THE TAX INSTITUTE

29 May 2018

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By email: steven.fogarty@ato.gov.au

Dear Steven,

Draft LCR 2018/D1 - Purchaser's obligation to pay an amount for GST on taxable supplies of certain real property

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office in relation to the draft *LCR 2018/D1 - Purchaser's obligation to pay an amount for GST on taxable supplies of certain real property* (**Draft Ruling**).

Summary

The Tax Institute considers that the Draft Ruling requires further work before it is in a position to be finalised. In our opinion, in its current form, there is uncertainty with respect to a number of matters, including the following:

a) Refunds and credits;
b) Genuine deposits;
c) Acquiring a thing supplied for a creditable purpose;
d) Timing re: lodgment of refund application form;
e) Non-monetary consideration; and
f) Additional examples.

Further details of our concerns are set out below together with a number of recommendations for the Commissioner to consider.

Discussion

1. Refunds and credits

A vendor that makes a taxable supply to which the Goods and Services Tax (**GST**) payment regime applies will still report the amount of GST payable in its Business Activity Statement (**BAS**) and will be entitled to a credit for the amount paid by the purchaser to the Australian Taxation Office (**ATO**). Refunds separate to the usual BAS process will only be available if an amount is withheld in error and certain timing restrictions do not apply. Section 18-60[1] and section 18-85[2] of the *Taxation Administration Act 1953* (Cth) (**TAA**) provide for this respectively. They state, in part, as follows (emphasis added):

> ***18-60 Credit—payment relating to taxable supply of real property***
>
> *(1) An entity is entitled to a credit if:*
>
> *(a) **the entity made a *taxable supply** to which subsection 14-250(2) applies; and*
> *(b) another entity made a payment under section 14-250 in relation to the supply….*
>
> ***18-85 Refund by Commissioner of amount withheld from payment in respect of taxable supply of real property***
>
> *(1) An entity (the recipient) may apply, in the *approved form, to the Commissioner for the refund of an amount if:*
>
> *(a) another entity (the payer) has made a payment under section 14-250, or purportedly under that section, **in relation to a *taxable supply** by the recipient; and*
> *(b) the payment, or part of the payment, was made in error…*

On a strict interpretation of each section, it is arguable that a vendor may only be entitled to either a credit or refund where the supply made by it is a "taxable supply". Therefore, where the purchaser erroneously pays an amount to the Commissioner in respect of a non-taxable supply, a credit or refund may technically not be available to the vendor under either of these two sections.

We understand that this matter was raised with Treasury after the *Treasury Laws Amendment (2018 Measures No. 1) Bill 2018* (Cth) (**Bill**) and the Explanatory Memorandum to the Bill (**EM**) was introduced.

Despite the concern with the drafting of the provision, it appears that a legislative fix was not considered necessary. This may have been so given the EM provides as follows (emphasis added):

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[1] Inserted by *Schedule 5 of Treasury Laws Amendment (2018 Measures No.1) Act 2018* (Cth) (**Amending Act**)

[2] Inserted by the Amending Act

> ***Refunds for amounts where the payment is made in error***
>
> *5.58 Where a purchaser withholds in error, but in purported compliance with the obligation to withhold, (**for example, where residential premises are not new residential premises and therefore withholding does not apply**), then the supplier may apply for a refund separate to the usual BAS process of the amount of the payment to the extent it was made in error. The amount that may be refunded is the amount that is withheld in error.*

Notwithstanding the above, the Commissioner expresses an opposing view in the Draft Ruling (emphasis added):

> ***Amounts incorrectly paid to the ATO by the purchaser***
>
> *61. Generally, if a purchaser incorrectly pays an amount to the ATO in purported compliance with section 14-250, the vendor may apply to the Commissioner for a refund under section 18-85 in the approved form. This must be done no later than 14 days before GST must be paid on the supply. If a refund is made, no credit is available under section 18-60 to the vendor.*
>
> *62. The Commissioner is only required to refund an amount to a vendor under section 18-85 if satisfied that it would be fair and reasonable to do so. **The Commissioner is unlikely to be satisfied that it is fair and reasonable to refund an amount to the vendor if a purchaser incorrectly made a payment in respect of a non-taxable supply. The vendor will not be entitled to a credit but the purchaser may be entitled to a refund.** The Commissioner will consider repayment requests by purchasers on a case by case basis.*

We have set out below our initial concerns that we foresee arising from what is perceived to be an inconsistent approach with how each of section 18-60 and section 18-85 should be administered.

i) <u>What is fair and reasonable?</u>

Pursuant to subsection 14-255(1), a supplier must not make "a taxable supply of residential premises or potential residential land…" unless it meets certain notification requirements.

There may be a number of circumstances where the supplier fails to provide the necessary notification to the purchaser. This does not absolve the purchaser of its obligation to pay an amount to the Commissioner. If the purchaser forms the view that the supply to it was a taxable supply and is unable to otherwise confirm this position, then subsection 14-255(3) provides that the purchaser will still have an obligation to make a payment under section 14-250.

Even if the purchaser receives a notification, it will still be under an obligation to make a payment to the Commissioner where it would be unreasonable for the purchaser to believe the statement in the notice was correct.

It is in these contexts that the purchaser may incorrectly make a payment to the Commissioner in respect of a non-taxable supply thus giving rise to an entitlement to a refund. Such a view might be taken on the mistaken assumption that the purchaser was acquiring new residential premises, say because it formed the view that the premises had been leased for less than five years.

The EM explains that the vendor (supplier) can apply for a refund where the purchaser withholds in error and that such an error may be where the purchaser withholds on a supply to it of "residential premises that are not new" (i.e. a non-taxable supply).

There is no suggestion in the EM that the vendor would not be entitled to apply for a refund in circumstances where the purchaser has made a payment to the ATO in respect of a non-taxable supply. Nor is there any suggestion that it would be unreasonable for the vendor to receive a refund of this mistaken payment.

Similarly, the Commissioner does not appear to take issue with the vendor making a request for a refund in such circumstances[3]. However, the Commissioner adopts a different view on what is "fair and reasonable" in that he will disallow a vendor's refund request which emanates from a payment made to the Commissioner in respect of a non-taxable supply.

In this regard, the EM and the Draft Ruling are at odds with one another. It is not clear whether the sentence "the Commissioner is **unlikely** to be satisfied" is intent on establishing the broad proposition that it would not be fair and reasonable to approve a vendor's refund request in the above set of circumstances. If this is the case, then the Commissioner must articulate why he is prepared to take a view that is contrary to that expressed in the EM.

For example, is the Commissioner seeking to rely on the policy intent underpinning Division 142 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**)? That is, the vendor would be receiving a "windfall gain" if it cannot establish that it reimbursed the purchaser the "passed on" GST. If this is the case, then before making a blanket statement the Commissioner should, among other things, at least be satisfied that:

a) the policy setting with which Division 142 is concerned is applicable to the current context; and if so
b) the GST has been "passed on".

If, on the other hand, the Commissioner is seeking to distinguish between the different contractual scenarios and how this might impact the vendor's entitlement to a refund, then this should be made clear. An example of a situation which the Commissioner thinks is fair and reasonable would be helpful in this regard.

[3] Refer to paragraph 61 of the Draft Ruling.

Whatever the reason might be, paragraph 62 of the Draft Ruling certainly does not provide taxpayers with sufficient clarity on the Commissioner's thinking on this matter. In its current form, the Commissioner's interpretation of what is "fair and reasonable" is likely to have an adverse impact on those developers that act appropriately.

ii) GST-exclusive v GST-inclusive

It follows from the above that what is fair and reasonable might in fact turn on how the contract for sale is drafted.

There are broadly two scenarios under which the purchase price may be expressed in a contract for the sale of land. That is, either on a GST-inclusive basis or GST-exclusive basis.

In ordinary property transactions of the type that these provisions are targeting, one would expect the relevant contract for sale to stipulate a GST-inclusive price.

The effect of a GST-inclusive price is that the parties have expressed the intention that the purchaser has no obligation to make a further payment in respect of any GST assessment that might later follow. In other words, the parties plainly intend that the risk that GST might need to be remitted to the ATO sits with the vendor. If the transaction does not involve a taxable supply, that risk is abated to the benefit of the vendor, who retains the full price that it contracted to receive for the property. This construction is neither uncertain, nor ambiguous.

The inverse is equally true where the contract specifies a GST-exclusive price.

Notwithstanding the above, we accept that Division 142 creates a specific deeming regime, whereby overpaid GST that has been "passed on" to another entity is taken to have always been payable until that other entity is reimbursed for that passed on GST. The idea is to prevent, what the Commissioner perceives to be, a windfall gain for the vendor. It is in this sense we suspect that the Commissioner may not be prepared to refund the vendor where the purchase price is GST-inclusive.

With respect, if this is the Commissioner's view, then we do not agree. This is because:

a) Division 142 will not be engaged until a BAS is lodged and there is an "assessed net amount". Where the vendor has formed the view that the supply to the purchaser was not a taxable supply then there may be nothing to report in its BAS and thus no "assessed net amount" or "excess GST".

b) The vendor will be making an application for a refund to the Commissioner in the approved form, which is something that will occur outside of the ordinary BAS process.

c) Division 142 is a specific statutory provision designed to overcome situations where the vendor has "passed on" a GST amount to the purchaser and remitted

this mistakenly to the Commissioner. If the contract is expressed as a GST-inclusive price, then this is the price that has been struck as between the vendor and purchaser. In a residential context, this is almost always whatever the market sets as the price. If the purchaser takes it upon itself to remit an amount to the Commissioner and the vendor has already taken the position that the supply was not a taxable supply, then it would be expecting to receive the full purchase price.

Thus from the vendor's perspective it would not be receiving a windfall gain and the purchaser, to the vendor's detriment, would instead be benefitting from a reduction in the purchase price that was not bargained for. To use Emmett J's words (in the context of the former section 105-65), "While its object may be commendable, in seeking to avoid windfall gains for taxpayers, it is, in a sense, a paternalistic interference with the rights of taxpayers."[4]

What the above serves to illustrate is that depending on the conditions it may be eminently "fair and reasonable" for the vendor to seek a refund. Equally, we do not necessarily disagree that the purchaser may be entitled to a refund, but this is concerning for the reasons noted below.

Recommendation

In light of the above, we would recommend the Commissioner:

a) explain why he has adopted a view that is potentially contrary to the one expressed in the EM;
b) articulates his interpretation of what is "fair and reasonable" and whether this view has its genesis in the principles underpinning Division 142; and
c) consider using his remedial power in section 370-5 of the TAA to rectify any potential anomalous outcome that might arise by virtue of the current drafting of the provisions.

iii) Purchaser's repayment request

If the Commissioner maintains the view that a vendor will not be entitled to a refund, then paragraph 62 of the Draft Ruling suggests that the Commissioner will consider repayment requests by the purchaser. It is not immediately apparent to us how the purchaser would go about making such a request since section 18-85 only provides for the vendor to make an application in the approved form.

In an interest withholding tax context for example, the payer is entitled to recover a mistaken payment from the Commissioner under subsection 18-65(5) of the TAA. However, this right of recovery is subject to the payer making the lender good for the amount that was incorrectly withheld. Subdivision 14-E has been specifically carved out from section 18-65.

[4] *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159; (2008) 168 FCR 319 at [33].

Therefore, is such a request made on the presumption that as a general law principle, the Commissioner is only able to collect and retain taxes that are properly due to him, and he must refund any overpaid tax? That is to say, the Commissioner's retention of the incorrectly paid GST would give rise to an unjust enrichment claim by the purchaser as it was the one that mistakenly paid the Commissioner such an amount.

Recommendation

The Commissioner should:

a) explain why it would be fair and reasonable to consider repayment requests by purchasers and not vendors;
b) explain how the purchaser would make a repayment request where there is no current provision in the Act to give effect to this outcome; and
c) consider using his remedial power in section 370-5 of the TAA to provide a specific statutory mechanism for the purchaser to recover payments made in error to the Commissioner.

An example of the relevant steps that the purchaser would need to take to give effect to such a repayment request would be expedient.

iv) Vendor's entitlement to a credit

Where, on the off chance, notification was not provided, the supplier is not registered for GST **but** the purchaser still makes a payment to the Commissioner under section 14-250, then it is unclear how the supplier would obtain a credit under section 18-60 and ultimately a refund of the GST paid. This would be one scenario, however unlikely it might be, that the vendor would be prejudiced by the Commissioner's current position.

Indeed, it seems that even if the vendor registered for GST, the Commissioner will not accept the vendor's entitlement to a credit. Rather, as mentioned earlier, the Commissioner will entertain a repayment request from the purchaser. Paragraph 62 of the Draft Ruling asserts "**the vendor will not be entitled to a credit** but the purchaser **may** be entitled to a refund".

If the Commissioner is not prepared to provide the vendor with a refund, then, without further reasons being provided, it is unclear why the vendor would not be entitled to a credit, particularly where the purchaser might not be eligible for a refund.

Recommendation

The Commissioner should clarify why the vendor would not be entitled to a credit. For example, is it because on a technical reading of section 18-60 the vendor is only entitled to a credit in respect of a taxable supply? If so, this would appear to be contradictory to the Commissioner's view at paragraph 61 of the Draft Ruling on how section 18-85

should be interpreted. Or is it because, as a matter of general law, it is the payer and therefore the purchaser that is entitled to recover a mistaken payment?

v) General language

The term "recipient" is used in paragraph 18-85(1)(a) when referring to a supplier who applies for a refund from the Commissioner. Although the supplier is applying to receive a refund from the Commissioner, the use of the term "recipient" in this context can create confusion especially where the common GST term "recipient" is used to connote the purchaser elsewhere in the Act.

Recommendation

The Tax Institute recommends that the Commissioner at least make reference to the term "recipient" so as to avoid any further misunderstanding.

vi) Substantial renovations

A supply of residential premises that has been the subject of 'substantial renovations' can be a taxable supply although purchasers are not required to pay an amount to the ATO on settlement.

If the purchaser pays an amount incorrectly to the Commissioner, this situation falls outside that of both the EM and the Draft Ruling. Is the vendor entitled to a refund, or would the Commissioner take the same position that it is unlikely to be fair or reasonable to do so?

Recommendation

It seems section 18-85 should cover this more explicitly as it is a taxable supply, but further clarification would be good (given the view in the LCR). It is The Tax Institute's view that it would not be fair or reasonable to deny such a request on the basis that:

a) it would create cash-flow concerns for the vendor; and
b) the provisions have been specifically drafted so as to exclude these types of transactions from the regime.

We have included in the Appendix three scenarios which further demonstrate the concerns with refunds and credits.

2. Genuine deposits

Example 5 illustrates when a payment made under an instalment contract triggers an obligation to pay an amount to the Commissioner under section 14-250.

Given the fact pattern flows from Example 4, is the Commissioner saying that the initial payment of $15 million will not be a “genuine deposit” or is it implied in the facts that this is an instalment payment?

Recommendation

If the $15 million is an example of a payment that will not qualify as a genuine deposit, then the Commissioner should explicitly state this position and the reasons for taking that view.

3. Acquiring a thing supplied for a creditable purpose

Section 14-250 provides that (emphasis added):

> *(1) You must pay to the Commissioner an amount if:*
>
> > *(a) you are the recipient (within the meaning of the *GST Act) of a *taxable supply that is, or includes, a *supply to which subsection (2) applies; and*
> >
> > *(b) in a case where the supply is a supply of *potential residential land—either:*
> >
> > ***(i) you are not registered (within the meaning of that Act); or***
> > ***(ii) you do not acquire the thing supplied for a *creditable purpose**.*

It is quite clear from the above that the purchaser will not be under an obligation to pay an amount to the Commissioner under section 14-250 where the purchaser is registered for GST and acquires the potential residential land for a creditable purpose. Examples 3 and 4 of LCR 2018/D1 provide useful guidance on this issue.

However, it would be beneficial to understand the Commissioner’s position if the potential residential land was acquired for a partly creditable purpose. The Commissioner appears to suggest that this does not present an issue at paragraphs 13 and 48 of the Draft Ruling (emphasis added):

> *13. A purchaser will be acquiring the property for a creditable purpose if they have a creditable purpose **to any extent**.*
> *48. …. Nor is it required for a supply of potential residential land where the purchaser is registered for GST and is acquiring the property for a creditable purpose **to any extent**.*

To put this beyond doubt, The Tax Institute recommends the inclusion of an example, as set out below.

Recommendation

Example 1 in GSTR 2009/4 is particularly salient in this respect and may be substituted in the Draft Ruling as an example but amended to suit the context. It could read as follows:

Kim is a property developer and is registered for GST. Kim recognises that the market for selling new residential premises has slowed significantly but is expected to pick-up in approximately four years. She decides to acquire proposed residential land from Dev Co for development and sale as part of her property development enterprise but makes a decision to lease the premises for 2 years once construction is finished in order to allow the market to improve. An objective assessment of the facts and circumstances supports this dual planned use. In particular, Kim's business plan at the time of making the acquisition and the loan application documents reflect this intended use of the premises.

As Kim will be acquiring the property for a partly creditable purpose and is registered for GST, she will not be required to make a payment under section 14-250.

Furthermore, will the Commissioner accept that a purchaser, who is registered for GST and acquires potential residential land for a partly creditable purpose, is not required to pay any amount to the Commissioner under section 14-250 on an apportionment basis?

If the answer to the above is yes, will the Commissioner seek to apply the reasoning set out in GSTR 2009/4 when determining whether the purchaser has a dual purpose? To the extent this is the case, then the Commissioner should refer to GSTR 2009/4 as he has in other parts of the Draft Ruling.

4. Timing re: lodgment of refund application form

In relation to refunds, section 18-85(2) provides that a supplier must make a refund application no later than 14 days before the day on which GST is payable on the supply. It is not clear whether this is referring to 14 days before the GST is payable by the purchaser on the supply (which would be an odd outcome) or as the EM suggests being at least 14 days before the end of the tax period to which the taxable supply is attributed.[5]

The Draft Ruling reverts back to the language used in the provisions, but these statements are potentially contradictory and require clarification.

5. Non-monetary consideration

It is common for real property to be held by more than one entity as either joint tenants or tenants in common. Circumstances may arise between these entities resulting in the termination of the co-ownership by way of the partition of the real property between them. The circumstances may include a dispute between the co-owners, or the conclusion of a venture between two or more entities to develop, subdivide and share the products of the subdivision. What may then follow is the subsequent sale of these premises to third party purchasers.

On the assumption that these entities are carrying on an enterprise and are registered for GST, the partition may give rise to a GST liability if what is partitioned is new

[5] Refer to paragraph 5.59 of the EM.

residential premises (this is consistent with GSTR 2009/2). This is not an uncommon scenario.

Where a GST liability arises on the partition, then each entity will be required to pay an amount to the Commissioner under section 14-250 in respect of each of their acquired interests. This view is consistent with the Commissioner's comments at paragraph 45 of the Draft Ruling.

The obvious concern with this particular arrangement is that each acquiring entity will have an unfunded GST liability.

Recommendation

There are plenty of instances where a partition must be carried out before each joint venturer can pursue their own objectives. There is now a clear disincentive for property development arrangements to be conducted in this manner. While the Commissioner notes that "certain development arrangements involve only non-monetary consideration"[6] may by be excluded, he provides no further guidance.

To remove such uncertainty, the Commissioner should confirm, in the form of an example or otherwise, the kinds of partitioning arrangements (or other non-monetary arrangements) that he would consider appropriate to make a determination and therefore not subject to section 14-250.

6. Additional examples

Paragraph 63 of the Draft Ruling provides that:

> *63. The Explanatory Memorandum to the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018 contains examples which demonstrate the intended application of the law. The examples that follow address some further aspects of the law.*

It is not clear whether the above paragraph is intended to incorporate the EM examples into the Draft Ruling or to simply signpost them for taxpayers – the better view is that the legal effect is the latter. This distinction is important because examples in the Draft Ruling would be binding on the Commissioner whereas examples in the EM are not.

The EM includes a number of practical examples dealing with aspects of the new law that are either complicated or not explicitly covered by the legislation (the Property Exchange Australia 'PEXA' system for example). Accordingly, taxpayers will necessarily have regard to examples in the EM when interpreting the new law. We recommend incorporating all (or at least some) of the examples into the Draft Ruling. This would give comfort to taxpayers that if they adopt a position covered in the EM, which the Commissioner acknowledges 'demonstrate[s] the intended application of the law', the Commissioner will not adopt a different position.

[6] Refer to paragraph 28 of LCR 2018/D1.

Recommendation

In light of the above, we recommend that paragraph 63 of the Draft Ruling be modified as follows:

> *63. The Explanatory Memorandum to the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018 contains examples which demonstrate the intended application of the law. The Commissioner agrees with the intended application of the law in the relevant examples (Examples 5.1-5.10). The examples that follow address some further aspects of the law.*

7. Other Issues

i) Transitional issues – paragraph 8 of the Draft Ruling

What happens if there is a variation of contracts after 1 July 2018? Does this result in a new contract with the consequence that the transitional provisions no longer apply? Does it matter how significant the variation is? We suggest that transitional relief should still apply (since the original contract was entered into before that date) and the Draft Ruling should explicitly confirm this.

ii) Entity issues

There are a number of issues that arise in relation to GST entities, including:

- Bare trusts – consistent with GSTR 2008/3, where there is a bare trustee / nominee acting for the vendor or purchaser, the Draft Ruling should confirm that the relevant entity for the purpose of Subdivision 14-E is the bare beneficiary, not the bare trustee.

- Partnerships - where there are multiple vendors or purchasers that constitute a partnership (either at general law or for tax purposes) and the partnership is the entity that is carrying on the relevant enterprise, the Draft Ruling should confirm that the relevant entity for the purpose of Subdivision 14-E is the partnership, not the partners.

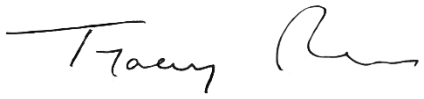
- Multiple vendors - where there are multiple vendors that do not constitute a partnership, the Draft Ruling should confirm that each vendor is the relevant entity for the purpose of Subdivision 14-E.

iii) Notices

The Draft Ruling should confirm that the defence in section 14-255(11) applies in all circumstances where the vendor makes an honest and reasonable mistake, for example, the vendor honestly and reasonably believed the margin scheme could be applied and issued a notice to this effect, when this was subsequently found not to be the case.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,



Tracey Rens
President

APPENDIX

Scenario 1

Facts: In this scenario, the vendor issues a notice that GST withholding is required, the purchaser remits GST to the ATO under section 14-250, the vendor remits GST through their BAS as required and also claims the withholding credit in its BAS. The vendor then realises **after it has lodged its BAS** it made a mistake and that no GST should have been payable (or that the margin scheme should have applied, instead of tax payable under ordinary rules).

Division 142 would deem the GST to be correctly payable and Subdivision 14-E would then operate as if the sale were taxable.

Issue: The vendor will only be able to get the input tax credit where the purchaser is required to withhold under the law. If the purchaser was not required to withhold, but did withhold, the vendor is not strictly entitled to the credit under section 18-60.

Division 142 already imposes restrictions on refunds for vendors, but these new rules potentially appear to provide the Commissioner with a further avenue to restrict refunds – either by not paying the credit / refund to the vendor in the first place or, if the credit has already been paid to the vendor, by assessing the vendor to claw back the credit that it claimed.

Even if the vendor could convince the Commissioner to pay a refund under Division 142, this then has a flow-on impact on the GST withholding rules. In particular, the Commissioner could potentially claw back the vendor's GST withholding credit under section 18-60 with the consequence that the vendor remains out of pocket even though it has satisfied Division 142 (and would have no refund entitlement under section 18-65).

This is even more of an issue for GST-exclusive sales, since the vendor could refund the GST to the purchaser, but would then have to repay the GST withheld amount to the Commissioner.

We are concerned that where the vendor is not entitled to claim a refund / credit or the Commissioner claws back the credit, this will cause disputes between vendors and purchasers as to which party will bear the GST cost (if the vendor cannot claim a refund, it will more than likely seek to recover the amount from the purchaser).

In our view, the Draft Ruling should confirm that the Commissioner would not seek to claw back section 18-60 credits in these circumstances.

Scenario 2

Facts: In this scenario, a vendor issues a notice that GST withholding is required, the purchaser remits the GST, but vendor realises **before it lodges its BAS** that it made a mistake and that no GST should have been payable (or that the margin scheme should have applied, instead of tax payable under ordinary rules).

Issue: Practically, the Draft Ruling has the effect that the Commissioner is seeking to bring forward the application of Division 142 to the time of settlement, rather than the time of the vendor lodging their BAS.

While this might be a reasonable policy (from the Commissioner's perspective), it is contrary to the example in the EM[7] (and for the other reasons set out in the submission). Interestingly, section18-85 does bring forward the effect of Division 142 to 14 days before settlement, but no further (in our view).

Scenario 3

Facts: In this scenario, a vendor issues a notice to the purchaser that no GST withholding is required. Despite the notice, the purchaser decides that withholding is required and remits GST.

Issue: If a purchaser incorrectly withholds an amount and the vendor is not entitled to obtain either a credit or a refund, then the vendor will seek to recover the withheld GST from the purchaser direct. The purchaser is unlikely to be able to rely on section 16-20 (since the amount was never payable to the Commissioner under section 14-250), so the purchaser will potentially be left out of pocket unless it can claim a refund from the Commissioner.

In other words, the Commissioner's approach under the Draft Ruling leaves it to the parties to work out which of them will bear the cost. This will create a dispute between the vendor and purchaser regarding who should claim the refund and how the claim should be made. We would not expect that the outcome of the new withholding provisions would be to create a dispute between the parties. The new withholding rules are intended to ensure that GST is remitted to the Commissioner and therefore they should be administered accordingly.

[7] Example 5.3