

Associates claim ITCs on construction of premises

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In *Tax Alerts* TA 2009/4 and TA 2009/5 the ATO explains the application of the general anti-avoidance provisions in Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) to an arrangement in which a landowner registers for GST as late as possible to minimise their GST and still claim full input of tax credits on construction services provided by one of their associates. This article discusses the ATO's views.

Scheme

Basically, the scheme which the ATO identifies as contravening the general anti-avoidance provisions begins with a land owner who acquires real property before the introduction of GST on 1 July 2000 engaging a GST registered associate to construct and market the residential premises.

The associate then either carries on the construction themselves or engages a builder to complete the construction. The associate does not require the landowner to make any progress payments and claims input tax credits on any payments it makes in respect of its provision of the construction services.

The landowner registers for GST prior to the sale or leasing of the residential premises and then receives a tax invoice from its associate. The landowner later claims full tax credits on the services acquired from its associate and calculates its GST payable on

the sale or leasing of the premises under the margin scheme using a valuation of the land as at the date of its GST registration.

According to the ATO:

- under Divisions 23 and 188 of the GST Act, the landowner is required to register for GST at a point earlier than the date that its registration actually takes place;
- the first main issue is that any act or payment by the land owner causes the associate's GST to be attributable in accordance with section 29-5 of the GST Act to a tax period prior to the tax period in which the associate treats its GST as being attributable; and
- the second issue is that any act or payment by the land owner causes any input tax credits which the land owner is entitled to, not to be attributable under section 29-10 of the GST Act. This is due to the fact that the land owner is not registered or required to be registered for GST when the act or payment occurs.

Penalty

The ATO's view is that the general anti-avoidance provisions apply as the arrangement appears artificial and contrived in its design and execution. A base penalty of up to 50% of the tax avoided may thus apply if Division 165 of the GST Act is found to apply.

Conclusion

The purpose of the ATO's recent Tax Alerts is to prevent landowners from claiming excess input tax credits on construction services and subsequently paying minimum GST on the sale or lease of the property by entering the above arrangement. It is important to note that the Alerts are not a final determination by the ATO. The final determination by the ATO usually follows shortly after the issue of such Alerts.