

Property Update

August 2009

End of the going concern exemption - cause for concern?



In the 2009/2010 Federal Budget, the Government announced its intention to accept and implement 41 of the 46 recommendations made in the Board of Taxation's report on its review of the law of GST administration. The most

important initiative for anybody considering buying or selling a business involves the introduction of a reverse charge mechanism to replace the existing GST-free concession for sales of going concerns. Assuming this measure

gets the unanimous support of the States and Territories, it will take effect from 1 July 2010.

The reverse charge mechanism shifts the obligation to charge GST from the supplier to the recipient. It requires the recipient

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Lavan Legal is the largest independently owned law firm in Western Australia, comprising of over 200 staff which includes 21 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. Advising on all aspects of property acquisition, disposals and developments including syndications. We have one of the few accredited leasing experts available to clients who has significant Australia-wide experience on very large and complicated leasing developments.

At Lavan Legal we believe in building long lasting relationships with our clients. We continue to provide the best legal advice and service, so that we can continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology, market insight, and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through increased innovation and process improvement.

(ie the buyer in a sale of business scenario) to be registered for GST purposes, and to charge itself GST on the supply and remit the same to the Australian Taxation Office (ATO). Assuming the recipient can claim an input credit for the amount of GST it has paid on the supply, the recipient can claim the input tax credit in the same tax period as it is required to remit the GST. The net GST effect for the recipient associated with the transaction would therefore effectively be nil. This method ensures that a seller is no longer faced with the risk of having to pay GST without being able to recover the same from the recipient, if a subsequent ATO audit finds that the supply was not in fact the supply of a going concern.

One of the disadvantages associated with the reverse charge approach, is that it requires the buyer to pay increased duty on the transaction. This is because duty is payable on the GST inclusive price of the

business. The buyer needs to be aware of this when arranging finance to fund the acquisition of the business, since the value of the business on which duty is payable by the purchaser will include the GST component, and the buyer needs to ensure that it has sufficient funds to cover the additional duty payable.

The reverse charge mechanism will also be less advantageous than the existing GST exemption for any buyer who is not entitled to claim any or only a partial input tax credit in respect of the relevant acquisition. This would be the case if the buyer, as part of its ordinary business, makes financial supplies, such as banks and financial institutions.

If the Government adopts the Board of Taxation's other recommendations relating to going concerns, then a less strict definition of 'going concern' will apply. This would mean that the reverse charge rules for going concerns have broader application by covering situations in which incidental parts of a business are

not sold, perhaps for example because the recipient already has some of the necessary business assets, such as office furniture, leased premises or staff. The result would be that a greater number of purchasers of businesses would not be required to take out additional finance to cover the cost of the GST, since the buyer would be required to pay GST in the same period as claiming an input tax credit for that GST.

Ultimately, the Government's proposed amendments to the GST provisions relating to going concerns, whilst favourable for sellers, are a mixed blessing for buyers. Given the importance of the proposed amendments, we will continue to closely monitor developments in this area for our clients.

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