Gail Hartridge
Roma Mitchell Chambers
Level 9, Quay Central
95 North Quay Brisbane Q 4000
ghartridge@qldbar.asn.au
(07) 3012 9147

[This paper was originally presented to the Legalwise 2nd Annual Property Law Conference, Tuesday, 8 March 2016 held at the Mercure Brisbane, North Quay, Brisbane, and is directed at an audience of other legal practitioners. Although care has been taken in preparing this paper, no part of it can be regarded as legal advice, and persons who consider that aspects of the paper may be relevant to their situation should contact a solicitor or barrister for further advice before acting upon any of its contents].

PROPERTY TAX ISSUES: DUTY, LAND TAX AND GST

Introduction

On the assumption that you are mostly if not all, practitioners in property law, my paper today presumes some familiarity with areas of revenue law relevant to property transactions. However, in the Annexure A to the paper there is an overview of the basic concepts for a refresher, should you need to refer to it.

As my brief for this seminar was to deal with "hot" topics in the areas of Duty, Land Tax and GST, I have selected some areas of interest from recent case law (i.e. in the last few years) where possible. In the time available, I will not be tackling the area of capital gains tax or income tax generally, although these areas of tax are of course relevant also to practitioners advising their clients in regard to property dealings. As the most interesting recent developments have occurred in regard to the Duties Act, I will spend more time on the case law in this area. Should we run out of time the Paper which has been distributed, contains a more expanded discussion of the relevant cases on these topics.

Duties (Duties Act 2001 (Qld)[1])

Many people, including legal practitioners, would be surprised at the reach of the provisions of the Queensland Duties Act in regard to transactions in the commercial world. In Annexure A I have set out the main heads of duty.

In my discussion today I am focusing on a couple of recent cases which illustrate the need to take due care in considering the duty implications when advising clients in regard to proposed property transactions:

[1] Referred to in this paper as the "DA".

You will no doubt be fairly familiar with transfer duty, which is payable whenever real property is sold. However, you may not be aware of the reach of transfer and other duties. Unlike the position under the previous *Stamp Act 1894* transfer duty is payable on all "dutiable transactions" regarding "dutiable property" i.e. it does not attach to a particular document, but rather to the transaction[2]. Further "dutiable property" is not limited to real property, but includes items such as a partner's interest in a partnership, a trust interest, a Queensland business asset, an existing right, and a chattel in Queensland, as defined in the DA[3].

Practitioners would be most familiar with the duty payable on the transfer of real property, which is generally a fairly straight forward process. However, it is still possible to run into trouble, if due regard is not paid to the effect of the DA and the requirements for exemption, concession or reassessment. This is illustrated in the recent decision of the Court of Appeal in *Harvey v Commissioner of State Revenue*[4] (*Harvey*).

1. Transactions that do not proceed

In 2009, Mrs Harvey agreed to purchase a property (in which she was then residing) for $1.5 million from a company of which her husband was the sole director. Completion was to be on 15 June 2009 or 14 days from written confirmation by the company that the National Australia Bank had agreed to release its security over the property. The next day, a company minute of the resolution made by Mr Harvey signed by Mr Harvey was also signed by Mrs Harvey, recording these terms, and noting a $100 deposit. On 15 June 2009 both parties signed an instrument of transfer, Form 1, and the Form 24 was also executed by the company.

About 2 months later, a notice of assessment of land tax was issued to the company, and the company and Mrs Harvey sought to obtain an exemption under the *Land Tax Act 1915*. In support of the application for exemption, a copy of the Form 23 settlement notice relating to the transfer, a letter from the company to the Office of State Revenue confirming settlement on 15 June 2009, a copy of the transfer and a copy of the Form 24, were provided. The application for reassessment of land tax was successful, so that the company's assessment for land tax was reduced to nil, and Mrs Harvey received in her amended assessment a deduction for the full unimproved value of the property on the basis that it was her principal place of residence.

---

[2] Sections 8(2) and 9(2) DA;
[3] Section 10 DA.
[4] [2015] QCA 258

Later in 2009 the Commissioner sought information from the company regarding the value of the property at the date of transfer, as her records indicated that the unimproved value was $6.2 million, and not the stated contract price of $1.5 million. In response a letter from a real estate agent was provided stating that a "reasonable asking price" would be between $1,480,000 and $1,520,000 (but this was expressed to not be a valuation).

Consequently, solicitors for Mrs Harvey advised the Commissioner that notice had been given to the company by Mrs Harvey to terminate the agreement to purchase, and the company had accepted the termination. Information subsequently obtained by the Commissioner from the National Bank was to the effect that no application to release the bank's security had ever been made.

In 2010, the commissioner issued a default assessment which included penalty tax and interest, on the basis of a valuation obtained by the Commissioner of between $5 and 5.5 million. Mrs Harvey objected to the assessment on grounds which included that her agreement for purchase from the company had been cancelled. The objection was disallowed, and subsequently in 2011, Mrs Harvey brought proceedings in the Supreme Court for a mandatory injunction requiring the Commissioner to reassess the agreement to nil under section 115(1) DA, together with a declaration that she was not indebted for the amounts assessed. These proceedings were brought without her taking any steps to seek a review of the decision or appeal it under the *Taxation Administration Act 2001* (TAA). In 2014, Mrs Harvey cancelled the 15 June 2009 transfer, and applied for reassessment on the grounds of that cancellation also.

The issues in the Appeal were:

(1) Whether the court at first instance wrongly held that Mrs Harvey relied upon the transfer form in her application for exemption from land tax, so that section 156A(2)(c) applied and therefore the obligation to reassess the duty on the basis of the cancelled agreement to transfer did not arise;

(2) Whether the court at first instance erred in holding that the transfer was liable to duty, as it was contended by Mrs Harvey that it was executed in escrow, and a condition was not fulfilled, so it was not "signed" for the purposes of the DA provisions. There was also an issue raised as to the reliance by the Commissioner on the valuation.

(3) Whether the court wrongly construed the justiciability of the validity and correctness of the default assessment issued, on the basis that it did not differentiate

between assessing the agreement and the transfer, and therefore it was infected by jurisdictional error and invalid. It was said that in these circumstances to therefore infringe the principle identified in *Kable v Director of Public Prosecutions*[5] (*Kable*).

Under section 156A(6), the Commissioner is required to make a reassessment in circumstances where essentially, transfer duty is paid, and the instrument effecting or evidencing the transfer is cancelled "*before it has legal effect*"[6] and the property has not been transferred. One case in which it is defined that an instrument will have legal effect, is if the instrument has been relied upon[7].

The Court found that there was reliance by Mrs Harvey on the transfer form to obtain the land tax concession, and that accordingly section 156A(2)(c) applied so she was not entitled to reassessment under section 156A of the DA.

In regard to the second issue, the Court found that unlike other jurisdictions, in Queensland, section 9(1) supported by s.115 and Schedule 2 to the DA renders conditional agreements dutiable i.e. liability arises when the agreement is made, even if conditional. The Court confirmed that s.115 was of no assistance to Mrs Harvey, as she relied upon the transfer under s.156A(2)(c) before the agreement was terminated and the transfer was cancelled, so that both the agreement and the transfer had legal effect. There was also found to be no warrant in the DA for there to be an exception to duty if the instrument or transfer is held in escrow.

The Court however, did accept the argument that a valuation giving an indicative range is not a valuation i.e. the common law meaning of the term would require a specific value[8]. Mrs Harvey could therefore have challenged the Commissioner's finding as to valuation through an appeal process provided in the DA and the TAA, but she did not. As the assessment was conclusive evidence[9] in proceedings other than review or appeal proceedings provided for in the TAA (subject to the finding on the third issue), this possible issue with the valuation could not now be pursued.

Finally, the Court agreed with the Appellants to the extent that in regard to the third issue, the Commissioner's assessment did not comply with s.21 of the DA, in that it referred to both the transfer and the agreement to transfer without clarifying which of these two dutiable

[5] (1996) 189 CLR 51
[6] Section 156A(1)(c).
[7] See section 156A(2), where the circumstances in which an instrument does not have legal effect, are prescribed.
[8] Per McMurdo P at paragraph [62]
[9] Section 132 DA

transactions were subject to transfer duty. However, the Court also found that as only one amount of duty was assessed (as required under s.22), it was a technical error only, and therefore not a jurisdictional error.

Importantly, the Court confirmed that the decision in *Federal Commissioner of Taxation v Futuris Corporation Ltd*[10] is persuasive authority that the assessment notice is conclusive evidence in these types of proceedings, and that this remained the case as the circumstances here were not within the scope of the identified exceptions in *Futuris* i.e. the assessment here was not tentative or provisional, nor was there evidence that the Commissioner acted in deliberate bad faith.

In regard to the *Kable* argument, the Court agreed[11] with the judge at first instance, that the proposition in *Kable* had no application to this case, particularly as Mrs Harvey had not sought to appeal under section 69 of the TAA. The Kable principle has been summarised as

> *"State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid..."*[12]

At first instance and again in the appeal, the Court found that there was nothing repugnant or incompatible in the section 69(1)(b) requirement for the taxpayer to pay the assessment before a merits appeal or review can be entertained, that offended against this principle.[13]

The appellant was therefore successful only in that she was not obliged to pay the Commissioner's costs of the flawed valuation obtained under s.505 of the DA. However otherwise her appeal failed.

The case has several points of interest:

- Most importantly it confirms the application of the principle in *Futuris* to the State tax legislation, and confirms that the manner in which to challenge a decision on objection remains primarily the procedure laid down in the TAA;

- Jurisdictional error will only arise if the failure by the Commissioner lies outside of the reach of s.132(2) (the protection of the validity of an

[10] (2008) 237 CLR 168
[11] See paragraph [80]
[12] *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 533 [40], as referred to in the decision of Jackson J at first instance in *Harvey v Commissioner of State Revenue* [2014] QSC 183
[13] An argument at first instance that *Kable* also stood for the proposition that a tax must not be incontestable, was also dismissed at first instance by Jackson J at [128].

assessment, where a tax law has not been complied with) i.e. where the assessment was tentative or provisional or where the Commissioner acted in deliberate bad faith so that there is no legitimate assessment.

- It clarifies the status of instruments executed in escrow for transfer duty purposes i.e. that duty remains payable on such instruments, subject to the exemption and reassessment provisions.

- It clarifies that the valuation undertaken by the Commissioner under s.505 of the DA must comply with common law requirements for a valuation.

2. Concessions

Concessions can also be areas fraught with difficulty when practising in a tax environment. As with all legislative schemes, it is important to ensure that the terms of the concession, as set out in the relevant statutory provision are fully complied with both before and after the transaction.

Although many purchasers, particularly home buyers (particularly first home buyers) are excited by the prospect of home ownership and may not be focusing on technical details it is important to bring to their attention, the obligations post-settlement, which continue for at least 1 year. In particular, where the property is leased at the time of settlement, care needs to be taken to ensure that there is no possibility of inadvertent breach of the conditions of the concession, which could result in the Commissioner reassessing the duty payable, and imposing penalties and interest.

To illustrate the potential for inadvertent breaching of the concession conditions, I will focus today on the first home owner's concession for residential property, and a recent case on the interpretation of one of the conditions.

The terms of the first home owner's concession[14] in Chapter 2 Part 9 and Part 14 of the DA require that:-

a) There is a transfer, or agreement to transfer of a first home or of vacant residential land[15] in Queensland on which a first home is to be constructed[16];

[14] There is also a concession for a home that is not the first home, which has similar occupancy requirements.
[15] Defined in s.86A of the DA. Note that the concession and reassessment provisions also have application to certain leases where a premium fine or other consideration is payable, or where property is vested under statute or court order. This paper focuses on residential land only.
[16] S.85(a) of the DA

b) The "home" must be a residence[17];
c) Which the purchaser starts occupying as the owner and as the person's principal place of residence within 1 year after the transfer date for a home[18] or 2 years if the property is vacant land[19]; and
d) In regard to first home buyers, the transferee must not have held an interest in other residential and in Queensland or elsewhere, other than as permitted under the DA[20] (e.g. as lessee, trustee, security interest holder, or as vacant land concession beneficiary); and
e) There is no "disposal" of the land before the occupation date by the transferee before the end of the applicable 1 or 2 year period from the transfer date[21].

It is also important to note that the "transfer date" is not necessarily the date of registration of the transfer, as it is defined as the date the transferee is entitled to possession under the dutiable transaction[22].

There is a statutory obligation upon a person having the benefit of a concession under sections 91, 92, 93 or 93A of the DA to give notice to the Commissioner and lodge documents for reassessment on the happening of a "notifiable event"[23]. Failure to give such a notice is an offence[24].

Accordingly a failure to comply with the occupancy and disposal requirements of the concession can lead to action by the commissioner to reassess the original transaction without the concession, together with penalties and interest. There is also a risk of prosecution for the failure of the transferee to notify the commissioner of the post-transfer event which had an effect on eligibility for the concession.

It is the prohibition against disposal that can trip up clients, as the term has been broadly defined to include not only a transfer of the property but also where the person leases or "otherwise grants exclusive possession" of part or all of the land[25]. In particular, a client can

[17] "Residence" is defined in s.87 of the DA.
[18] S.88 of the DA – the "occupation date"
[19] S.86B of the DA
[20] S.86(2)(a)
[21] ss.153 and 154 of the DA.
[22] s. 89 of the DA. Accordingly, the Form 24 filed with the Transfer should accurately record the date of possession, as this would at first instance be relied upon to establish this date.
[23] s.155 of the DA
[24] s.120 of the DA
[25] S. 154(2). There are exceptions e.g. where the disposal is to the transferee's spouse – see s.151 and s.153(1A) and s.154(2A). Also if there has been an "intervening event" as defined in Schedule 6 which includes

run into difficulty where the property is purchased with an existing lease or subject to the continued occupation by the transferor of the property. There is a carve out to permit continuance of a pre-existing occupancy or lease. However, the key requirement in regard to a lease is it that the occupier must vacate, at the earliest of the termination of the current term of the lease or within 6 months of the transfer date.

This provision was at issue in the case, *Commissioner of State Revenue v Di Sipio & Anor*[26] (*Di Sipio Case*), a decision of the Court of Appeal. This is one of the rare cases that has been taken on appeal from the Appeal Tribunal of the Queensland Civil and Administrative Appeal Tribunal (QCAT). It is also a notable decision in that the Commissioner's decision to reassess was ultimately overturned.

The respondents were first home buyers, and purchased a property in 2011, subject to a 12 month tenancy expiring in April 2012. They took up occupation in April on a date that was six months after the settlement date, which the Commissioner relied upon as being the "transfer date" for the purposes of the DA. The Tribunal at first instance confirmed the Commissioner's decision to reassess on the basis of that the respondents had granted exclusive possession to the tenants before their occupation date, and the tenants had not vacated within 6 months. The Appeal Tribunal reversed this decision, as it found that the respondents had not leased the land nor given them exclusive possession. There was no privity of contract between the tenants and the respondents, and the tenants had already been granted exclusive possession under the lease by the transferor[27]. The Appeal Tribunal rejected an argument by the Commissioner that the words "*otherwise grants exclusive possession*" in s.154(2) was wide enough to encompass where a transferee took property subject an existing lease. Accordingly, the Appeal Tribunal found that there was no disposal and s.154 did not apply so as to require a reassessment.

The Court of Appeal decided that s.154(2) was ambiguous, and had regard to the explanatory notes. It concluded that it would make little sense to read the exception as being dependent on the activities of the occupier, where that person had no connection to the disposition of the land[28]. The court found that s.154(2) would have application where a transferee permits a transferor to retain possession following settlement or where a

---

a natural disaster, or the death or incapacity of the transferee, there will not be a non-compliance (s.153(1)(b) & s.154(1)(b)).

[26] [2015] QCA 198;

[27] As summarised by Holmes CJ in the Court of Appeal decision, [2015] QCA 198 at paragraph [8].

[28] Ibid at paragraph [22]

transferee decides to grant an existing tenant a further lease. In these circumstances the 6 month time limit or the end of the lease, whichever was sooner would apply to the exception.

However, the court found no warrant for construing s.154(2) as contemplating that the lease or grant of exclusive possession could occur merely by the transferee's acquisition of a property subject to an existing lease. Although the definition of "lessor" in the DA included an assignee of the lessor, this did not give rise to an implication that the assignee had actually leased or otherwise granted possession of the land to the lessee. The Court also found that the s.8(1) of the *Residential Tenancies and Rooming Accommodation Act 2008* together with s.35A of the *Acts Interpretation Act 1954* did not assist the Commissioner's interpretation. Attornment by the tenant is the tenant's acknowledgment of obligations now owed to a new owner but it does not amount to a disposition by the new owner[29].

Burns J and Peter Lyons J agreed with the Chief Justice. Burns J also made the point that s.154 only applies where there has been a "*subsequent noncompliance*" with the occupancy requirements i.e. after the transfer. Accordingly, a lease already in existence at the date of the transfer does not fall within its ambit.[30]

So where does that leave us? .

The overall position appears to be that provided the purchaser of a property over which there is an existing lease does not take any step to vary or renew it such as to itself "grant possession", there will not be a disposal. Accordingly it would seem that the only requirement in regard to the concession, in the absence of a positive action by the transferee in regard to the lease, will be that the transferee must occupy the property within the 1 or 2 year period required under s.154(1)(b)(ii) of the DA. The lease therefore can continue in effect up until that time despite s.154(2) of the DA.

Having regard to the submissions by the Commissioner in this matter, it must be concluded that the Commissioner had a firm view that this provision was not intended to operate in this manner. However, as at the date of this paper, there have been no amendments introduced to Parliament to address the issue. It may be that the view will be taken that the overall intent of the concession, with the 1 or 2 year transition period, is intact so that no amendment is necessary to protect revenue. However, the next general revenue law amendment bill should be checked to ensure that it does not contain an amendment to s.154 or s.91 and 92 of the DA to address this decision.

---

[29] Ibid at [25] per Holmes LJ
[30] Ibid at [30] to [32] per Burns J

3. Landholder Duty (previously known as "land rich duty")

Land rich duty was introduced in Queensland in 1988 to address avoidance of duty payable on the transfer of land, by means of the acquisition of the company owning the real property, rather than a transfer of the real property[31]. From the introduction of the *Duties Act 2001* until 2011, the threshold for application of the duty was that the company owned at least $1,000,000 in landholdings in Queensland and a prescribed percentage of the assets of an unlisted corporation were landholdings. In 2011, the model was changed to the "*landholder model*" that does not depend on the company being "*land rich*" that is the second criteria as to a prescribed percentage of the total assets of the company being landholdings no longer applied. A landholder company therefore is now one that has "*land-holdings*" in Queensland with the unencumbered value of $2,000,000 or more[32].

The decision in *Sojitz Coal Resources Pty Ltd v Commissioner of State Revenue*[33] related to the pre-2011 legislation. However, the decision remains relevant to the interpretation of the words "*interest in land*" in the current s.167 DA and its interaction with the definition of "*interest*" in the *Acts Interpretation Act 1954* (AIA).

At issue was whether a corporation's land-holdings included its interest in a mining lease granted under the *Mineral Resources Act 1989* (MR Act). This was in the context of section 10 of the MR Act, which stated that

> *"The grant of a mining tenement under this Act does not create an estate or interest in land"*

Section 167 set out a definition of a corporation's "*land-holdings*" for the purposes of the land rich duty provisions. You will see that after paragraph (a) of s.167(1) there is an "Editor's note" which at that time quoted the s.36 of the AIA[34] definition of "interest". The Commissioner argued that the mining leases fell within paragraph (b) of the definition of "interest" in the AIA, which provided as follows:

> ***"interest**, in relation to land or other property, means—*
> *(a) a legal or equitable estate in the land or other property;*
> *or*
> *(b) a right, power or privilege over, or in relation to, the land*

[31] Explanatory Notes to the *Community Ambulance Cover Levy Repeal and Revenue and Other Legislation Amendment Bill 2011* at page 4.
[32] s.165 of the DA.
[33] [2015] QSC 9; (2015) ATC 20-485
[34] The wording of this note has changed now to a cross-reference only rather than a quote. This would not affect the findings of the decision in *Sojitz*.

or other property." (underlining added)[35]

The Commissioner conceded that paragraph (a) of this definition did not apply to the mining leases.

The Court confirmed that without regard to the definition in the AIA, the application of s.167(1)(a) of the DA, would be confined to a proprietary interest in the land[36] and that the Commissioner had correctly conceded, that the mining leases did not create an estate or interest in land, having regard to both s.10 of the MRA and the decided position at common law.[37]. It also found (although it was not necessary to the decision) that the term "*interest in land*" in s.167(1)(a) would include an estate on the basis of the dictionary meaning of this phrase.

The Appellant's primary argument was that the phrase to be interpreted was "*interest in land*" in section 167(1)(a), and that the second limb of the section 36 AIA definition of "*interest*" (i.e. paragraph (b)) referred to rights, powers or privileges in relation to land. If the second limb of the definition was imported into section 167(1)(a) it would therefore change the effect of the express words of section 167(1)(a). The existence of this "tension" between s.167(1)(a) and the second limb of s.36 definition of "interest" was found to be a persuasive argument by the Court.

The Commissioner's submissions as to the fact that there were many instances in regard to other statutes which the definition "*right, power or privilege over, or in relation to … land*" was found to be included in the phrase "*interest in land*" were not accepted. The fact that the broader interpretation had been taken in the context of other statutes, particularly where the phrase was given the extended meaning within the statute itself without recourse to external interpretative provisions, was not found to be persuasive.

The Commissioner also argued that s.167(1)(a) "*interest in land*" should be interpreted having regard to the dutiability of the transfer of a mining lease itself on the basis that it fell within the meaning of "*land in Queensland*" in s.10(1)(a). The Court however agreed with the Appellants that the mining leases would be "*existing rights*" within s.10(1)(c) but were not within the definition of "*land*" in the DA, at least as far as relevant to the application of s.167(1)(a).

---

[35] This is the same definition as now appears in Schedule 1 to the current AIA.
[36] *Sojitz* at [13], per P. McMurdo J
[37] Ibid at [14]

Arguments by the Commissioner on the basis of the position under the *Stamp Act 1894* were similarly dismissed by the Court.

Ultimately, the Court found that the note in s.167(1)(a) was extrinsic material under s.14B(3)(a) and (e), and to apply the second limb of s.36 of the AIA to the words "*interest in land*" in s.167(1)(a) would give rise to absurd or unreasonable consequences "*for companies whose assets could not be realistically described as land holding in any ordinary sense*"[38]. On this basis and also as the expression "*interest in land*" was not obscure or ambiguous, His Honour declined to have regard to the note. Instead, the Court determined that interest in land in s.167(1)(a) was to be given its ordinary meaning, and the definition of interest in the AIA could not apply. As a consequence the company in question was found not to be a land rich corporation and the duty was not payable in regard to the transfer of shares in that corporation.

As a footnote, it is noted that an amendment was made to the DA by the *Fiscal Repair Amendment Act 2012* to expressly include in the definition of "*land*" in Schedule 6 to the Act reference to a "*resource authority*" which is defined to include a mining tenement under the MRA and therefore mining leases[39]. However, as the Court on *Sojitz* found that the definition of "*land*" within the Act did not assist in interpreting the phrase "*interest in land*" in s.167(1)(a)[40], this amendment would appear not to have altered the position that a mining lease is not within the scope of the latter phrase for the purposes of section 167(1)(a), and therefore will not be taken into account in determining whether the threshold of landholdings of $2,000,000 is exceeded. However, it would be wise to check any amending legislation to be passed in the next few years, in case this issue is subsequently addressed by legislative reform..

4. Aggregation

In 2014, the first reported decision was made on s.30 of the DA in *Camp Seabee Properties Pty Ltd v Commissioner of State Revenue*[41] (*Camp* Seabee). Essentially the provision requires that dutiable transactions that together "*form, evidence, give effect to or arise from what is, substantially 1 arrangement*", must be aggregated and treated as one transaction[42]. This can have an effect on the quantum of duty payable, as it may take the transaction into a higher duty bracket.

---

[38] Ibid at [53]
[39] This amendment was referred to in *Sojitz* at paragraph [46]
[40] Ibid at [47]
[41] [2014] QCAT 258
[42] S.30(1) and (2) of the DA

It will be noted that section 30 is a mandatory section, if it is found that the transactions are substantially 1 arrangement. However, there is in section 30(4) a non-exhaustive list of "*relevant circumstances*" which are to be taken into account under s.30(3) in deciding whether the circumstances fall within the requirements of section 30(1). The section also contains some lengthy examples of its intended operation.

Camp Seabee is a useful case in that it summarises a number of decisions in other jurisdictions, and assists to clarify the circumstances in which section 30 will be found to apply in Queensland.

In that case, Camp Seabee contracted to purchase from a company that was the special purpose vehicle for a joint venture between a developer, as successful tenderer, and the Brisbane City Council, 5 proposed lots of land which previously formed part of the Brisbane Airport. The venders and purchases were the same, the terms and conditions were the same, all contracts were entered into on the same day and all settled on the same day. The lots were used by the transferee together after the sale for leasing purposes to unrelated lessees. However the contracts were not conditional on each other. The contracts were entered into successively as the negotiations with prospective lessees progressed. The QCAT Member ultimately found that section 30 did apply to aggregate the transactions.

The decision is of note for a few reasons:

- It confirms that a broad interpretation of "*1 arrangement*" is to be given, having regard to the word "*substantially*"[43];
- It notes that "unity of purpose" has been found in other jurisdictions to be an element to be found, but did not find that such an element was required to be established in this case, where the parties were the same[44];
- It leaves open the possibility that s.30 may apply even where the parties are not the same, and that in those circumstances unity of purpose may be relevant[45];
- It rejected the argument that only circumstances of the dutiable transactions themselves were relevant[46];
- It rejected the argument that the use by different lessees was relevant. Only the use by the transferee and whether or not the lots were used together or dependently was relevant under s.30(4)(g)[47].

[43] Ibid at [39]
[44] Ibid at [41] and [47]
[45] Ibid at [41]
[46] Ibid at [52]

The Commissioner has released a public ruling on the operation of section 30[48]. However in this matter the ruling was not in effect at the time that the transactions occurred, and so was not taken into account.

However, this ruling was in force for a subsequent case on this section handed down by QCAT on 15 January 2015 – *Rawlings & Ors v Commissioner of State Revenue*[49]. This case concerned the transfers of 2 residential properties as an in specie distribution from a testamentary discretionary trust. A trust agreement between the trustees and the beneficiaries was entered into, which agreed on the proposed transfers, and included an indemnity of the trustees by all beneficiaries. The two properties were contiguous, the transferors were the same but the transferees were not, although all of the beneficiaries were cousins. The transactions were found to have been negotiated with the two sets of beneficiaries separately, but the transfers were signed on the same day. The use of the properties prior to transfer was as separately rented residential premises, and after transfer, use for residential purposes was to continue (apparently separately).

The Tribunal considered the factors under s.30(4), and determined that there was no term of the trust agreement which provided for the consent by one set of beneficiaries to the transfer to the other beneficiaries. It was considered that the fact that the beneficiaries were cousins was a consideration even though such persons were not "related parties" under s.61 of the DA.

Member Allen referred to the decision in Camp Seabee, and decisions in other jurisdictions, which indicated that aggregation could apply where the transferees were different, as in this case. Member Allen interpreted the approach taken in prior case law as follows:

> *"The common thread in all of these cases is that the Courts have analysed the transactions from the perspective of the purchaser or transferee to determine if there is a relationship between the transactions. The fact that the transferor or vendor is the same in respect of each transaction is not a deciding factor and the intention of the transferor or vendor is not relevant.*
> *…It is only where the sale is to the same purchaser or related purchasers or the purchasers intend to use the land for some common purpose that the question of amalgamation should be raised."*[50]

The Member also noted the effect of the Ruling, and in particular its reference to the line of cases which established the principle that a "*unity of purpose*" in the business being

---

[47] Ibid at [64]
[48] DA030.1.2 – Transfer duty – aggregation of dutiable transactions.
[49] [2015] QCAT 10, Member Allen
[50] Ibid at [12] - [13]

transacted should be shown for there to be an arrangement under the aggregation provisions[51].

The decision in *Rawlings* was that the transactions should not be aggregated under s.30 of the DA. The Member found that while there were "*superficially many common features*"[52], the lack of any contractual requirement for each of the transferees to consent to the other transfers, the lack of evidence that the transferees intended to use the properties for a common purpose, and the lack of negotiation as to price, and the fact that one transaction was not conditional on the other meant that there was not one arrangement[53].

It is an interesting decision as

- It adopts the proposition from case law in other jurisdictions that "*unity of purpose*" is considered a key element in the application of section 30, even though the section makes no reference to that phrase.
- It appears to be suggesting a limitation on the application of s.30 (in the passage quoted previously), that the purchasers in the transactions must be the same party or related purchasers.
- It equates the circumstances where there is no negotiation regarding a trust distribution transfer to where a purchase is made at auction. The relevance of this analogy would appear to be that, in *Attorney-General v Cohen*[54] and subsequent case law it has been recognised that purchase at auction precludes there being found to be integration and unity of purpose, and therefore there is no aggregation for duty purposes arising from such purchases.

The first two findings appear to be consistent with the examples given in the section and the Public Ruling. The final point was expressed somewhat hesitantly, and may not have been central to the decision in the case, so is unlikely in itself to be influential in subsequent cases. It may however be a point that will be further developed in subsequent cases on this section.[55]

---

[51] Ibid at [15]; See also Ruling DA030.1.2 paragraph 6.
[52] Ibid at [19]
[53] Ibid at [19] to [21]
[54] (1937) 1 KB 478
[55] This decision has not gone on appeal or been subsequently considered in any higher court matters to date.

Land Tax (Land Tax Act 2010 (Qld)[56])

You would all no doubt be aware as to the fact that liability for land tax arises in regard to taxable land each year at midnight on 30 June for the forthcoming year[57], and that it is the person who is the "owner" of the land at that time (as defined in the Act), who is liable for payment of land tax.

That sounds straight forward, but as will all revenue laws there are some traps and complications behind that simple summation of the law.

(a) Who is the owner?

It is important to carefully consider the timing of the entering into transactions including subdivisions, having regard to the key date of 30 June. Due to the combined effect of sections 6, 7, 8 and 10 of the LTA and the *Land Title Act* 1994[58], it is the registered proprietor of the taxable land as at 30 June who is generally liable to pay the tax. However, express provision is made in s.11 of the Act, for circumstances where as at 30 June an agreement has been made for the sale of land. In those circumstances, the determination as to who will be considered the owner, depends upon whether it is the seller or the buyer who is in possession, whether or not the agreement has been completed.

The decision of the QCAT Appeal Tribunal in *Haigh Developments v Commissioner of State Revenue*[59] (*Haigh* Developments) is illustrative of the fine line that exists between when a buyer is taken to be the owner and when not.

This case was an appeal against a decision by the Tribunal member at first instance, confirming the Commissioner's view that the discount provision in s.30 of the LTA and its predecessor relating to subdivisions of land, did not apply in the relevant tax. Under that section there are several pre-conditions for the application of the discount. Most relevantly in this case it was required that at the date of subdivision of the land Haigh Developments had to be both the "subdivider" of the land and the owner.

The facts of the case were that Mr and Mrs Haigh had land at Samford since 1989. In 2006 they incorporated a company, Haigh Developments, and then entered into a put and call option deed with that company. Mr and Mrs Haigh exercised the put option on 1 May 2009, and signed a contract with the company the next day, and then executed the transfer Form 1

[56] Referred to in this paper as the "LTA".
[57] LTA s.6
[58] Particularly Schedule 2 definition of "registered owner", in the context of the indefeasibility provisions.
[59] [2014] QCATA 203

on 5 May 2009. However the transfer was not lodged for registration until 16 June 2009. The date of subdivision was 7 May 2009, and that was the key date upon which the ownership and "subdivider" status needed to be established.

The case largely turned on the issue of whether or not the buyer, Haigh Developments had "possession" as referred to in s.11 of the LTA on the 7 May. Evidence of the granting of possession relied upon by the Commissioner, was the date (being 16 June 2009) entered on the Form 24, which was lodged with the transfer,. Further, the Commissioner pointed to the fact that the contract of sale did not provide for early possession, and the put and call option deeds only provided for access to the property by the development company for limited purposes terminable at the will of Mr and Mrs Haigh.

In the Appeal proceedings, the Court admitted further evidence in the form of an affidavit, to which was attached an email from the solicitor for Mr and Mrs Haigh. This email set out the proposed process to obtain registration of the transfer. The court relied upon this email to find that the parties to the option deed intended that the effect of the execution of all of the necessary documents on 5 May 2009 was that there would be no further steps in order to effect the transfer, despite the duty still needing to be paid and there being no evidence of the transfer of the purchase monies. In other evidence from Mr and Mrs Haigh's solicitor, it was said that the Form 24 date entry for possession of 16 June 2009 was an error by a paralegal, and did not reflect instructions.

Of note is that the Appeal Tribunal rejected the contentions of the Commissioner that for there to have been possession, that a grant of possession to the buyer as purchaser, by contract, was required, as well as de facto possession. The Tribunal did not accept that *Highlands Limited v Deputy Federal Commissioner of Taxes (SA)* [60] and the other case law relied upon by the Appellants was distinguishable in that regard. The Tribunal member found that substantial works were undertaken towards development by Haigh Developments since the option deeds were entered into and that the exercise of these rights was sufficient for "*effective*" or de facto possession by Haigh Developments as buyer, and this satisfied s.11 despite there being no contractual grant of possession.

It also found on an alternative argument, that as a result of the new evidence as alluded to above, possession would have been granted at the latest by 5 May 2009, as at that date the seller had done all that was necessary to permit the transfer to proceed and the parties intended to transfer possession.

[60] (1931) 47 CLR 191

(b) Concession or exemption provisions

There are several concession, exemption and alleviating provisions in the LTA. The most common of course is that land is exempt land if it is used as the home of the owner or where a trustee is the owner, all of the beneficiaries of a trust[61]. There is a 6 month residency test in s.36(1)(a) of the LTA which must generally be satisfied. There is also a catch all provision, which permits a variety of circumstances to be considered, by the Commissioner i.e. as to whether the land has been used as the person's "principal place of residence"[62]. I won't go into that fruitful area of the law in the time we have available today, but have referred to some case law in the paper on the topic[63].

In *Harvey* (as considered earlier) Mrs Harvey had claimed the benefit of this exemption. The outcome of the decision as to the reassessment of the duty payable, would presumably have been a reassessment also of land tax payable by the company. That decision, illustrates that in the handling of any property transaction and its effect in respect of land tax concessions, it is also necessary to consider the duty implications of the transaction and vice versa.

The care needed to be exercised in regard to ensuring that transactions take the best advantage of concessions and exemptions is also illustrated in *Haigh Developments*. It would of course have been preferable for the parties to have lodged the transfer from Mr and Mrs Haigh to the development company prior to the date of subdivision, or at least provided formally for the granting of early possession upon execution of the contract of sale, so as to put the issue of who was the owner as at the date of subdivision beyond doubt. In such circumstances, the no doubt significant legal fees involved in two QCAT applications would have been avoided.

Two provisions in the LTA which could easily be misinterpreted are s.18 and s.90. These provisions provide for averaging of values over 3 financial years in certain circumstances and for capping of the value for the 2010-11 year, respectively. They were considered in the case *Greendale Developments Pty Ltd v Commissioner of State Revenue*[64]. The current s.18 (which is substantially the same as that considered in *Greendale*) provides as far as is relevant to this decision, as follows:-

---

[61] s.36 LTA
[62] s.37(1)(c) LTA.
[63] See *Jackman v Commissioner of Land Tax* [2010] QLC 0003; considered in *Black v Chief Commissioner of State Revenue* [2011] NSWADT 66
[64] [2013] QSC 326;

"18 Averaged value

(1) The ***averaged value***, of land for a financial year, is—

(a) if there are Land Valuation Act values of the land for the financial year and the previous 2 financial years—the amount that is the average of those 3 values; or

(b) otherwise—the amount equal to the Land Valuation Act value of the land for the financial year multiplied by the averaging factor for the year."

The question was as to what was meant by the equivalent of the current "*Land Valuation Act values of the land for… the previous 2 financial years*". The Commissioner's case was that section 18(1)(a) did not apply as such values did not exist for the two previous years, as the current year valuation was for three lots valued together, whereas in the previous two years, the lots 1 and 3 were valued together and lot 2 was valued separately.

The Court held, having regard to the *Valuation of Land Act 1944* provisions regarding valuation[65], "*the land*" for both s.18 and s.90 was the land as constituted by the 3 parcels and the "*value*" must be the value of that "*land*". The Court found that an aggregate of the values of the lots was not sufficient, as this would be inconsistent with other provisions in the LTA (e.g. s.19)[66]. The Court rejected an argument based on the evident purpose of the provision i.e. to confer a benefit or advantage on the taxpayer, and said that the provision had to be interpreted according to its terms.

The outcome in this case confirms the importance of the Valuer-General's valuation determinations to the imposition of land tax and strong inter-dependence of the two pieces of legislation. It reinforces the conclusion that any issues involving the valuation need to be challenged under the processes for objection in the *Land Valuation Act 2010* rather than at the time that land tax is imposed. The difficulty is however, that clients need to recognise that there will be the land tax (and rates) consequences flowing from the valuation at the time that the annual valuation is received, in order to make the objection to the valuation within the statutory time limits[67].

[65] s.34 and 35 of the *Valuation of Land Act 1944*. Note that the *Valuation of Land Act 1944* was repealed and replaced by the *Land Valuation Act 2010*. A somewhat similar provision in the latter Act is s.57, 61 and 63.
[66] See *Greendale* at [19] to [24]
[67] See *Land Valuation Act 2010* s.109.

GST (A New Tax System (Goods and Services Tax) Act 1999[68], and A New Tax System (Goods and Services Tax Transition) Act 1999 Cwlth[69])

In the time available today, it is proposed to consider a few of the common errors which taxpayers make in regard to GST. I had originally thought that we may have needed to grapple with proposed policy reforms of the GST, which had been mooted strongly over several months early this year. However at the time of writing this paper, it is noted that the Turnbull Government has publicly indicated that there will be no increase in the GST. The opposition has also strongly indicated that such initiatives are not on its agenda. However, in view of the key position that GST plays in the gathering of revenue for the benefit of the Commonwealth and the States, it will be important to continue to monitor the reform proposals leading up to and following the election.

(a) Common GST errors and property[70]

There are several common GST errors which the ATO has identified in its publications:-

1. Failure to register for GST, when carrying on an enterprise in making a property transaction.

2. **Claiming GST credit on a property transaction, when not entitled.**

3. **Not using the margin scheme properly**

4. Change of use of new residential premises

5. Selling new residential property within 5 years of purchase.

6. GST accounting for settlement adjustments

7. Selling a property as part of a GST-free going concern.

8. GST on inducements to enter into commercial leases.

---

[68] This is the most relevant of the statutes in the GST scheme, and will be referred to in this paper at the GST Act.

[69] There are other statutes and regulations which govern the scheme, including the *A New Tax System (Goods and Services Tax Imposition – General) Act 1999*, which will be referred to as the "General Act" and the *Taxation Administration Act 1953*, which will be referred to as the TAA.

[70] This list of issues for discussion is based on the fact sheet "Common GST errors and property" at https://www.ato.gov.au/business/gst/in-detail/rules-for-specific-transactions/international-transactions/common-gst-errors---importing-or-exporting/ and the GSTR 2003/16 ruling on inducements to enter into a lase of commercial premises, available on the Australian Taxation Office website.

Today, I will touch on items 2 and 3 only. There are references in the paper to the ATO materials relating to the other topics in case you would like to look into them following the seminar. There is also an overview of some of the basic concepts in GST in Annexure A to the paper to refresh your memory.

(a) Claiming a GST credit on a property transaction, when not entitled.

In general a taxpayer who is registered for GST can claim a GST credit where property is purchased for use in an enterprise conducted by the taxpayer. However, this will not apply if the acquisition relates to a supply by the taxpayer that would be input taxed[71]. This is because an input tax credit is only claimable for a "*creditable acquisition*", and this is defined in s.11-15 (as far as is relevant to property) as follows:

> *"11-15 Meaning of creditable purpose*
>
> *(1) You acquire a thing for a creditable purpose to the extent that you acquire it in *carrying on your *enterprise.*
>
> *(2) However, you do not acquire the thing for a creditable purpose to the extent that:*
>
> > *(a) the acquisition relates to making supplies that would be *input taxed; or*
> > *(b) the acquisition is of a private or domestic nature."*

This provision was recently the subject of the decision of the Full Court of the Federal Court in *Rio Tinto Services Limited v Commissioner of Taxation* [72]. In that case Rio Tinto Services Limited (Rio Tinto) wanted to claim credits for GST it paid for acquisitions relating to the supply of residential premises by Hamersley Iron Pty Ltd (a member of its GST group). It was not in dispute that the group was to be treated as a single entity under s.48-45(1) of the GST Act, and Rio Tinto was entitled to input tax credits on creditable acquisitions made by other members of the group.

Hamersley supplied residential accommodation to its employees, contractors and service providers in the Pilbara region. Rio Tinto paid GST on acquisitions in connection with the provision of the accommodation. The acquisitions included refurbishment, minor works, maintenance and repairs of residences; cleaning, housekeeping, landscaping, and construction and purchase of new housing. These residences were then supplied to employees, contractors and service providers by lease.

Rio Tinto claimed that the acquisitions fell within s.11-15(1) but that s.11-15(2)(a) did not apply, as the purpose of the acquisitions overall was the carrying on of Hamersley's

[71] See s.11-5 and 11-15 of the GST Act
[72] [2015] FCAFC 117

enterprise of mining and the selling of iron ore, which involved making taxable supplies, and not the supply of the leasing of the accommodation (which were admittedly input taxed supplies)[73].

The Full Court dismissed the appeal finding that the relevant inquiry called for by s.115(2)(a) is not into the relationship between the acquisition and the enterprise more broadly[74].

> *"The application of s 11-15(2)(a) requires, therefore, the precise identification of the relevant acquisition and a factual inquiry into the relationship between that acquisition and the making of supplies that would be input taxed. An acquisition will not be for a creditable purpose to the extent that the facts disclose that the acquisition relates to the making by the enterprise of supplies that would be input taxed. Some acquisitions may relate to the making of supplies that would be capable of distinct and separate apportionment as between an input taxed supply and an otherwise table supply. In that case it may be possible to divide the creditable purpose between the two… But as is the case here, an acquisition which relates wholly to the making of supplies that would be input taxed is not to be apportioned merely because that supply may also serve some broader commercial objective of the supplier".*[75]

The court did not find on the facts of this case, that any apportionment was required between a taxable supply and the input taxed supply of the leasing of the premises. It did note "*undifferentiated general overhead outgoings*" may need in some cases to be apportioned between taxable supplies and input taxed supplies, but the acquisitions in this case were not of this character[76]. The acquisitions in this case were:

> *"undifferentiated [and] related to different supplies, but were acquisitions of things which related wholly to the otherwise input taxed supply of residential premises, and could not relate to the broader purposes of the enterprise other than by acquisitions relating to the otherwise input taxed supplies. The extent of the relationship between the acquisitions and the supply of the residential premises is not to be reduced by the fact that the acquisitions may also have related to another purpose where that other purpose is only related to the acquisition wholly by and through the otherwise input taxed supply"*[77]

This is a somewhat circular passage on first reading. To understand the reference to "undifferentiated general overhead outgoings" it is necessary to consider the comment in the context of the cited decision of *HP Mercantile Pty Ltd v Commissioner of Taxation*[78] .

---

[73] See judgment of Davies J at first instance [2015] FCA at paragraph 7
[74] [2015] FCAFC 117 at paragraph 7.
[75] Ibid
[76] Ibid at paragraph 8.
[77] ibid
[78] (2005) 143 FCR 553 at 563[37].

In *HP Mercantile*, the Hill J (with whom the other judges of the Full Court of the Federal Court agreed) explained the operation of section 11-15 of the GST Act in some detail, and it is a useful case to read to obtain an overview of input tax and financial supplies and the policy behind these concepts. In that case the question was whether a trustee carrying on the enterprise of purchasing of debts (factoring), could claim the costs of recovering those debts, and the due diligence advice obtained at the outset to determine whether to purchase the debts, as input tax credits. The purchase of the interest in a debt was a financial supply[79], and therefore was not a taxable supply, but rather an input taxed supply. The Commissioner had allowed the taxpayer to claim 75% of the input tax credits claimed under other provisions of the GST Act, but denied the credits for the advice. The taxpayer was successful before the AAT in obtaining the tax credits for the due diligence advice payments, but not the debt recovery services expenditure. The taxpayer appealed on the basis that it said it was entitled to the full input credits for the debt recovery costs, and the Commissioner cross appealed in regard to the decision regarding the due diligence advice. It is noted that the input taxed supply in this case (i.e. the purchase of the debts) occurred prior to the expenditure on the debt recovery services for which input tax credits were being claimed, which is not the usual course of events in regard to input tax credits. The taxpayer relied on this point to argue that there was no subsequent input taxed supply. The Court found that on the language of s.11-15(2)(a), a relationship between the acquisition and the making of the supplies was required, but it didn't require that those supplies be in the future only.

Of most relevance to the *Rio Tinto case*, the Court found, that in the context of s.11-15, that the relationship required in s.11-15(2)(a) may be indirect[80], but it must be a "real or substantial relationship[81]. The court also noted that the words in s.11-15(2), "*to the extent that*", provide for apportionment where an acquisition relates to making of supplies that are input taxed as well as supplies that are taxable. It is in that context that Hill J referred to "*undifferentiated general overhead outgoings of an entity making both taxed and taxable supplies*". The acquisitions in the HP Mercantile case were not found to be of that nature – "*the acquisition of the debts and then collecting them were closely connected as one continuous course of conduct*"[82]. For similar reasons, the feasibility study advice costs were also not claimable as input tax credits.

It does appear that the decision in Rio Tinto is consistent with *HP Mercantile*, albeit that the "enterprise" in the case of Rio Tinto is clearly more than the simple debt factoring business

[79] Regulation 40-5.09 as referred to at paragraph 19 in the judgment of Hill J in *HP Mercantile* at p 559.
[80] Per Hill J at [37] on p563
[81] Ibid at [39]
[82] Hill J at [40] on p 564.

considered in *HP Mercantile*. The Court appears to have taken a conservative view of "creditable purpose" such that it will remain important to be able to clearly demonstrate the relationship of the acquisition to the taxable supplies of the enterprise rather than the input taxed supplies before it can be claimed to be a creditable acquisition either in whole or part. The ATO have released a decision impact statement in regard to Rio Tinto that states that the ATO considers the decision to be consistent with the Commissioners ruling on the issue.[83]

(b) Margin scheme

The "margin scheme" is a GST concession favoured by many developers. It has changed considerably over time, and there are a number of rulings issued by the ATO regarding its application.

If the taxpayer and the property concerned qualifies, and there is agreement between the seller and purchaser, the margin scheme means that the seller's GST liability is reduced i.e. the GST is payable on 1/11th of the margin rather than the whole of the value of the supply. The purpose and effect of the scheme was explained by the Full Court of the Federal Court in *Stirling Guardian v Commissioner of Taxation*[84]

> *"the drafters of the Act recognised that this [*GST*] system might operate unfairly on some forms of business activity. Thus special rules were provided in Ch 4 of the Act. The special rule with which the present case is concerned was directed towards developers. Very commonly developers acquire land from private owners. Those owners are not liable for GST on the supply of land to the developer because the supply is not made in the course of furtherance of an enterprise and the owners are not registered or required to be registered under the Act. Because the owners are not liable for GST on their supply, application of the general scheme of the Act would mean that the developer, as acquirer, would not be entitled to any input tax credit on the acquisition of the land. The developer would have to pay GST on the whole value of the developed property that it supplied to the ultimate purchasers…Hence Div 75 provided an optional basis for taxpayers supplying real estate of a kind referred to in s 75-5(1)(a),(b) or (c). They can elect to pay GST on the "margin" as defined in s 75-10(2)."*

.

The "margin" is:

- For property acquired before 1 July 2000, the amount by which the consideration for the supply by the taxpayer exceeds the consideration for the acquisition of the property[85];

[83] Ruling GTSTR 2008/1
[84] (2006) 149 FCR 255; [2006] FCAFC 12
[85] S.75-10(2)

- For property acquired after 1 July 2000, it will be the amount by which the consideration for the supply by the taxpayer exceeds the valuation of the property[86].

The key requirements for its application are[87]:

- The taxpayer is selling real property, a stratum unit or granting or selling a long-term lease, and GST applies to sale (i.e. it is a taxable sale);
- The seller and the buyer have agreed in writing that the margin scheme is to apply;
- The taxpayer did not acquire the property through a supply that was ineligible. The circumstances in which the acquisition is ineligible include:
    - The property was inherited by the taxpayer, and the deceased had acquired it through an ineligible supply;
    - The property was acquired as part of a supply of a going concern from an entity registered for GST, and that entity acquired the property without applying the margin scheme;
    - The property was acquired from an associate, member of the taxpayer's GST group or a partner in a joint venture and certain other conditions apply.

Common mistakes identified by the ATO[88] include:

1. *The absence of a written agreement between the seller and purchaser.*
   Section 75.5(1A) of the GST Act states the agreement must be made on or before the making of the supply by the taxpayer or "*within such further period as the Commissioner allows*". Therefore, although the agreement on this point is often included in the contract of sale, it is not necessary that it be so. The ATO has a Practice Statement[89] that sets out the basis upon which the Commissioner will exercise a discretion to allow more time to obtain the written agreement of the purchaser. However, it should be noted that the discretion does not extend to altering the circumstances in which the margin scheme can otherwise be applied. The decision as to the extension is not a reviewable GST decision, but can be the basis of an objection under the *Taxation Administration Act 1953*.[90]

2. *The property was ineligible.*

[86] S.75-10(3)
[87] S.75-5 of the GST Act.
[88] GST and the Margin Scheme paper delivered by Neil Dixon & James Francis, ATO Directors 10 February 2016.
[89] Practice Statement Law Administration: PS LA 2005/15
[90] PS LA 2005/15 paragraph 8.

The provisions in s.75.5 need to be carefully considered in determining whether are particular property is eligible.

3. *Failing to obtain a proper margin scheme valuation e.g. incorrect valuation date; or failing to determine the correct cost base for the margin calculation.*

   The ATO has released several margin scheme valuation determinations, which contain detailed instructions as to the manner in which valuations should be undertaken[91].

   In particular it should be noted that it is not permissible to include in the value of land used for the cost base i.e. "*the consideration for the acquisition*", the legal costs, stamp duty and holding costs of the land (which is different to the position in regard to capital gains)[92].

As with other commonwealth taxation laws, there are anti-avoidance laws in regard to GST in Division 165 i.e. scheme which have the purpose or effect of reducing GST. One such scheme which involved the margin scheme, was the subject of the 2013 High Court decision of *Commissioner of Taxation v Unit Trend Services Pty Ltd*[93]. This case involved a group of companies involved in development of land at Surfers Paradise into three Towers developed over time. The first tower was sold to members of the public and the margin scheme was applied. Subdivision for the second tower occurred and when construction was at an advanced stage this property was sold to another member of the group as "a going concern" with a price determined by an independent valuer. After tower 3 commenced to be sold off the plan, it was sold to another member of the group of companies, under a similar contract to the previous sale. The units were sold to the end buyers under the margin scheme, and the value used for determining the margin was the sale price of towers 2 and 3 to the internal companies. The taxpayers sought to argue that the GST provisions provided the taxpayers with a "choice", in respect of the sale of each unit, and that they did not obtain a GST benefit which was "not attributable to" that choice expressly permitted by the GST Act[94]. The High Court rejected the argument, and found that the anti-avoidance provisions did apply, even

[91] These can be found in the Legal Database under Legislative Determinations and Declarations, Margin Scheme Valuation; See particularly MSV 2009/1
[92] *Sterling Guardian Pty Ltd v Commissioner of Taxation* (2006) 149 FCR 255
[93] (2013) CLR 523
[94] Ibid at p 541

though the legislation permitted the taxpayer the choice of using the scheme.[95] The benefit was the use of the higher amount of consideration paid for towers 2 and 3 in the calculation of the margin.

Accordingly care needs to be taken particularly in regard to transfers of development property between members of a group to ensure compliance with the pre-requisites for the application of the margin scheme and so as not to give rise to reason for the anti-avoidance provisions to have application.

[95] Ibid at p 541

Annexure A

Overview of the application of Duty, Land Tax and GST

Duties

- 5 types of duty (of which those with * are most relevant to property transactions):
  - Transfer*
  - Landholder*
  - Corporate trustee*
  - Vehicle registration
  - Insurance
- Transfer duty is not limited to real property transfer transactions – see Chapter 2.
- Landholder duty relates to transactions involving companies that have over $2,000,000 in unencumbered value of land-holdings in Queensland (s.165 DA).
- Rates of duty are prescribed in the schedules, depending on the type of dutiable transaction.

Land Tax

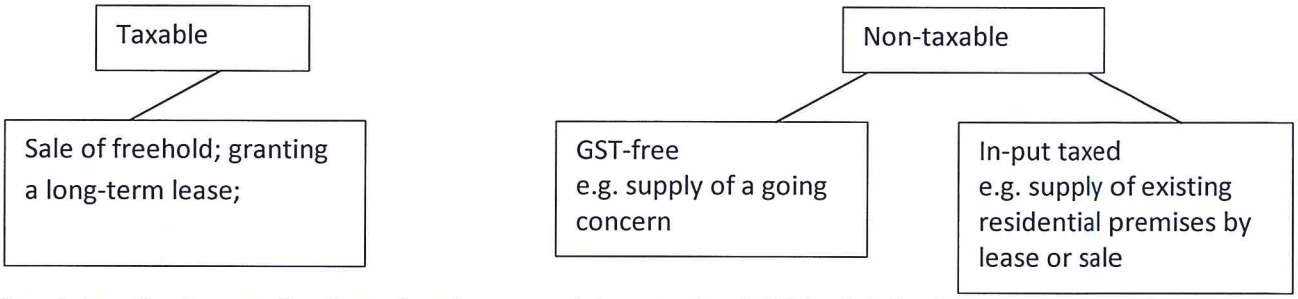
- Imposed on the "owner" of "taxable land" as at 30 June of the previous financial year.
- Concessions include where the property is resided in as a home; where the lot is subdivided and being developed and held for sale.

GST (as relevant to real property)

- Imposed on the value of "taxable supplies" at the rate of 10%[96].
- The value of the taxable supply = price x $\frac{10}{11}$.
- The price, if it is expressed in monetary terms, is the amount payable on the supply, and if not expressed as an amount of money, it is the GST inclusive market value of the consideration for the supply.[97]

[96] General Act s.4; GST Act s9-70.
[97] GST Act 9-75

- Supplies can be taxable or non-taxable



Key dates (for the application of various provisions in the GST legislation) are:

- 2/12/1998: - the date the GST legislation was introduced to federal Parliament.
- 8/7/99: – the date legislation passed and received Royal Assent.
- 1/7/2000 – the date of commencement of the GST Act (s.1-2 GST Act).