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WEEKLY COMMENT: FRIDAY 28 JUNE 2013

1. This week and next week I am once again turning my mind to GST matters. This week I look at a recent case involving a real estate agreement and the recently issued QWBA on GST and compulsory acquisitions.

2. The case and the QWBA have this much in common: they both highlight the importance of getting things right from a GST perspective.

Real estate agents are not responsible for ensuring terms and conditions are correct

3. The case of *Gregory John Wyatt v The Real Estate Agents Authority and Barfoot & Thompson Limited* [2012] NZHC 2550 was an appeal from a decision of the Real Estate Agents Disciplinary tribunal ("the Tribunal") concerning standards of professional conduct for licensed real estate agents under the Real Estate Agents Act 2008 ("the REAA").

4. The proceeding arose from the sale of a rural property by the trustee of a family trust. The appellant, Mr. Wyatt had primary responsibility for the sale on behalf of the vendor and, for practical purposes relevant to the appeal, was the vendor. Barfoot & Thompson was engaged as agent for the vendor on the sale.

5. Barfoot and Thompson used the seventh edition of the standard form agreement for sale and purchase of real estate approved by the Real Estate Institute of New Zealand Inc and the Auckland District Law Society (the Ninth Edition was released in July 2012). Approximately 2 months before the agreement was entered into the eighth edition of the standard form agreement had been released, in February 2007, for use by real estate agents and lawyers (and any others who chose to use the form by buying it). Mr. Wyatt's complaint was that the eighth edition should have been used.

6. The central issue arising on the appeal was whether the use of the seventh edition constituted unsatisfactory conduct by Barfoot & Thompson under s. 72 of the REAA or misconduct under s. 73 of the REAA.

7. Mr. Wyatt's family trust, through a company, was the owner of rural land at Wainui, north of Auckland. The asking price was $1,385,000, and he received an offer from a Mr. Wright for $1,350,000. An agreement was entered into on 13 April 2007, with a possession date of 24 May 2007.

8. The agreement was made using the seventh edition of the standard form. The only changes were the addition of some further terms stipulated by Mr. Wyatt and the insertion of the

variable provisions relating to whether the price was inclusive or exclusive of GST and the possession date.

9. On the first page there were the standard terms to record whether the agreement was "plus GST (if any)" or "inclusive of GST (if any)". In accordance with Mr. Wyatt's express instructions the words "plus GST" were deleted. It was Mr. Wyatt's understanding that the trust would have no liability for GST on the sale. In the event, the trustee company was assessed for GST of $110,000, and the sum was not recoverable from the purchaser because of the terms of the agreement.

10. Mr. Wyatt's complaint was that the loss suffered due to the liability for GST arose because of different wording in the standard form clause 13.0 relating to the supply of a going concern and zero rating for GST.

11. The Tribunal summarised the GST issue as follows:

    "The appellant accepts that he had not turned his mind to whether or not a taxable activity was being undertaken at the subject property, or whether or not the sale was the transfer of a going concern, at the time the agreement was drawn up. He simply assumed GST would not be payable because the land had not been subdivided. It has not been suggested that Barfoot was on notice that the seller was carrying on a taxable activity and that what was intended was the transfer of a going concern."

12. The Tribunal did, however, consider the merit of the GST issue and concluded that:

    (a) Even if the eighth edition had been used, the trust/company vendor would still have incurred a GST liability; and

    (b) It was unreasonable for Mr. Wyatt to expect Barfoot to advise whether the GST arrangement for the sale was appropriate;

    (c) Mr. Wyatt was responsible for the terms of the agreement, including the terms in respect of GST. He was acting as his company's lawyer. If he had any concerns in respect of GST, it was his responsibility to seek legal advice. He chose not to obtain legal advice. Mr. Wyatt provided detailed instructions regarding the terms of the agreement. He stipulated that the purchase price should be "*Inclusive of GST (if any)*".

13. Woodhouse J stated he was satisfied that the evidence fell well short of what would be required for an enquiry into misconduct under s. 73 of the REAA. So the enquiry was limited to whether there had been unsatisfactory conduct as defined in s. 72 of the REAA.

14. The essence of Mr. Wyatt's submission was that there was a reasonable public expectation that a standard form of agreement for sale and purchase produced by a real estate agent would be the current one. Woodhouse J was not convinced. He noted that:

    "[57] … Whether particular provisions in a standard form are appropriate for a party to the agreement is a matter to be determined by the party or that party's lawyer. This is not a matter for a real estate agent unless the particular circumstances give rise to a particular responsibility for the agent (the licensee). The standard form of the agreement, whether it is the seventh edition or the eighth edition, in fact gives the parties to the agreement express notice of the desirability of obtaining professional advice before the agreement is signed. …

[58] … The subject matter of this complaint is a standard form. It is simply a template. No doubt it will be suitable without amendment in many cases. But in particular cases it may not be suitable, or particular provisions in it may need modification. …

[59] … The circumstance of this case of particular relevance is that Mr. Wyatt made it quite clear that he was assuming full responsibility for the terms of the agreement. … there was nothing to indicate that … Barfoot & Thompson … were being asked to assume any responsibility as to the suitability of any of the terms of the agreement. …

[60] … Mr. Wyatt by his own clear instructions effectively made clear that he was not relying upon any advice or representation, express or implied, that might be proffered by (Barfoot & Thompson)".

Secondhand goods input tax deduction applies to a compulsory acquisition

15. Inland Revenue recently released *Question We've Been Asked QB 13/03* ("the QWBA"), on whether a compulsory acquisition of land is a "supply by way of sale". The specific question was whether:

    (a) A compulsory acquisition of land under the *Public Works Act 1981* ("PWA 1981") is a "supply" for GST purposes; and

    (b) If so, whether it is a "supply by way of sale" such that the recipient is entitled to a secondhand goods input tax deduction under ss 3A(2) and 20(3) of the GST Act where the supplier is not registered.

16. The answer is that a compulsory acquisition under the PWA 1981 is a "supply" for GST purposes, and this applies equally to compulsory acquisitions under the *Canterbury Earthquake Recovery Act 2011*:

    (a) Where the supply is made by a registered person, it will generally be zero-rated under s. 11(1)(mb); and

    (b) Where land is compulsorily acquired from an non-registered person, the recipient will be entitled to a secondhand goods input tax deduction if the other requirements of ss. 3A(2) and 20(3) are met.

17. The starting point is that the meaning of "supply" for GST purposes is wide enough to include both active and passive senses: in *Databank Systems Ltd v CIR* (1987) 9 NZTC 6,213, Davison CJ considered that "supply" meant "to furnish with or provide", and the definitions in the *Concise Oxford English Dictionary* of "provide include "make available for use; supply", and of "furnish" include "be a source of; provide".

18. However, South African and Australian case law establishes that for there to be a supply there must be an act on the part of the supplier. In addition, comments by Judge Willy in *Case* T22 (1997) 18 NZTC 8,124, made in the context of a compensation payment, could suggest that a compulsory acquisition is not a supply.

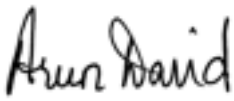
19. These authorities are not conclusive, and the context and purpose of the term "supply" are then considered in the QWBA. It is noted that in *Glenharrow Holdings Ltd v CIR* [2008] NZSC 116, (2009) 24 NZTC 23,236, the Supreme Court noted that GST was intended to be as non-distortionary as possible, and that it would be inconsistent with the scheme of the legislation if a registered person from whom land was compulsorily acquired were entitled to an input

tax deduction on acquisition, but not required to account for output tax. On this basis, the conclusion is reached that a compulsory acquisition is a "supply".

20. In looking at whether a compulsory acquisition is a "sale", the meaning of "sale" is briefly considered. *In Smith v FCT* (1932) 48 CLR 178, Rich J considered that the word "sale" did not have a precise meaning and that in some contexts the essence of a sale was the conversion of property into money.

21. In the context of s. 3A(2) of the GST Act, a sale is a supply. Where the supplier and recipient are not associated persons and the supply is the only matter to which the consideration relates, the amount of the input tax deduction is, under s. 3A(3)(e) based on the consideration in money for the supply. Therefore, the amount of the input tax deduction where a compulsory acquisition is made would be based on the compensation paid for the acquisition.

22. The conclusion reached is again based on the policy underlying the secondhand goods input tax deduction and the principle from *Glenharrow* that there should be GST neutrality for a registered person. It is noted that allowing a secondhand goods input tax deduction recognizes that as the non-registered supplier was charged GST on the acquisition of the goods, the consideration for the goods includes a notional GST component.



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