Example 2 - caravan parks

19. Florinda owns a caravan park where more than 70 % of the occupants stay for 28 days or more. The caravan owners are permitted to leave their caravans on site and occupy them whenever they choose. She charges a GST inclusive weekly rate for the sites of \$110 (\$100 plus \$10 GST). She also hires linen, blankets and appliances like televisions and toasters for an additional charge.

34 Zuwu Zou and Myloan Huynh 'GST Implications on Properties' (2013) *Taxation in Australia* 548, 549.

35 GSTR 2012/7 'Goods and services tax: Long-term accommodation in commercial residential premises (19 December 2012).

36 Ibid [5].

37 GST Act s 87-20(1), (2), (3).

20. Florinda does not make a choice under subsection 87-25(1) to treat supplies as input taxed supplies. To work out the GST applicable to Florinda's long-term site-hire rate, Florinda first takes 50 % of what the price of the supply would be if Division 87 did not apply, that is, 50% of \$110 or \$55. The GST is 10 % of this or \$5.50. Florinda's long-term charge is \$105.50 (\$100 plus \$5.50 GST). The GST for linen, blanket and appliance hire is 1 /11 of the price she charges for these supplies, regardless of the period the site is occupied.³⁸

In either situation the supplier may instead choose, *not* to apply Div 87 and to treat the supply as input taxed.³⁹ If the supplier does this then the occupants will be effectively treated in the same manner as the tenants of residential premises.

VI COMMERCIAL PREMISES

There is no specific definition of 'commercial premises' in the GST Act. Essentially, as s 40-65 provides that sales of real property are input taxed if they are residential premises and s 40-35 provides that the lease of real property is input taxed if it is residential premises, the sale or lease of commercial premises will be a taxable supply. Clearly all other requirements of the GST legislation must be met in that the vendor/lessor of the commercial premises must be registered for GST and the sale/lease must be in the course of carrying on their enterprise.

VII THE MARGIN SCHEME

The margin scheme only applies to real property. It was introduced in order to ensure that the GST payable in respect of taxable supplies of real property is only in respect of the value added either, since the introduction of GST, or the previous taxable supply of the subject real property. The relevant provisions are contained in Div 75 of the GST Act. Where the property was acquired before 1 July 2000, the 'margin' will generally be the increase in the property's value since the introduction of the GST.⁴⁰ If, on the other hand, the property was acquired after 1 July 2000, eg by a developer who adds value to the property acquired before reselling it, the 'margin' will generally be the difference between the prices at which they acquired and on-sold (supplied) the property.⁴¹

38 GSTR 2012/7 'Goods and services tax: Long-term accommodation in commercial residential premises (19 December 2012) [19] – [20].

39 GST Act s 87-25.

40 Ss 75-5(1), (1A); 75-10(1), (2), (3); table items 1–4.

41 S 75-10 (2).

Example

In January 2000, Billy purchased land for \$100,000 as part of her land development business. When GST was introduced on 1 July 2000, Billy registered for GST purposes. By 1 July 2000, the property had increased in value to \$133,000.

On 1 January 2010, Billy sold the land as part of her business to a builder, Col, for \$155,000. Billy and Col are eligible to use and agree in writing to apply the real estate margin scheme in relation to this transaction (s 75-5).

Applying the margin scheme provisions, Billy's liability was based on the GST "margin" between the value of the land as at 1 July 2000 and the sale price, ie $\$155,000 - \$133,000 = \$22,000$ (s 75-10(3), table item 1), and the GST payable was 1/11th of this amount, ie $1/11 \times \$22,000 = \$2,000$ (s 75-10; note s 75-14).

Col was not entitled to claim an input tax credit in relation to this acquisition (s 75-20).

Without the margin scheme, Billy's GST liability would have been based on the difference between the acquisition cost and sale price, ie $\$155,000 - \$100,000 = \$55,000$, and the GST payable would have been 1/11th of this amount, ie $\$55,000 \times 1/11 = \$5,000$, but Col would have been entitled to claim an input tax credit.⁴²

Section 75-20 provides that acquisitions of the relevant interests in real property under the margin scheme are not creditable acquisitions. As can be seen from the above example, input tax credits cannot be claimed when the margin scheme is used. The margin scheme will therefore not have any impact from a GST perspective on private purchasers but may not be attractive to a registered purchaser.

The other criteria for the operation of the margin scheme are essentially that there must be an agreement in writing between the vendor and purchaser that the margin scheme applies⁴³, the acquisition of the real property by the vendor must not have been made to them by a taxable supply that did not apply the margin scheme and the supply to the vendor must not have been GST-free as the supply of a going concern.⁴⁴

42 CCH Tax Library, Goods and Services Tax [27-100].

43 GST Act s 75-5.

44 GST Act s 75-5(3).

VIII CONCLUSION

Although at first glance the application of the GST to real property appears straightforward the above analysis demonstrates that it is in fact a very complex area. This point is supported by the number of cases decided and GST rulings that have been issued relating to residential premises and commercial residential premises.

The definitions of residential premises and new residential premises are complicated by the requirement that the premises are to be used predominantly for residential accommodation. The case law has been divided on whether the vendor and/or purchaser's subjective purpose must be established however it now appears that this is not the case and that the objective facts of the premises such as its zoning, the condition of the building and its actual usage are relevant. Taking into account these factors will make the task of determining if a premises is residential or new residential easier however it is still a mixed question of law and fact which can result in difficulties where the factors are finely balanced.

The determination of whether premises are commercial residential premises or residential premises is also complex and there will always be borderline situations particularly where strata title units are involved and some units are occupied by owners and others are leased on a short term basis, eg for holidays. The issue by the ATO of ruling GSTR 2012/6 'Goods and services tax: Commercial residential premises' has however provided a high degree of certainty and guidance in this area.

