Australian Government
Australian Taxation Office

Australian Taxation Office Legislative Instrument
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A New Tax System (Goods and Services Tax) Waiver of Tax Invoice Requirement (Creditable Acquisition by a Lessee or Sub-Lessee Following a Sale of a Reversion in Commercial Premises) Legislative Instrument 2013

Explanatory Statement

General outline of this instrument

1. This legislative instrument is made under subsection 29-10(3) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

2. This instrument waives the requirement for a lessee or sub-lessee (as recipient) of commercial premises to hold a tax invoice in certain circumstances for an input tax credit to be attributable to a tax period for a creditable acquisition of the premises when they hold documents that meet the information requirements prescribed in this instrument.

3. This instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

4. All legislative references in this explanatory statement are to provisions in the GST Act unless otherwise specified.

Commencement and application of this instrument

5. This instrument commences on 1 July 2010 and applies to creditable acquisitions made by a recipient of commercial premises following the sale of the reversion in those premises to the extent that the input tax credits for creditable acquisitions are attributable to tax periods commencing on or after 1 July 2010. The instrument applies to both a lessee or a sub-lessee of commercial premises as the term 'reversion' has been defined to include both the freehold interest sold subject to a lease and a leasehold estate assigned subject to a sub-lease.

6. The retrospective application of this instrument does not have an adverse effect on the rights or liabilities of any person other than the Commonwealth.[1] The effect of the instrument is to the advantage of affected parties. It waives the requirement for a recipient making a creditable acquisition of commercial premises by way of lease to hold a tax

[1] Subsection 12(2) of the *Legislative Instruments Act 2003* provides that a retrospective legislative instrument (or provision of that instrument) will be of no effect if it applies to adversely affect the rights or liabilities of any person other than the Commonwealth or an authority of the Commonwealth.

invoice before an input tax credit is attributable to a tax period when the recipient holds documents that meet the requirements prescribed in this instrument.

7. These prescribed requirements are not substantively different to the requirements under which documents held by the recipient were treated as tax invoices in accordance with the Decision Impact Statement (DIS) for *South Steyne Hotel Pty Ltd & Ors v Commissioner of Taxation*[2] (NSD 97/2009) (ruling status of the administrative treatment withdrawn on 23 February 2012). This means that suppliers and recipients do not have to change their practices, software or accounting systems to comply with this instrument.

8. The instrument applies retrospectively to align to the date of effect of the legislative change for tax invoices.[3]

What is this instrument about?

9. This instrument provides that an input tax credit for a creditable acquisition is attributable to a tax period for an acquisition by a lessee or sub-lessee of commercial premises when they or their agent hold documents other than a tax invoice following the sale of the reversionary interest in those premises. This instrument also sets out the particular information that must be included in these documents for the input tax credit to be attributed to that tax period.

What is the effect of this instrument?

10. This instrument waives the requirement for a recipient to hold a tax invoice before an input tax credit for a creditable acquisition is attributable to a tax period when the recipient holds documents that meet the requirements of this instrument.

11. This instrument intends to give effect to the same general treatment as when the Commissioner exercised the discretion to treat documents as a tax invoice in the situations set out in the DIS.

12. Compliance cost impact: An assessment of the compliance cost impact indicates that the impact will be minimal for both the implementation and on-going compliance costs. The instrument is routine in nature.

Background

13. Generally, when a recipient makes a creditable acquisition, an input tax credit for the acquisition is not attributable to a tax period until they hold a tax invoice. A tax invoice is a document that meets the requirements of subsection 29-70(1).

14. In some cases, the necessity for the recipient to hold a document that meets the requirements of subsection 29-70(1) may impose a disproportionate burden on a supplier or a recipient, particularly if the document that they hold has most of the required features of a tax invoice.

15. The DIS outlined circumstances under which certain documents were treated as tax invoices because the Commissioner exercised the discretion under former subsection 29-70(1). The Commissioner's discretion to treat a document as a tax invoice is now contained in subsection 29-70(1B).

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[2] [2009] FCAFC 155; 2009 ATC 20-145; 74 ATR 41.

[3] See *Tax Laws Amendment (2010 GST Administration Measure No.2) Act 2010* and the repeal of regulations 29.70.01 and 29.70.02 to the *A New Tax System (Goods and Services Tax) Regulations 1999* by the *A New Tax System (Goods and Services Tax) Amendment Regulations 2010 (No.1)* (206 of 2010).

16. The Commissioner's discretion under subsection 29-70(1B) is administrative, and can only be exercised on a case by case basis. It is therefore no longer appropriate to deal with this matter in a public ruling. Instead, the Commissioner is making a determination under subsection 29-10(3) to ensure that taxpayers do not have to change their administrative practices.

Explanation

17. The purchaser of a reversion in commercial premises (the current owner in the context of this instrument) makes a supply to the lessee under paragraph 9-10(2)(g) by way of entering into an obligation to honour the terms of the lease. Where the requirements of section 9-5 are satisfied, this supply is a taxable supply.[4]

18. A lease agreement for the commercial premises or other document issued by the owner that originally granted the lease or sub-lease can be a tax invoice if it satisfies the requirements of subsection 29-70(1).[5] However, such documents cannot be a tax invoice for the period of the lease following the sale of the reversion in the commercial premises. This is because the documents would not have been issued by the current owner of the commercial premises[6] and would not contain the identity and Australian business number (ABN) of the current owner.[7]

19. Further, following the sale of the reversion, a new lease agreement does not need to be entered into between the current owner and the recipient. The previously existing lease or sub-lease agreement may continue in operation.

20. Therefore, following the sale of the reversion, the recipient might not have a document that complies with the tax invoice requirements.

21. This legislative instrument is intended to save recipients in these circumstances from the requirement to hold a tax invoice before an input tax credit is attributable to a tax period if they or their agent hold the following documents:

- (a) a document that was issued by the current owner of the commercial premises[8] from which the following can be clearly ascertained:
  - (i) the current owner's identity and ABN;
  - (ii) the address of the premises; and
  - (iii) the consideration or part of the consideration payable for the lease for which there is an entitlement to an input tax credit; and
- (b) a document that was issued by the owner or sub-lessor who originally granted the lease or sub-lease of the commercial premises that meets the requirements of subsection 29-70(1) as they applied to that owner or sub-lessor.

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[4] *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682. See also Goods and Services Tax Determination GSTD 2012/2 Goods and services tax: what are the goods and services consequences following the sale of commercial premises that are subject to a lease? for the Commissioner's views on the GST consequences following the sale of commercial premises that are subject to a lease.

[5] See paragraphs 48 to 50 of Goods and Services Tax Ruling GSTR 2000/35 Goods and services tax: Division 156 – supplies and acquisitions made on a progressive or periodic basis.

[6] Paragraph 29-70(1)(a).

[7] Subparagraph 29-70(1)(c)(i).

[8] When a leasehold estate is assigned subject to a sub-lease of commercial premises, the assignee will become the sub-lessor. In these circumstances, for the purposes of this instrument, the 'current owner of the commercial premises' under the sub-lease is the assignee. Accordingly, the sub-lessee will need to hold a document issued by the sub-lessor from which the particular information listed at subclause 5(1) may be clearly ascertained. This includes the sub-lessor's identity and ABN.

22. The recipient must hold the above documents at the time they submit to the Commissioner a GST return for the tax period in which the input tax credit for the acquisition has been attributed.

Consultation

23. Section 18 of the *Legislative Instruments Act 2003* specifically provides for circumstances where consultation may not be necessary or appropriate. One of those circumstances is where the instrument is considered minor or machinery in nature, and does not substantially change the law.

24. Although the instrument was considered minor or machinery in nature, and does not substantially change the law, comment was invited from members of the community through the publication of a consultation draft of this instrument and explanatory statement.

James O'Halloran

Deputy Commissioner of Taxation

19 March 2013

Related Rulings / Determinations

GSTD 2012/2

Legislative references

A New Tax System (Goods and Services Tax) Act 1999
9-5
9-10(2)(g)
29-10(3)
29-70(1)
29-70(1)(a)
29-70(1)(c)(i)
29-70(1B)
Div 156

Legislative Instruments Act 2003
12(2)
18

Human Rights (Parliamentary Scrutiny) Act 2011
Part 3
3

A New Tax System (Goods and Services Tax) Regulations 1999
29-70.01
29-70.02

Case references

South Steyne Hotel Pty Ltd & Ors v Commissioner of Taxation [2009] FCAFC 155; 2009 ATC 20-145; 74 ATR 41.
Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682.

Other references

Decision Impact Statement (DIS) for *South Steyne Hotel Pty Ltd & Ors v Commissioner of Taxation* [2009] FCAFC 155; 2009 ATC 20-145; 74 ATR 41 (NSD 97/2009)

Subject references

Goods and services tax
Acquisitions and supplies by agents
Attribution rules
Creditable acquisition
GST input tax credits & creditable acquisitions
Taxable supply
Tax invoices

Tax Office references

NO:
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Statement of Compatibility with Human Rights

This Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Overview

This instrument waives the requirement for a lessee or sub-lessee (recipient) of commercial premises to hold a tax invoice in certain circumstances for an input tax credit to be attributable to a tax period for a creditable acquisition of the premises.

Human Rights Implications

On an assessment of the compatibility of this instrument with the seven core international human rights treaties to which Australia is a party, it has been determined that this instrument does not engage any of the applicable rights or freedoms because the instrument is minor or machinery in nature.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

James O'Halloran
Deputy Commissioner of Taxation