

GST & partitions of land

By Stella Bae, Law Graduate & Luis Batalha, Director

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The ATO recently released *GST Ruling* GSTR 2009/2 in which it clarifies the GST implications of the partitioning of real property. The partitioning of real property may be subject to a lower amount of GST as a result of the application of the margin scheme rules if the transfer of the interests in land between the co-owners meets the requirements of Division 75 of the GST Act. Otherwise, if a taxable supply results, a partitioning of land may have GST consequences in the ordinary manner.

Meaning of “partition”

It is common for real property to be held by more than one entity as either joint tenants or tenants in common. The termination of co-ownership is generally effected by way of a 'partition'.

The term partition is not used or defined in the GST Act. For the purposes of the GSTR 2009/2, however, the term is defined by reference to its ordinary and property law meanings as “the division of land and the transfer of the divided parts between the co-owners so that one or more co-owners become the owner in severalty of a specifically ascertained part(s) of the land” (GSTR 2009/2, paragraph 18).

A partition can be effected either by agreement (partition by agreement) or by court order (court ordered partition). In the case of the latter, the court may order the transfer of interests to the different parties, or appoint trustees to hold the property on trust for the parties. Alternatively, the court may order the sale of the property and distribute the net proceeds (GSTR 2009/2, paragraph 28).

In both cases, an 'owelty' (or a sum of money) may be given to make up for any differences in value of the land each receives after a partition or to compensate for the value of the land given up without receiving an interest in any other land in return (GSTR 2009/2, paragraphs 30 and 31).

Taxable supply

GST is payable on a taxable supply which meets the requirements of section 9-5 of the GST Act.

In particular, for there to be a taxable supply, it is relevant to identify the supply and whether it is made for consideration in the course or furtherance of an enterprise carried on by the supplier (GSTR 2009/2, paragraphs 30 and 31).

Supply

The transfer or conveyance by each co-owner of their respective interests in the land to be taken by the other co-owners under a partition by agreement or under a court ordered partition is a supply within section 9-10(1) of the GST Act to mean 'any form of supply whatsoever' (GSTR 2009/2, paragraphs 46, 47 and 56).

The making of a supply requires positive action by the co-owner but the act does not have to be voluntary. Thus, a transfer of interests under a court ordered partition constitutes a supply for GST purposes (GSTR 2009/2, paragraph 56).

Subdivision

While the term "supply" has a broad meaning, the subdivision of land by co-owners does not constitute a supply for the purposes of the GST Act (GSTR 2009/2, paragraph 50).

This is because while a subdivision results in the creation of new rights and titles, there is no change in the ownership of the subdivided land and accordingly, no transfer of interests in the land between the co-owners (GSTR 2009/2, paragraph 50).

'In the course or furtherance of an enterprise'

The phrase 'in the course or furtherance of an enterprise' is not defined in the GST Act but the *Explanatory Memorandum* supports a broad meaning.

If land is applied or intended to be applied in an enterprise carried on by a co-owner, a supply is in connection with the enterprise and is a supply in the course or furtherance of an enterprise. The connection does not have to be substantial but can be minor (GSTR 2009/2, paragraph 57).

Further, where a partition of a land results in the termination of the enterprise, the supply may still be in connection with the enterprise and be a supply in the course or furtherance of an enterprise (GSTR 2009/2, paragraph 58).

Consideration

Consideration for a supply means a payment, or any act or forbearance 'in connection with' 'in response to' or 'for the inducement' of a supply (GSTR 2009/2, paragraph 88).

For land transactions, consideration may be anything that 'moves' the transfer (GSTR 2009/2, paragraph 91). Under a partition, co-owners give up their respective interests in a part of the land in return for an interest in another part of the land. Thus, the transfer of an interest in part of the land by a co-owner is 'in connection with', 'in response to' or 'for the inducement' of the supply by each of the other co-owners of their respective interests in a part of the land (GSTR 2009/2, paragraph 98).

The consideration is the sum of the GST inclusive market value of all the other co-owners' interests in the part of the land acquired by a co-owner plus any owelty received in respect of the partition (GSTR 2009/2, paragraph 97).

Margin scheme

An entity may apply the margin scheme to work out the amount of GST payable on a taxable supply of land. If you make a taxable supply of real property, the GST

payable under the basic rules is 1/11th of the price. However, if you make a taxable supply of real property under the margin scheme, the GST payable is 1/11th of the margin. The margin scheme applies to a taxable supply of land made by selling a freehold interest in land, a stratum unit, or granting a long term lease.

However, for the margin scheme to be available there must be a "sale" of real property.

Sale

The terms 'selling' or 'sale' are not defined in the GST Act. Therefore, for the purposes of the GST Act, the ordinary meaning of these terms applies relevant. The ordinary meaning of sale is broad enough to include a transfer or exchange of something for consideration or a price that is of a non-monetary nature, and is not restricted to a disposal of something for an amount of money (GSTR 2009/2, paragraph 104).

A supply by a co-owner of their interest in freehold land under a partition will be a sale of a freehold interest in land for the purposes of the margin scheme provisions (GSTR 2009/2, paragraph 102).

Joint ventures

Under a partition, the transfer by each participant in a joint venture of their interest in land is a taxable supply provided all the conditions of section 9-5 of the GST Act are met (GSTR 2009/2, paragraph 161). Transfer of interests between the participants in the joint venture is a supply made for consideration (GSTR 2009/2, paragraph 163).

Conclusion

The transfer of interests in real property between co-owners under a partition may attract GST. However, it may be possible to calculate GST by applying the margin scheme rules. A subdivision of land, by contrast, attracts no GST, as it does not involve the transfer of any interests between the co-owners of the real property.