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**Caveat Emptor – Let the Purchaser Beware!**

Over the past couple of months we have been getting to grips with some of the GST changes which came into effect on 1 April 2011. It is fair to say that some of the changes have the potential to seriously disadvantage a purchaser under a contract for the sale of land. Take the following relatively common situation.

A purchaser enters into a contract in September 2010 before the introduction of the Taxation (GST & Remedial Matters) Bill to purchase bare land from a GST registered vendor for a price of \$1,000,000 inclusive of GST. The agreement provides for a deposit to be paid upon signing the agreement with the balance payable on settlement which is 31 May 2011. The deposit is to be held by a stakeholder until settlement thereby deferring time of supply until after 1 April 2011.

Under the new GST zero rating rules, where parties enter into a binding contract for the sale of land before 1 April 2011 but with time of supply occurring after that date, the supplier may choose at their sole discretion whether to apply the old or new rules in determining the GST treatment of the supply.

Under the old rules, the purchaser would be entitled to a GST input tax claim in excess of \$130,000 and the vendor would have a corresponding GST output tax liability.

However, if the new rules applied, the supply would be zero rated under section 11(1)(mb) of the GST Act which means that the vendor will have no GST to pay and the purchaser will obtain no GST input.

What do you think the vendor will choose to do in this situation? If the vendor chooses not to apply the old rules thereby saving themselves \$130,000 while leaving the purchaser out of pocket, there doesn't appear to be a lot the purchaser can do.

Take another perhaps less obvious scenario. A developer enters into contracts to sell residential apartments off the plans to mum and dad investors. The agreements are entered into during 2009/2010 with a deposit payable upon signing the contract. The deposit is held under a stakeholder arrangement until unconditional date which is likely to occur when section 225 of the RMA is satisfied. Settlement is to occur 5 working days after titles are issued.

If time of supply occurs after 1 April 2011, the vendor can determine whether section 11(1)(mb) applies to zero rate the supply of the apartments at the settlement date and not at the time of supply.

If time of supply occurs in a taxable period which precedes the period in which settlement takes place, the developer does not need to take a GST position in the period in which time of supply occurs.

If it is determined after settlement that the supply cannot be zero rated due to the purchaser using the apartment for the supply of residential accommodation, then section 5(23) of the GST Act treats the purchaser as being the supplier with the obligation to account for GST on the supply in the period in which settlement takes place. If the purchaser is not a GST registered person, they are required to register for GST, pay the GST to the IRD and then de-register.

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If the purchaser has already paid the GST inclusive purchase price to the vendor, they should be legally entitled to recover the GST content from the vendor, but if the developer is in financial difficulty this may not be easy, particularly if the settlement funds have already been paid to a secured lender.

If time of supply has yet to occur, there may be scope for a purchaser to avoid such a result by providing the vendor with a statement as to their intended use of the apartment now so that the vendor has no grounds to treat the supply as zero rated.

We suspect that Parliament did not intend such outcomes to be possible, but our interpretation of the new rules suggests that these results are in fact possible.

We would recommend that advisers review any contracts for the sale and purchase of land with these issues in mind and where possible try and alleviate any potential pitfalls.

**Graeme Carruthers**

## Seminars

We have 2 seminars running over the next few weeks – an LTC Workshop and Tax Consequences of Litigation. Please find attached a registration form with full details.

**Lara Hartmann**

## Loss Limitation Calculator Now Available

nsaTax are pleased to announce that our loss limitation calculator is now available. If you've attended any of our seminars or webinars on the new look through company (LTC) regime you will be well aware that one of the main headaches with LTC's is calculating the "owner's basis" to determine whether any losses (technically deductions) will be disallowed/quarantined under the loss limitation rule.

As we've pointed out previously, the legislation is not particularly user friendly, yet the ability to continue claiming losses is a crucial issue for clients. This issue will likely be a significant factor in deciding whether clients elect into the LTC regime or instead opt to transition to a sole trader or partnership.

We are still waiting to hear back from IRD on submissions we have made relating to some aspects of the owners basis formula, however, we have highlighted the areas of uncertainty in the accompanying notes. We hope to provide an update on the outcome of our submissions by the end of this month.

Our calculator can assist you to quickly and easily calculate how your clients will be affected under the loss limitation rule so you can make meaningful recommendations to clients based on their individual circumstances. The calculator comes in an excel spreadsheet format with full notes and instructions at each relevant step. We are offering it for sale at \$250 including GST. If you would like to purchase the loss limitation calculator please contact Lara Hartmann ([larah@nsatax.co.nz](mailto:larah@nsatax.co.nz)).

**Maggie Jaques**