



# Real Estate

## Continuing Professional Development

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# Goods and Services Tax (GST)

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## Learning outcomes

At the end of this topic, you will be able to:

- explain key terms relating to GST
- explain key taxation legislation around land transactions
- explain some potential GST issues related to land transactions
- explain the documentation required around GST in real estate interactions and transactions.

## Terms used in this guide

In this guide, we will use various terms related to real estate agency work and complaints processes. This table will explain key terms

Term/abbreviation	Notes
CAC	This abbreviation stands for the Complaints Assessment Committee.
Client	A client is a person on whose behalf an agent carries out real estate agency work under a signed agency agreement. In this guide, we will consider that the agency has a client relationship with the seller and, therefore, that seller is their 'client,' and any buyers or potential buyers are 'customers'.
Code of Conduct	We will refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 as the 'Code of Conduct'.
Consumer	In the context of this guide, the word 'consumer' refers to buyers and sellers and potential buyers and sellers in the real estate sale and purchase process.
Customer	A customer is a person who is a party or a potential party to a transaction and excludes a client or potential client (as defined in rule 4.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012). The meaning of 'customer' depends on with whom the agency has a client relationship.
Disciplinary Tribunal	We will refer to the Real Estate Agents Disciplinary Tribunal as the Disciplinary Tribunal.
Purchaser	The person buying the property (sometimes referred to as the 'buyer')
REA	This abbreviation stands for the Real Estate Authority.
Vendor	The person selling the property (sometimes referred to as the 'seller')

## Introduction

A 2019 Nielsen survey of consumer perceptions in real estate transactions, commissioned by REA, highlighted that 24% of consumers who bought or sold, or tried to buy or sell, residential real estate over the previous 12-month period had difficulty understanding the price or value of the property.

Confusion over pricing can relate to the GST treatment of the sale. Many clients (vendors) and customers (buyers) enter into a sale and purchase contract unaware of the GST implications, and the workings and treatment of GST under the agreement, and without seeking accounting or legal advice. The consequence of this can be that a GST liability is triggered which the parties were unaware of and hadn't anticipated at the time of signing the agreement.

Sometimes consumers are confused about whether a sale is inclusive of GST or exclusive of GST.

You are not expected to be GST or tax experts. REA strongly suggests you recommend that vendors and potential buyers seek their own expert taxation advice due to the complex tax issues that can arise with the sale and purchase of a property or a business. This should be done **before** the parties sign the sale and purchase agreement and it should be confirmed in writing.

However, you do need to know about the issues that can arise with regard to GST and land transactions, and what you need to communicate to clients and customers regarding GST. It is important that you seek advice from your supervising branch manager or agent if you are unsure in this area.

The purpose of this guide is to reinforce key points around GST with regard to land transactions.

## What is GST?

Goods and Services Tax (GST) is a standard 15% tax on most goods, services and other items sold and consumed. This includes the sale of businesses and can apply to people who buy and sell residential property.

Before we look at GST in detail, the section below explains key terminology used.

## Key terms related to GST

### Types of supply

A 'supply' is the sale of Goods and Services.

### Registered person

A 'registered person' is a person who is registered for GST or is liable to be registered for GST under the Goods and Services Tax Act 1985. 'Registered persons' must charge and collect GST, file GST returns, and account for GST to Inland Revenue.

### Input tax

When a **registered person buys goods or services** to use in a taxable activity, the **GST portion of the price** is called input tax. Input tax is usually called a **GST credit**.

Input tax includes

- the GST on imported goods, and goods held in bond
- 3/23 of the cash price of second-hand goods bought for the business from
  - a non-registered person, or
  - a registered person where the goods are not part of their business.

### Output tax

Output tax is **GST charged by a registered person on goods and services supplied** in a taxable activity. It includes GST on sale of assets. Output tax is usually called **GST payable or GST collected**.

### Trader

A trader in property is a person who tries to gain an income through purchasing property. They sell the property when it has received sufficient capital gain or after renovations.

## Types of supply

### Exempt Supply

Exempt supply is described in Section 14 of the Goods and Services Tax Act 1985. 'Exempt' means that GST of 15% is **not chargeable** on the sale of these items.

There are several supplies (sales) in the Act that are deemed exempt from GST. Examples are precious metals, financial services, and shares. Residential dwellings and accommodation are also classified as exempt supply.

There are some exceptions to the exemption. For example, if the property is an apartment and it is managed as a 'hotel pool' (that is, short term letting) then GST may be payable.

### The Compulsory Zero-Rating Scheme (CZR)

Although the rate for GST is 15%, some goods and services can be 'zero-rated'. This means the taxable supplies are taxed a rate of 0% rather than 15%.

Prior to 1 April 2011, a registered person selling land (other than residential land) generally paid output tax unless it was the supply of a going concern. Also, a person buying land from an unregistered person could potentially claim input tax based on the land being second-hand goods. There was a risk to the Inland Revenue that if the person selling the land did not pay the output tax due to them, usually deliberately winding up their entity, Inland Revenue would still have to pay the customer(buyer) their input tax.

As a result, the government introduced the Compulsory Zero-Rating scheme (CZR). Section 11(1) (mb) was inserted into the Goods and Services Tax Act 1985 to specify the legal requirements for the CZR, and this legislation came into effect on 1 April 2011. Under this legislation, GST on a transaction involving the sale of land is assessed at the rate of zero percent where

- the sale is from one GST registered person to another GST registered person
- the property is used as part of a taxable activity, and
- the property is not being used as a principal place of residence.

To be a zero-rated supply, all these conditions for zero-rating must be satisfied prior to or at the time of settlement of the transaction. If any of these conditions are not satisfied at the time of settlement, the supply must be taxed at 15%.

If the land is only part of the transaction between the two GST registered people, the whole transaction will still be zero-rated. If a lease is part of the transaction, it may also be zero-rated.

Where the sale of land is between two GST registered parties it is deemed as a CZR compulsory zero-rated supply. This is a GST activity and GST is charged at zero percent. In this case you need to ensure that on the front page of the Sale and Purchase Agreement, the purchase price is recorded as 'Plus GST (if any)'.

## **Sale as a 'Going Concern'**

A going concern is the sale of a taxable activity which continues in operation.

The sale of land is deemed to be a supply of goods within the scope of the Goods and Services Tax Act 1985. However, where the land supplied is a 'going concern' no GST liability attaches to the business that is transferred, or the assets used to carry it on.

If the sale involves the transfer of a capital assets structure for a business, but not the actual business activity, it is not the sale of a business as a going concern.

To be a going concern

- the sale must be the supply of the whole or stand-alone part of the taxable activity, from one registered person to another
- the sale must be the supply of all the goods and services necessary for the continued operation of the activity
- both parties must agree that there is a supply of a going concern, and record this agreement in a sale and purchase agreement document
- both parties must intend that the activity is capable of being carried on as a going concern by the customer (buyer)
- the business (taxable activity) must be a going concern at the time of supply and carried on up to the time of the transfer to the customer.

A sale of a going concern by one registered person to another registered person is zero-rated. Also, when only part of a taxable activity (able to operate separately) is sold as a going concern, the sale is zero-rated.

A going concern could be added to the sale of land at a later time provided it is prior to settlement.

A going concern sale is a zero-rated supply but must not be confused with the sale of land (property) between parties that are GST registered. A going concern sale is typically considered a separate supply under the Act and GST is charged at 0% as it is a zero-rated supply.

Care must be taken where the ownership of the land is separate from the ownership of the stock and/or plant.

All details of a going concern sale must be included in the Further Terms of Sale in the Sale and Purchase Agreement.





## Questions

Aaron is a dairy farmer who owns his own property.

1. If Aaron sells his dairy farm (including land, herd, all buildings, and all machinery required to run the business) to another GST-registered farmer, does this count as a sale of a going concern? Why?

The details of the sale are stated in the 'Further Terms of Sale' section of the Sale and Purchase agreement. The farm continues to be operational through to settlement day.

2. If Aaron sells the land and the buildings to another GST-registered farmer, but keeps the herd of cows and most of the machinery,
  - a. does this count as a sale of a going concern? Why?

- b. what would be the GST rate on the land portion of the sale?

## Who must register for GST?

Usually residential land (that is, residential land and buildings on the land) is GST inclusive because neither party is registered for GST. It is usually developers, builders and dealers who would have to concern themselves with GST.

Most buyers of residential land are not GST-registered and therefore can't claim GST on the sale, nor do they have any obligation to pay GST. For example, if a person who is not GST-registered buys from a builder, the price they pay will be inclusive of GST, but the builder will have to account to Inland Revenue for the GST he has collected because he is regarded as being 'in trade'.

Traders must register for GST if their annual turnover in the previous 12 months was more than \$60,000 (or is likely to be in the next 12 months). Turnover is the total value of supplies made for a person's taxable activities, excluding GST.

Problems can arise with GST and the sale and purchase of residential land

- when either party is not GST registered, or
- when the parties have different GST registration status, or
- when there is an extended settlement date.

Parties should seek their own specialist advice if they are unsure whether GST is payable.

You should **always advise parties in writing to seek their own specialist advice** even if they claim to understand the GST implications of the transaction.

It is **vital to document that you have recommended the parties seek their own expert advice.**

## GST on Commercial, Industrial and Rural Land

Whilst it is rare for GST to be an issue with residential land, GST is charged on all commercial, industrial and some rural land. Often the GST will be zero rated because the sale of the property includes an ongoing taxable activity.

Rural land can present complications because not all rural land is sold with a GST element that must be accounted for by the client (vendor). Large farms (for example dairy farms, sheep and beef farms, forestry and horticultural properties) will always attract GST because there is clearly a business activity on the land. Lifestyle blocks may or may not attract GST. The licensee must clarify this with the client. Here are examples of questions the licensee can use to find out key details:

- Is the property being sold with GST included in the purchase price (for example, for residential land)?
- Is it being sold 'plus GST' (for example, for a working farm)?

If a lifestyle block contains a house, gardens and a couple of paddocks that are kept tidy by a few sheep, it probably won't attract GST. However, if the vendor is breeding exotic sheep, and selling them for a profit, this may be a taxable activity and the vendor may be liable for GST when the property is sold. When selling a property of this nature, if there is even a possibility a taxable use has been conducted from the property in the past, it is best practice to require the vendor to provide a statement from their accountant confirming their GST status, to ensure that historic taxable activity is not overlooked by vendors.

## **GST issues in land transactions**

GST is 15% of the cost of the property excluding GST. Errors in accounting for GST on property transactions are quite common and may involve significant amounts of money. These errors may result in a purchaser having to find 15% of the purchase price on settlement day or a vendor receiving 15% less than they thought they were getting.

It is critical that the sale and purchase agreement includes the correct statements, particulars and information regarding the GST position of the parties to the agreement. GST liability can be triggered if the parties to the agreement have not recorded their respective GST positions correctly.

Note that if a client (vendor) is registered for GST the contract price is treated as being inclusive of GST by

- the parties choosing this option on the Sale and Purchase Agreement, or
- the parties neglecting to choose the GST status of the transaction on the Agreement, or
- a buyer opting to change their GST status from registered for GST to not registered for GST.

This will usually mean the vendor will be required to account for the GST on the purchase price to Inland Revenue.

If GST is payable on a transaction in any of the options listed above and the purchase price is recorded as 'plus GST (if any)', the buyer would be required to pay the GST to the vendor as part of the property transaction. This means the sale price is the price the client (vendor) receives, and GST is added on to it, which is paid by the buyer. The buyer will have to pay an additional 15% on the contracted purchase price.

Any one of the three options above would trigger a requirement for both parties to confirm in writing they have sought advice and understand the implication of a GST inclusive sale by a GST registered vendor.

It is important to obtain written confirmation from the vendor of their GST status, and confirm this with them at the point of listing.



## Key points

- Traders must register for GST if their turnover in the previous 12 months was more than \$60,000 (or is likely to be in the next 12 months).
- It is vital that both parties to the sale and purchase transaction (the customer and the client) are certain of the GST status of the other, and that the GST status of the buyer and vendor is recorded accurately, to avoid situations where unexpected GST bills or penalties could result.
- You should advise the parties to seek expert advice on the GST treatment of the transaction.
- You should document that you have recommended the parties seek their own expert advice on GST.
- A trader should always select 'Yes' to the question on the front page of the Sale and Purchase Agreement regarding whether they are registered for GST, even if the sale is inclusive of GST.

## Licensee role regarding GST

While you want to be a trusted resource for your clients during the purchase process, you cannot provide your client with advice that is deemed tax advice. As a licensee, you need to be very careful about the treatment of GST and giving any kind of advice or providing commentary either verbally or in writing that could be construed as advice.

## GST and the Listing Agreement

It is important to clarify the vendor's GST position at the time of listing. There are various questions you can ask of the vendor to do this. For example:

- Are you GST-registered?
- Does your GST registration relate to the property being listed?
- What is your GST registration number?

It is important that the GST status of the vendor is accurately recorded if there is any reference to GST in the Listing Agreement.

You need to inform the vendor of the following:

- whether the agency's scale of charges is 'Plus GST' or 'Inclusive of GST'
- whether your appraisal is 'Plus GST' or 'Inclusive of GST'
- whether your calculated commission using the appraisal is 'Plus GST' or 'Inclusive of GST'.

In the example from a Listing Agreement shown below, the scale of charges, appraisal value and commission amount should clearly show whether they are 'Plus GST' or 'Inclusive of GST'.

5.3 How Commission is calculated:

The Agent's commission is calculated as follows:

A base fee of \$

Plus  % of the first \$  of the sale price;

Plus  % of the balance of the sale price.  
plus GST.

For example, based upon (tick one ):

the Client's asking price (where an appraisal was not possible to be given) or

the appraised value,

A sale price of \$  would mean an estimated commission of  
\$  including GST.

If the appraisal states a price range, both values must be calculated and described 'Inclusive of GST' or 'Plus GST', as appropriate.

## GST and the Sale and Purchase Agreement

The Agreement for Sale and Purchase of Real Estate form contains specific warranties with regards to GST, zero-rating and the supply of a going concern. This form is approved by REINZ and by the Auckland District Law Society.

Changes were made to the form when the CZR regime changes came into effect. These changes were designed to avoid any difficulties with zero rating. Note that the images on the following pages are from the 'Agreement for Sale and Purchase of Real Estate' (tenth edition 2019).

If the buyer and vendor have not correctly recorded their respective GST positions, a situation where a GST liability is triggered can occur. The result could be that the vendor would effectively receive a 15% reduction of the contracted purchase price (as they may have to return 15% of the purchase price to Inland Revenue). If the agreement specifically says 'inclusive of GST' then the buyer will not have to pay GST on top of the purchase price. The vendor will have sold it inclusive of GST.

It's critical that the GST position of buyer and vendor is recorded accurately in order to avoid any unexpected GST implications at settlement.

It is important that the parties obtain technical advice (such as taxation or accountancy advice) and **you must allow the parties a reasonable opportunity to obtain such advice.**

### Correctly recording the GST position

On the front page of a standard ADLS/REINZ Agreement for Sale and Purchase of Real Estate, the vendor is required to warrant their GST status to the buyer. The vendor will either be registered for GST or they won't be, and they will either be required to return GST to the IRD on the purchase price or not. This means the statement regarding GST status is a statement of fact.

The GST status of the vendor is important as this affects the purchase price a vendor is willing to accept.

In addition, the parties must elect whether the transaction will be 'plus GST (if any)' or 'inclusive of GST'.

Note that **if no election is made** as to the GST status of the transaction, then **the agreement will deem the contract price to be inclusive of GST.**

This is where the client (vendor) warrants their GST status to the buyer. **This panel must be completed** (meaning 'Yes' or 'No' must be deleted).

The vendor is registered under the GST Act in respect of the transaction evidenced by this agreement and/or will be so registered at settlement: Yes/No

<b>PROPERTY</b>			
Address:			
Estate:	FREEHOLD CROSSEASE (FREEHOLD)	LEASEHOLD CROSSEASE (LEASEHOLD)	STRATUM IN FREEHOLD STRATUM (freehold)
Legal Description:	Area (more or less):	Lot/Flat/Unit:	DP: Record of Title

It must be clear whether the Purchase price is 'Plus GST' or 'Inclusive of GST'.

<b>PAYMENT OF PURCHASE PRICE</b>	
Purchase price: \$	Plus GST (if any) OR Inclusive of GST (if any) If neither is deleted, the purchase price includes GST (if any).
Deposit (refer clause 2.0): \$	GST date (refer clause 13.0):
Balance of purchase price to be paid or satisfied as follows:	Interest rate for late settlement: % p.a.
(1) By payment in cleared funds on the settlement date which is	
OR	
(2) In the manner described in the Further Terms of Sale.	

Where the **sale is between two registered parties**, CZR must be applied and **the purchase price must be 'Plus GST'**. The text 'Inclusive of GST (if any)' must be deleted.

Where the **vendor is a non-registered person**, the purchase price must be **'Inclusive of GST (if any)'**.

**When the sale is made by a registered vendor to a non-registered buyer**

If the sale is inclusive of GST and the buyer is not registered, zero-rating would not apply to the sale. In this case, the vendor may make the contract 'Plus GST (if any)', and this would mean the buyer would have to pay the additional (GST) amount.

**The vendor must be GST registered to be able to charge GST on the sale.**

## Recording the GST particulars

Further GST information must be included in Schedule 1 of the agreement (GST information). These details are used to find out whether a GST obligation will exist or not for both the vendor and the buyer.

ADLS   REINZ		Tenth Edition 2019
<b>SCHEDULE 1</b>		
(GST Information – see clause 14.0)		
This Schedule must be completed if the vendor has stated on the front page that the vendor is registered under the GST Act in respect of the transaction evidenced by this agreement and/or will be so registered at settlement. Otherwise there is no need to complete it.		
<b>Section 1 Vendor</b>		
1.(a) The vendor's registration number (if already registered):		
1.(b) (i) Part of the property is being used as a principal place of residence at the date of this agreement.		Yes/No
(ii) That part is: (e.g. "the main farmhouse" or "the apartment above the shop".)		Yes/No
(iii) The supply of that part will be a taxable supply.		Yes/No
<b>Section 2 Purchaser</b>		
2.(a) The purchaser is registered under the GST Act and/or will be so registered at settlement.		
2.(b) The purchaser intends at settlement to use the property for making taxable supplies.		
If the answer to either or both of questions 2.(a) and 2.(b) is "No", go to question 2.(e)		
2.(c) The purchaser's details are as follows:		
(i) Full name		
(ii) Address:		
(iii) Registration number (if already registered):		
2.(d) The purchaser intends at settlement to use the property as a principal place of residence by the purchaser or by a person associated with the purchaser under section 2A(1)(c) of the GST Act (connected by blood relationship, marriage, civil union, de facto relationship or adoption).		Yes/No
<b>OR</b> The purchaser intends at settlement to use part of the property (and no other part) as a principal place of residence by the purchaser or by a person associated with the purchaser under section 2A(1)(c) of the GST Act. That part is: (e.g. "the main farmhouse" or "the apartment above the shop".)		Yes/No
2.(e) The purchaser intends to direct the vendor to transfer title to the property to another party ("nominee").		
If the answer to question 2(e) is "Yes", then please continue. Otherwise, there is no need to complete this Schedule any further.		
<b>Section 3 Nominee</b>		
3.(a) The nominee is registered under the GST Act and/or is expected by the purchaser to be so registered at settlement.		
3.(b) The purchaser expects the nominee at settlement to use the property for making taxable supplies.		
If the answer to either or both of questions 3.(a) and 3.(b) is "No", there is no need to complete this Schedule any further.		
3.(c) The nominee's details (if known to the purchaser) are as follows:		
(i) Full name:		
(ii) Address:		
(iii) Registration number (if already registered):		
3.(d) The purchaser expects the nominee to intend at settlement to use the property as a principal place of residence by the nominee or by a person associated with the nominee under section 2A(1)(c) of the GST Act (connected by blood relationship, marriage, civil union, de facto relationship or adoption).		Yes/No
<b>OR</b> The purchaser expects the nominee to intend at settlement to use part of the property (and no other part) as a principal place of residence by the nominee or by a person associated with the nominee under section 2A(1)(c) of the GST Act. That part is: (e.g. "the main farmhouse" or "the apartment above the shop".)		Yes/No

Note that this statement says Schedule 1 **must** be completed if the vendor has stated on the front page that they are registered for GST.

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## Implications when the GST status of the buyer changes between signing the agreement and settlement

Sometimes whether the buyer will be GST-registered is not known at the time of signing the Sale and Purchase agreement. A buyer may

- sign the agreement in the name of a non-registered GST entity and plan to nominate a GST-registered entity before settlement, or
- sign the agreement in the name of a GST-registered entity and plan to nominate a non-registered GST entity before settlement, or
- nominate another party to complete the purchase.

Consequently, a vendor cannot always be absolutely certain whether the ultimate buyer of the property will be registered for GST or not. The sale and purchase agreement includes mechanisms to amend the GST information before settlement.

Often it is assumed that GST is 'not applicable (to the party)' or 'zero-rated'. However, this may not be the case.

Always advise parties to seek technical advice regarding their GST status if there is any doubt regarding the GST treatment of the transaction, irrespective of their experience in buying and selling property.

If the buyer is dependent on a certain GST status at settlement, Clause 14.1 of the Sale and Purchase agreement warrants that the vendor's GST status in relation to the transaction is correct at the date of the agreement and will remain correct at settlement.

Under Clause 14.8, if the particulars of the purchase change between the date of the agreement and the date of settlement, meaning the GST treatment of the sale is no longer zero-rated, the purchase price will be altered to reflect this.

## Clauses related to GST

Further detail regarding GST is included in the clauses in the sale and purchase agreement.

### *Clause 13 - Goods and services tax*

Clause 13 outlines the requirements for buyers and vendors to pay GST, as indicated on the front page of the agreement. If the buyer is required to pay GST but has not done so by the settlement date (or another specified date), the buyer must pay the vendor interest along with any default sum of GST (Clause 13.1(3)).

### *Clause 14 - Zero-rating*

Clause 14.1 warrants that the GST statement on the front page, and any particulars stated by the vendor in Schedule 1, regarding the vendor's GST registration status in relation to the transaction, are correct at the date of the agreement and will remain correct at settlement. Clause 14.2 also warrants that the buyer's details relating to GST in Schedule 1 are correct at the date of the agreement. The remaining sub-clauses (14.3 to 14.7) clarify the circumstances under which GST must be paid and requirements for making GST payments.

Clause 14.5 (1) states that if any particulars stated by the purchaser in Schedule 1 are incomplete or alter between the date of the agreement and settlement, the purchaser must notify the vendor of the particulars which have not been completed and the altered particulars **as soon as practicable before settlement**.

Clause 14.8 states that if the particulars on the front page and in Schedule 1 are such that GST is chargeable at 0%, but the particulars stated by the purchaser alter between the date of the agreement and settlement such that GST no longer becomes chargeable on the supply at 0%

- the purchase price shall be plus GST (if any), even if it has been expressed as being inclusive of GST (if any) on the front page of the agreement, and
- if the vendor has already had to account to the IRD for the GST which is payable in respect of the supply under the agreement (and did so on the basis that GST would be chargeable at 0%), the purchaser shall pay GST or any default GST to the vendor immediately upon demand served on the purchaser by the vendor. (If the GST or default GST is not paid to the vendor, the purchaser is required to pay the vendor interest at the interest rate for late settlement on the amount unpaid from the date of the vendor's demand until payment.)

### *Clause 15 - Supply of a going concern*

Following on from the GST provisions, clause 15 relates to the supply of a taxable activity (going concern), where both vendor and buyer are GST registered at the time of supply. For example, if a leased commercial property is being sold, the property is considered as being zero rated for GST, and the GST will be charged at zero per cent. In other words, no GST will be payable by either party. The criteria for a sale to be of a 'going concern' is outlined earlier in this guide. If a sale meets these criteria, it is **zero-rated** (i.e. there is no GST content).

Read the following case study and answer the questions that follow.

(**Note:** Fictional names have been used for the purpose of making the case easier to follow.)

## Case study 1

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A case against two salesperson licensees from the same agency, Sarah and Angela, was taken to a Complaints Assessment Committee. The case related to incorrect recording of the GST position on the listing and sale and purchase agreements for a property ("the Property").

The Complainants were the purchasers.

(Note: There were several other issues also raised in the complaint. For the purposes of this guide we will just focus on the complaint related to the GST treatment in the sale of the property.)

The case is summarised below.

### The Background

Sarah completed a listing agreement for the vendor. She addressed the issue of GST during the listing of the Property and had a discussion with the vendor about going to see his accountant to resolve the issue. Sarah ticked "GST inc" on the front page of the listing agreement document but inserted "plus GST?" above by hand on the listing agreement, so that if someone purchased the property who was not GST registered then GST would be added.

Sarah was unsure of the GST status of the Property at this stage. The Committee found that she allowed the listing to progress to marketing stage without being certain that what was entered onto the listing agreement was in fact correct. This left confusion for other licensees who might obtain an offer to present on the Property and meant that there was uncertainty for the vendors as to the GST outcome of any sale.

The Complainants became interested in the property. Sarah states that she told the Complainants that the property was plus GST and they informed her that they were GST registered.

Angela became involved in the potential sale as Sarah was due to go on leave. Angela was asked to assist the Complainants to make an offer. The Complainants came to Angela's office and said the offer would be GST inclusive. Angela told the Committee that before the offer was presented, she rang both her accountant and solicitor to check the GST implications if both parties were registered and was told that the transaction would be zero rated. The vendors countersigned and said the offer needed to be "plus GST". The vendors also said they would not take any less than the amount of their counteroffer.

The Committee stated that when Angela became involved in the process, due to Sarah being away on leave, the GST should have been resolved immediately to everyone's satisfaction. Angela admits that she should have circled "GST if any" on the contract. The evidence from the vendor is that when he received the Complainants' offer and decided to make a counteroffer, he said to Angela "remember it is plus GST" to which she responded "yeah, yeah I'll fill that part of the form out later". This did not happen, and it was only when the agreement went to the vendor's solicitor (during the due diligence period) that it was picked up that the GST had not been represented correctly. The contract was varied by correspondence between solicitors for the parties.

Angela told the Committee that in hindsight she should have circled "GST if any" on the contract, which was totally her mistake, and that she understood this had caused stress to the vendors for

which they had been compensated. (The two licensees contributed towards the vendor's solicitor costs in the form of a reduced commission). The Property was zero rated so neither party had had to pay any GST.

The Complainants submitted that the GST issue, which was rectified by their solicitor, could have had a huge financial impact on all. The Complainants say the GST issue caused delays whilst the solicitors sorted out the problem and this in turn led to an increase in legal costs to them. The Complainants (to the date of the decision on orders) had not had a breakdown from their solicitor of the extra costs to them in relation to the GST issue.

### **The Decision**

The Committee found that the licensees failed to correctly record the GST position on the listing agreement and then the sale and purchase agreement. This was a breach of Rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. The Committee made a finding of unsatisfactory conduct against the Licensees and ordered them to pay a fine of \$1,000 each to the Authority.

(Under Rule 5.1 'A licensee must exercise skill, care, competence and diligence at all times when carrying out real estate agency work.')

Note: The case refers to a previous edition of the Sale and Purchase Agreement, and references to the GST statements on the contract refer to the statements on the front page of the Agreement form at that time.

### **Complaint number: C06271**

Date: 12 October 2015

You can read about this complaint and decision in the REA decisions database which you can find at the top of the homepage at [rea.govt.nz](http://rea.govt.nz)



## **Questions**

3. What should Sarah have done before the listing agreement was finalised and marketing commenced?

4. What should Angela have done when she became involved in the process?

5. What were the implications for the vendors and purchasers of the error in entering the GST status on the Sale and Purchase Agreement?

## **GST requirements and the Rules**

Several of the rules from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 are particularly relevant to references to the GST treatment of a real estate transaction:

- Rule 9.7 requires licensees to inform a potential customer (buyer) of their rights in relation to independent legal and technical advice. It also requires licensees to give them sufficient time to seek independent advice if they choose to.

In terms of GST requirements, it is important that the parties are given a reasonable opportunity to seek legal and technical advice such as accountancy and taxation advice.

- Rule 9.9 requires licensees to ensure **all material particulars are included** and attached to a sale and purchase agreement.

Material particulars mean **all information** relating to the agreement, including all required details and terms, additional pages containing further clauses, and any other relevant information. The material particulars must be included/attached **before** the signatories are asked to sign the agreement.

In terms of GST requirements, the licensee must ensure that the 'material particulars' relating to GST are entered on the agreement.

- Rule 6.2 states that the licensee has an obligation to act in good faith towards all parties engaged in the transaction and to treat them fairly. These are the minimum standards when dealing with the parties.

In relation to GST requirements, the licensee should ensure that they act in good faith and deal fairly with all parties. For example, if they become aware of information regarding the GST treatment of the transaction, they should ensure that all parties are made aware of any implications in a timely manner.

## Communicating the price of the property

It is very important that the price of the property is clear to you as the licensee and that it is clearly conveyed to other parties. At the time the sale and purchase agreement is drawn up and negotiated it is critical that the parties are clear on whether the sale is inclusive of GST or exclusive of GST and, if GST is payable, that they understand the amount that will be paid.

The advertising for the property must make it clear if it is being sold 'plus GST'.

Read the following case study and answer the questions that follow.

## Case study 2

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A case against a salesperson licensee, "the Licensee", was taken to a Complaints Assessment Committee. The case related to the GST treatment on the sale of a property ("the Property").

The Complainant is a tax agent (accountant) who made the complaint on behalf of the purchaser. The purchaser is a company, who bought the property at auction.

The case is summarised below.

### The Background

The complaint is that the licensee misled the directors of the company who purchased the property by advising them the vendor was not GST registered when the vendor was GST registered. No specific remedy was requested by the Complainant. However, a letter from the Complainant's lawyer was included which advised that the purchaser would be taking proceedings to recover the amount of the company's loss.

The licensee told the committee the following.

- At the time he listed the Property he asked the vendor if the vendor was registered for GST and the vendor advised that he was not registered for GST.
- The vendor, who was known to him, was generally known as [Name X] and that was on the title to the property. However, when he completed the listing form the vendor told him his legal name was 'Name Y'.
- He was not concerned about the vendor's statement that the vendor was not GST registered because the vendor was an individual person and the Property was in his name. He did acknowledge knowing that the vendor was a developer and that it is common for developers to be registered for GST.
- During a viewing of the property the directors of the purchasing company asked about the GST status of the vendor. The licensee said that he advised "the vendor had declared he was not registered for this transaction and the property was being sold inclusive of GST".
- After sending the conditions of sale to the vendor's solicitor he discussed the Sale and Purchase Agreement with the vendor's solicitor and asked him to confirm the vendor's GST status. When the vendor's solicitor confirmed the conditions, the solicitor did not mention that the GST declaration on the front of the Sale and Purchase Agreement (that the vendor was not registered for GST) was incorrect.
- Prior to the auction commencing the auctioneer stated the Property was being sold inclusive of GST because the vendor had declared he was not registered for GST.

The Sale and Purchase Agreement recorded that the vendor was not registered for GST and specified the purchase price to be inclusive of GST.

The Complainant told the committee the following.

- The directors proceeded on the basis that because the vendor was not registered for GST they could make a second-hand goods claim for GST on the purchase price of the property.

- The purchaser was going to use the GST refund to develop the property.
- Subsequent to settling its purchase of the property the client made a secondhand goods claim for GST on the purchase price. The claim was refused by IRD on the basis that the transaction was zero rated because the vendor was registered for GST.
- If the purchaser (the company) had known the vendor was registered for GST it would not have purchased the property.
- The purchaser paid \$141,521.74 more for the property than it should have because it was unable to claim a refund of the GST. This was a financial loss.

(In his submission for the decision on orders, the Complainant also stated that the loss would be increased when they sold the Property as the purchaser would have to return GST on the sale price.)

### **The Committee's findings**

The committee found that on the evidence they had

- it was a proven fact that the vendor was GST registered
- it was a proven fact that the Licensee misrepresented the GST registration status of the vendor.

In terms of misleading the purchaser as to the GST registration status of the vendor the committee made the following findings.

- The Committee is not satisfied the Licensee specifically addressed the GST registration status of the vendor with the vendor's lawyer. The Licensee inferred that because the lawyer did not raise an issue about the GST status the lawyer was verifying that the vendor was not GST registered.
- In this case the issue is whether sending a draft Sale and Purchase Agreement (the conditions of sale) to the vendor's lawyer where the draft Sale and Purchase Agreement records the vendor is not registered for GST, and where the lawyer does not indicate a problem, is sufficient verification of the vendor supplied information.
- There is a long line of CAC decisions and Real Estate Disciplinary Tribunal (READT) decisions dealing with how Licensees should treat vendor supplied information. The common theme of these decisions is that a licensee should either verify vendor supplied information or caveat it if it cannot be verified.
- There were several red flags in the circumstances of this transaction related to the GST status. One red flag is that the purchaser was a company. The other is that the directors of the purchaser specifically asked about the GST registration status of the vendor.
- There were several other red flags associated with this transaction that should have put the Licensee on notice to be more cautious about accepting a statement from the vendor that he was not GST registered. Those red flags being:
  - He knew the vendor was a developer
  - The vendor had two different names
  - The vendor had informed the Licensee that he was a bankrupt
  - There was a caveat by the Commissioner of Inland Revenue on the title to the Property.
- The Committee infers that the Licensee did not ask and did not know why the Commissioner of Inland Revenue had registered a caveat against the Property. Taken with



the other red flags referred to, the Licensee should have enquired as to the reason for the caveat and if necessary, taken steps to verify the information provided. It is possible such further enquiries would have disclosed that the vendor was GST registered.

- It is a failure to exercise adequate skill care and competence for the Licensee to have continued with this transaction without properly verifying the legal identity of a vendor who operated under two different names (Rule 5.1).

(In the decision on orders the Committee stated that the prudent step for the Licensee would have been to require to sight the vendor's passport and to verify his identity.)

- Because the purchaser had specifically asked about the vendor's GST registration status and was a company the Licensee should have enquired further. He should have ascertained why the vendor's GST registration status was important to the purchasers, what plans they had for the property, and what the purchasers' GST registration status was. He would have been on notice to proceed with greater caution and to address more carefully how the vendor's GST registration should be verified.

(In the decision on orders the Committee stated that with the information above the Licensee could have avoided this complaint by advising the purchasers to seek specialist accounting or legal advice about the GST status of the transaction.)

- In the circumstances of this case it was not sufficient for the Licensee to take an implication from the fact the vendor's lawyer did not raise an issue about the GST registration of the vendor as sufficient confirmation of the information provided to him by the vendor.
- The appropriate course of action should have been for the Licensee to caveat the vendor supplied information that the vendor was not GST registered by saying that the information had not been verified – and for the auctioneer to do the same.
- The Licensee has not deliberately or recklessly misrepresented the vendor's GST registration status. However, the misrepresentation might have been avoided if the Licensee had acted with more care or if the purchasers had been put on notice to exercise more care themselves because the GST registration status of the vendor had not been independently verified.

The Committee found that the Licensee had misrepresented the vendor's GST registration status to the purchaser of the Property. The Licensee represented the vendor not to be GST registered when the vendor was GST registered.

The Committee made two findings of unsatisfactory conduct against the Licensee.

- The Licensee failed to caveat or verify the vendor supplied information about the vendor's GST registration status.
- The Licensee failed to properly verify the legal identity of a vendor who was operating under two different names.

The committee found that the Licensee had contravened Rule 5.1 and Rule 6.4 in that he had failed to exercise adequate skill care and competence (Rule 5.1) and misled the purchasers (Rule 6.4).

(Note: We have covered the Committee's comments related to the GST registration status of the vendor. The Committee made further comments regarding the red flags raised in terms of the risk of facilitating criminal offending. As this guide is on GST treatment of property sales, we have focused on this aspect of the case.)

### **Relief / rectification**

The Committee felt that in the circumstances of this case the Licensee's representation that the vendor was GST registered has not caused a direct financial loss to the purchasers. They said there was no evidence that the purchasers paid more for the property than it was worth.

The representation has caused the purchasers to buy the Property when they would not have if they had known the vendor was GST registered.

The Committee said that even if the purchasers had suffered a loss then that loss was likely to be outside of the limited power of the Committee to order relief.

The Licensee did not deliberately mislead the Complainant's clients about the GST registration status of the vendor. His fault was in not verifying and/or caveating the vendor supplied information.

The Licensee was censured and fined \$1,000.00.

### **Complaint number: C23848**

Date: 28 September 2018

You can read about this complaint and decision in the REA decisions database which you can find at the top of the homepage at [rea.govt.nz](http://rea.govt.nz)



## **Questions**

6. Why did the Committee decide that the licensee had breached rule 6.4?

7. What was the Committee's reason for finding that the licensee's conduct was unsatisfactory regarding the vendor's GST registration status?

8. What were the implications for the purchaser of the incorrect vendor GST status being entered on the Sale and Purchase Agreement, in the purchasers' view ?

9. Give **two** actions the licensee could have taken that may have avoided the issues which arose.

## Implications for Lifestyle and Rural Sales

Compulsory zero rating (CZR) **must be applied** to all sales of land where both parties are GST registered. Care must be taken when dealing with the sale of lifestyle properties. If the owner is registered for GST, they have the option to charge GST on the sale or to sell inclusive of GST.

If the owner sold the property inclusive of GST, they would have to account for the GST in their next GST return. The situation could be reversed where the buyer is GST registered and the vendor is not. In this situation the vendor would not have to account for any GST as they are not registered.

If the vendor is not GST registered, then it will be sold 'inclusive of GST'. However, if the buyer qualifies, they can still claim it back. Note that IRD could refuse a refund if they perceive the property to be a non-qualifying activity. IRD would look at this on a case by case basis.

### How GST is calculated on rural sales

If rural land is sold, and it attracts GST, the GST will probably not be calculated on the complete sale price. Most rural land includes a dwelling and domestic outbuilding, gardens, driveways and so on. This part of the property is called the curtilage. GST is not charged on the curtilage because there is no business activity taking place on that part of the land.

The curtilage is usually considered to be the dwelling and any domestic outbuildings, and the 'one acre' (4048m<sup>2</sup>) that the dwelling sits on. With lifestyle blocks (and small farms) in most cases this will account for a high percentage of the value of the entire property. This means a high percentage of the sale price is exempt from GST.

The 'one acre' that surrounds the dwelling is the most valuable acre of the property, because under council regulations it can have a dwelling built there. Usually, no second dwelling is allowed on the land, so the other acres are less valuable. The value of the 'one acre' would equate to the value of a small bare block that is sold for someone to build a home, or the value of a new section in a local subdivision.

As an example, a 20-acre lifestyle block is sold where the vendor is breeding exotic sheep and selling them at a profit. This activity attracts GST, and the vendor requires the land for the activity, so GST is payable on the land. If the property sells for \$1,000,000, GST will be charged on the sale price less the value of the curtilage. The curtilage is the value of the house (let's say \$450,000), the value of the domestic outbuildings and other assets like a swimming pool (let's say \$50,000) and the value of the one acre that surrounds the house (let's say \$350,000). The curtilage is therefore valued at \$850,000 and the balance of the land at \$150,000. GST is therefore charged on just \$150,000 of the sale price, even though the sale price was \$1,000,000.

GST will be much more significant on a large farm, where a lot of the value is in the land. If a dairy farm is sold for \$2,500,000 with curtilage valued at \$900,000, GST will be charged on \$1,600,000. \$1,600,000 is the difference between the sale price and the value of the curtilage.

## Other tax considerations

### Property taxation provisions under the Land Transfer Act 2017

Sections 78 and 79 of the Land Transfer Act 2017 enforce the income tax obligations of those who buy and sell real estate.

Under Section 78 transferors and transferees must provide a tax statement that states that either the transfer is non-notifiable or that it provides tax information. Section 79 outlines what the tax statement must contain. This legislation applies to all land and interests in land entered into from 1 October 2015.

Every person who enters into a sale and purchase agreement for any land in New Zealand is required to provide a New Zealand IRD number and complete a Tax Statement for their lawyer. This information is required prior to settlement and possession.

'Offshore persons' who enter into a sale and purchase agreement for any land in New Zealand are also required to provide a New Zealand IRD number. Applicants are required to open a New Zealand bank account before applying for a New Zealand IRD number.

Where an entity is involved (for example, a trust, charitable trust, company or partnership) an IRD number is required for the entity alone, not the individuals (such as trustees, company directors or partners).

A completed land transfer tax statement is required for all contracts entered into when transferring freehold, leasehold, life estates, stratum estates, licences to occupy and other specified estates in land as defined in the Land Transfer Act 2017. A tax statement isn't needed if the transfer relates to Māori land as defined by Te Ture Whenua Māori Act; and/or is part of a Treaty of Waitangi settlement process.

For more information, see the Land Information New Zealand website:

<https://www.linz.govt.nz/land/land-registration/prepare-and-submit-your-dealing/land-transfer-tax-statements>

A link to the Land Transfer Tax Statement 2019 form is on this web page under the heading 'Changes are coming' and sub-heading 'Attachments'.

### Bright-line test

The Taxation (Bright-line Test for Residential Land) Act 2015 applies to agreements to purchase residential land entered into from 1 October 2015.

The Brightline Test applies to the sale of any residential property a consumer has bought on or after 1 October 2015:

- If the consumer bought a residential property from 1 October 2015 to 28 March 2018 inclusive, they are required to pay income tax on the gains from the sale of residential land if it is sold within 2 years unless exemptions apply.
- If the consumer bought a residential property on or after 29 March 2018, they are required to pay income tax on the gains from the sale of residential land if it is sold within 5 years unless exemptions apply.

Whenever a person buys a property intending to resell it, they need to pay tax on any profit they make when they sell that property.

There are some exemptions to the Brightline test. Exemptions include:

- if the property was the main home of a New Zealand resident
- if the property was inherited
- if the property was transferred under a relationship property agreement.

All existing property rules apply so even if the bright-line rule doesn't apply in a situation, it doesn't necessarily mean the consumer will not need to pay tax on their property profits.

Generally, the bright-line period starts on the date the property title is officially transferred to the person, which is the date the property transfer is registered with Land Information New Zealand (LINZ). In other words, the time owned is calculated from the settlement date when the property is purchased and ends on the date the person enters into an agreement to sell the property.

Different dates apply if the land is sold before the purchase was registered with LINZ (that is, a profit is made before the sale settles) or if the land was bought because of a subdivision of property (for example, as a sale 'off the plans').

Note: The Bright-line rule only applies to residential property.

### **Bright-line test for lifestyle properties**

Lifestyle blocks sold within the bright-line period will be excluded from the bright-line test

- when the lifestyle block is farmland, or
- the lifestyle block is residential land, and
  - is the vendor's main home, and
  - more than 50% of the area of the lifestyle block has been used for the vendor's home, curtilage and residential purposes, and
  - the lifestyle block has been used in that manner for more than 50% of the time the vendor has owned it.

### **Implications for licensees**

- Licensees must advise that the non-provision of tax information may delay settlement.
- Licensees must advise that possible exemptions and other issues related to property taxation provisions must be discussed with a lawyer or conveyancer.
- Licensees must ensure clients and customers are aware that they need to liaise with their lawyers or conveyancers well before settlement date and allow clients and customers a reasonable time to obtain advice before signing a sale and purchase agreement.
- Licensees should also be aware that clients and customers need to speak to their lawyer or conveyancer about the following:
  - A tax statement must be provided for **all** agreements for sale and purchase before the property transfer can be registered

- An IRD number will need to be provided for the tax statement. There will be an exemption for a New Zealand resident's main home, but this exemption will **not** apply for offshore persons or trusts (unless the property was used as the main home of the principal settlor and the main home of one of the beneficiaries of the trust).
- IRD numbers can **only** be given to holders of a New Zealand bank account.
- Overseas tax residents will also need to supply their foreign tax identification number (TIN) and their country code from their home jurisdiction.
- Advice from a lawyer or conveyancer must be sought to help with exemptions or to deal with situations where people have more than one home.

Read the scenario and answer the question that follows.

## Scenario

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John and Janine bought 10 York Street on 20 November 2015. They thought it would be a great property to live in when they retire in 2019, but in the meantime, they rented it out. Their friends, Frank and Fiona, bought the neighbouring property at 12 York Street a few months later, on 1 January 2016, and moved in a few days later.

When house prices began to rise in 2017 both couples decided to sell so they could retire early and travel with the profit they would make on the properties. An agreement for sale and purchase for 10 York Street was entered into on 28 July 2017 and the property settled shortly afterwards. 12 York Street took longer to sell but an agreement for sale and purchase was entered into on 25 December 2017, and this property also settled soon afterwards.

Michael and Mark want to join the other two couples on their travels, so they sold their investment property at 31 Hull Street, which they bought on 15 March 2015. They entered into an agreement for sale and purchase on 1 April 2018 with the purchasers being Amy and Aaron. Amy and Aaron plan to use this property as a rental for 4 years and then sell it to Amy's brother.



## Questions

10. Under the bright line rule, which of the couples, if any, will be liable to pay tax on the profit they made on the property they bought? Why?



## Putting my learning into practice

Describe **at least three** key learnings you will take away from this 'GST' topic.

Describe **at least one** change you will make to the way you work as a result of this topic.