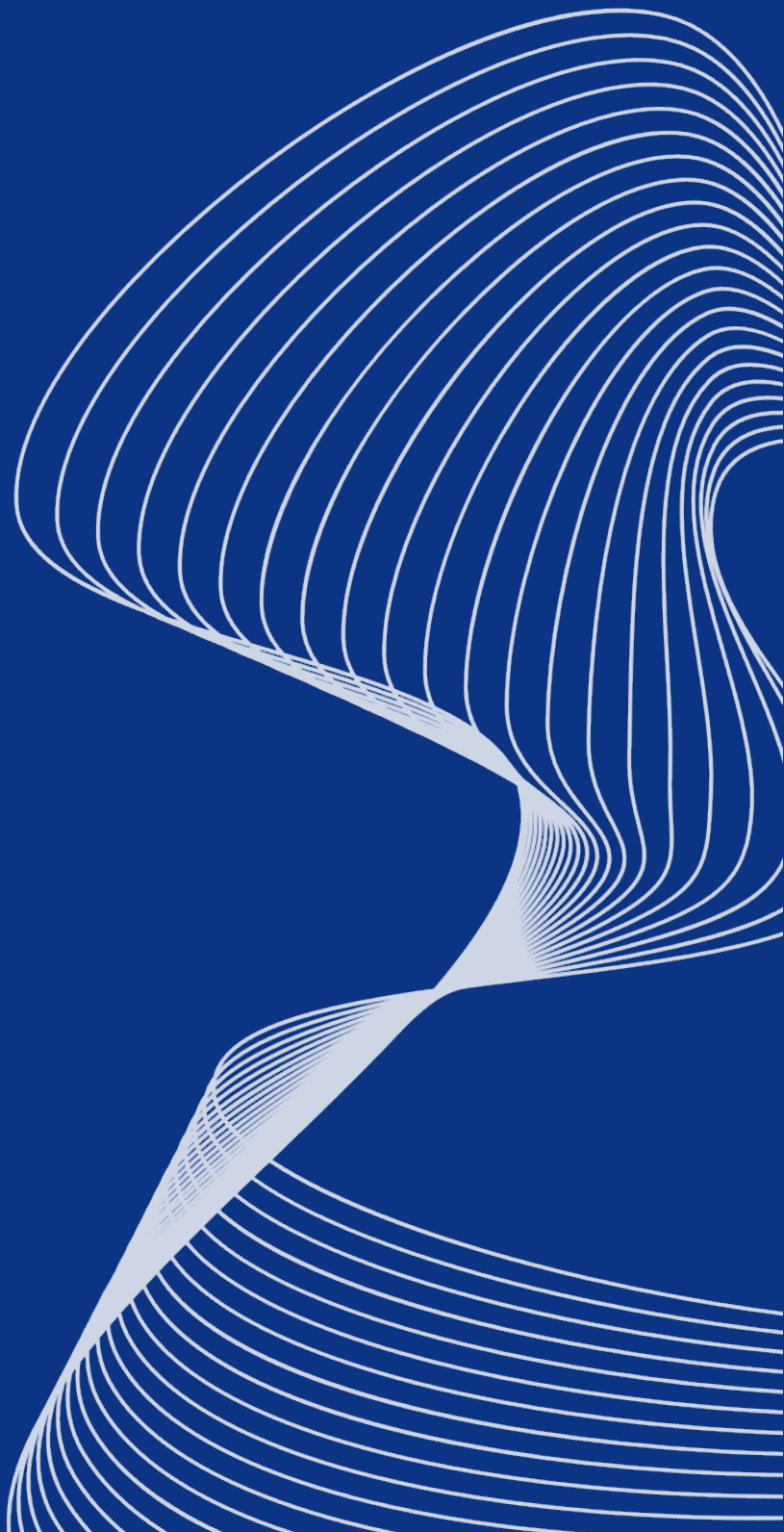
GST and Real Property

THE MARGIN SCHEME AND MULTIPLE TITLES



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The GST margin scheme and multiple titles

The decision in *Landcom vs FCT [2022] FCA 510* may present an opportunity to revisit the GST implications of certain property transactions in respect of the application of the margin scheme.

Introduction

The Federal Court of Australia decided in favour of the taxpayer on all GST matters in *Landcom v FCT [2022] FCA 510* on 9 May 2022, clarifying that:

- the jurisdiction of the court is able to rule on matters of notional tax for certain government bodies; and
- amalgamated land sold under a single contract can be multiple supplies, which then individually need to be assessed for margin scheme eligibility and to determine the GST payable per supply.

These findings overturn the previous ATO administration of the application of the margin scheme to property transactions, giving rise to an opportunity to revisit the GST implications of certain property transactions.

Key Facts

The taxpayer was a state-owned corporation that purchased, sold and developed real property. It owned a number of lots, each with a separate certificate of title, that it intended to sell as a single piece of land to a developer to build residential premises, effectively creating a new suburb. The lots were grouped together for the purpose of preparing two contracts of sale, with 12 lots being the subject of contract B1 and four lots (lots L, M, N and P) the subject of contract B2. These lots had all been held by the state of New South Wales since before 1 July 2000. The lots were previously owned by the NSW Land and Housing Corporation (LAHC) and were transferred from LAHC to the taxpayer on 1 January 2002.

The taxpayer subsequently applied for a private ruling from the Commissioner of Taxation about the operation of a specific margin scheme provision in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) (GSTA99) in relation to the transfer of the lots. The margin scheme provision, namely, item 4 of s 75-10(3) GSTA99, that they were requesting a private ruling on, applies to the Commonwealth, a state or a territory for property held since before 1 July 2000 where there have been no improvements on the land in question as at 1 July 2000, and has the effect of reducing the GST payable under the margin scheme to nil for eligible property. In particular, the taxpayer was concerned about whether, for the purposes of Div 75 GSTA99, there was one supply of all lots the subject of contract B2 or single supplies of each of lots L, M, N and P.

After receiving an unfavourable ruling, namely, that the sale of the freehold interests in lots L, M, N and P pursuant to contract B2 would be a single supply, and having its objection to the ruling disallowed, the taxpayer lodged an appeal against the objection decision.

At dispute were the following two key matters:

1. whether the Federal Court has jurisdiction to rule on the matter of notional tax; and

2. whether amalgamated land sold in a single contract should, for margin scheme purposes, be viewed as a single or separate supplies and the implication for calculating GST on the margin.

Further details on these matters are set out below.

The case is still within the period for potential appeal by the ATO. However, regard should be had as to whether the timing of objecting to previously issued ATO private rulings related to these matters may lapse for particular circumstances before an appeal is heard.

Whether Federal Court has jurisdiction to rule on the issue of notional tax

According to the Constitution of Australia, the Commonwealth is prohibited from imposing "any tax on property of any kind belonging to a State". However, through a series of elective agreements, state-owned enterprises voluntarily opt to report notional GST amounts.

On this basis, the Commissioner contended that the Federal Court had no jurisdiction to entertain the appeal as there was no "matter" that could be the subject of the court's jurisdiction.

The Commissioner further contended that he was not authorised to issue the private ruling or make the objection decision, and that these had been done as a "courtesy" to provide guidance to the taxpayer. The Commissioner described the document issued to the taxpayer in response to its application for a private ruling as a "purported" private ruling.

The Federal Court found in favour of the taxpayer that the court does have jurisdiction to rule on this matter due to the following three circumstances:

1. the item 4 provision for calculating the margin on the sale of the land titles expressly applied to the taxpayer;
2. the taxpayer had a right under the Taxation Administration Act 1953 (Cth) to seek a ruling about how a provision of the GSTA99 applied to it or would apply if it took identified steps; and
3. the taxpayer was "dissatisfied" with the private ruling given by the ATO.

Further, the court found that the voluntary inclusion by the taxpayer of notional GST in a GST return resulted in an assessment that gave rise to a debt to the Commonwealth, which was enforceable by the Commissioner. The taxpayer had a real interest in knowing how much notional GST to include, voluntarily, in its GST return.

Importantly, this finding contradicts the ATO guidance released on dispute resolution for notional GST matters of government entities released on 21 April 2022. Taxpayers should revisit the GST outcomes of private rulings applied for on notional tax matters historically, and consider their objection rights, depending on time limits.

Margin scheme considerations for amalgamated land

Broadly, the margin scheme is a concession in the GST law which allows suppliers of certain sales of real property to remit GST of 1/11th of the value added since 1 July 2000. This is subject to a number of provisions which impact this calculation of the margin on which GST is paid, including item 4 of s 75-10(3) GSTA99 which has specific application to government entities. As set out above, this should apply to the Commonwealth, a state or a territory for property held

since before 1 July 2000 where there have been no improvements on the land in question as at 1 July 2000, and has the effect of reducing the GST payable under the margin scheme to nil for eligible property.

By a put and call option agreement dated 5 November 2015 (as amended), the taxpayer granted an option to the purchaser, and the purchaser granted the taxpayer an option to require the purchaser, to purchase the lots comprising property B1 on the terms of contract B1, and to purchase the lots comprising property B2 on the terms of contract B2. The contract of sale provided that the parties agreed that the "margin scheme" would be applied to work out the GST payable on any taxable supply of property under the contract.

In particular, the taxpayer was concerned about whether, for the application of the margin scheme, there was one supply of all lots the subject of contract B2 or single supplies of each of lots L, M, N and P. For margin scheme purposes, if there was an improvement on any of the lots, the concession for determining the margin in item 4 would not apply to the entire sale if it were viewed as a single supply. After receiving an unfavourable ruling, namely, that the sale of the freehold interests in lots L, M, N and P pursuant to contract B2 would be a single supply, and having its objection to the ruling disallowed, the taxpayer lodged an appeal against the objection decision.

The Commissioner submitted that the "supply" made by the taxpayer was the sale of all four lots, namely, the entirety of the freehold interests making up what was referred to as property B2. In the Commissioner's view, the "substance and commercial reality" was that the four lots were to be sold in a single transaction with an indivisible purchase price to one purchaser, as a development site for a new suburb.

In relation to the application of the margin scheme to its proposed sale of land, the taxpayer submitted that, even if it was possible for a supply of multiple freehold interests to be a single supply under the basic GST rules, the margin scheme provisions in the special rules treated separately each supply made by selling a "freehold interest in land". It did not matter to the operation of the special rules that the supply of the particular freehold interest to which the provisions were directed might be part of a larger supply for the purpose of the basic rules.

The court found that the margin scheme provisions do not require a consideration of the identification of the "supply" under the basic rules. The policy and context of the margin scheme was different from the context of the general provisions contained in the "basic rules".

The focus of the margin scheme, in so far as it applied to selling freehold interests in land, was on the sale of individual interests in land. According to the court, the better construction was that the margin scheme provisions looked to where there had been a supply by selling a particular freehold interest in land and the supplier and recipient had agreed that the margin scheme was to apply. Where that had occurred, the margin was calculated by reference to the particular freehold interest that was sold. It applied whether or not that particular supply, made by selling a freehold interest in land, was part of a larger supply.

The court ruling has broader considerations for the application of the margin scheme in the form of:

- eligibility to apply the margin scheme should be considered on a per supply basis, which may have the consequence that some supplies qualify as opposed to the whole sale of land being subject to GST at the full rate of 10%; and

- the calculation of the margin scheme should be considered on a per supply basis with the various provisions to determine that margin applying based on the factors of that land title, such as whether the land is improved, how it was acquired etc.

The takeaway

Consider your objection rights and/or revisiting previous private rulings on notional tax and item 4 margin schemes to assess whether this case overturned that ruling and the subsequent GST outcomes.

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