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ABN? What ABN?

This article appeared in this month's edition of the Law Society Journal (NSW).

You are acting for Annabelle Smith on the purchase of a commercial building for \$1 million, subject to existing tenancies. The contract states that the sale is not a taxable supply because the vendor is neither registered nor required to be registered for GST.

Annabelle is in the same situation as the vendor - she is not registered for GST either and does not need to be, even after she buys the building. The rental value of the building is less than the GST threshold of \$75,000.

Annabelle's accountant has explained that she could be registered when she buys the building, because she'll be carrying on the enterprise of leasing, but considers that she's better off not registering because the cost of paying GST on the rent would be greater than the benefit of input tax credits on what she acquires for the building.

Everything goes according to plan. Settlement takes place in the normal way. Ho hum you think.

The sting

Some time later Annabelle's accountant telephones to say that the ATO is conducting a random audit. One of the requirements they have is details of Annabelle's acquisition of the commercial building. They want to see what ABN the vendor provided.

You say, "what are you talking about? The sale was not subject to GST. There was no need to get a tax invoice".

The accountant says, "what do you mean? Didn't you get the ABN? Don't you know about withholding tax? It's nothing to do with GST."

You give up and ask the accountant to explain. You prepare yourself for the bad news you feel is coming.

The Taxation Administration Act 1953 schedule 1 s.12-190 provides in brief that when payment is made for real estate or goods or services supplied "in the course or furtherance of an enterprise carried on in Australia" by the supplier, the recipient of the supply must withhold "an amount" unless the supplier quotes their ABN or tax file number.

Leasing a commercial building is an "enterprise" whether or not you are registered for GST. Selling an enterprise is "in the course or furtherance of it".

There are some exceptions which might save Annabelle but this is the basic rule.

Unless those exceptions help, Annabelle will be faced with an obligation to pay the ATO 46.5 per cent of the purchase price of \$1 million – \$465,000 in all: this is what "an amount" means under regulation 38(2) Taxation Administration Regulations 1976.

The Commissioner has power to reduce the penalty and undoubtedly will do so in genuine, but seemingly somewhat limited circumstances. In ruling TR 2002/9 he give these examples:

"119. The Commissioner has exercised this power in a number of cases or class of cases including payments made to individuals under the age of 18 years where the payment does not exceed \$120,¹⁴

Contacts

Jim Main Brendan Cockerill	www.jmalegal.com.au Call 1800 618 869	Cootamundra 46 Cooper St Cootamundra NSW 2590 T 02 6942 1655 F 02 6942 3692	Canberra 11/60 Marcus Clarke St Canberra ACT 2601 T 02 6243 3610 T 02 6243 4848	Gundagai 195 Sheridan St Gundagai NSW 2590 T 02 6944 1755 F 02 6944 1850	Sydney 3 Spring St Sydney NSW 2000 T 02 8249 4028 T 02 8249 4872
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payments to indigenous artists for artistic works where the indigenous artist has income from art activities of less than \$10 000 and the artist qualifies for a Special Zone A rebate;¹⁵ payments made by a member of a body corporate for body corporate levies and like payments;¹⁶ and payments of certain allowances to employees or labour hire workers.”

No mention of a poor old solicitor who was simply unaware.

Author: Jim Main, JMA Legal March 2011.
For further information on this issue, please see the contacts below.

Contacts

Jim Main	www.jmalegal.com.au	Cootamundra	Canberra	Gundagai	Sydney
Brendan Cockerill	Call 1800 618 869	46 Cooper St Cootamundra NSW 2590 T 02 6942 1655 F 02 6942 3692	11/60 Marcus Clarke St Canberra ACT 2601 T 02 6243 3610 T 02 6243 4848	195 Sheridan St Gundagai NSW 2590 T 02 6944 1755 F 02 6944 1850	3 Spring St Sydney NSW 2000 T 02 8249 4028 T 02 8249 4872

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