



ICCA NEWS

Newsletter Date

Special points of interest:

- Buying and selling residential properties
- Relevant rulings and determinations
- Impacted practice statements
- Decision outcome

Company Details

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Property Developers—Buying and Selling Residential Properties

The ATO on Tuesday 21 February 2011 released its Decision Impact Statement on the Sunchen Pty Ltd Decision.

The Cases Conclusion—A residential property continues to be input taxed (i.e. no GST is attributable to the sale of a residential property) even though the property is sold with a development approval or the sale is conditional upon the obtaining of a development approval, on the basis that the property meets the requirements of a Sec 40-65: *A sale of *real property is input taxed, but only to the extent that the property is residential premises to be used predominantly for residential accommodation... and is not commercial residential premises or new residential premises.*

The impact Statement is attached herein and is a very easy read. For further information please contact Noe Vicca.

(This Newsletter does not constitute legal advice)

DECISION IMPACT STATEMENT

Sunchen Pty Ltd v Commissioner of Taxation

Court Citation's

[2010] FCAFC 138
2010 ATC 20-229

Venue: Federal Court of Australia—Full Court

Venue Reference No: NSD 159 of 2010

Judge Name: Edmonds, Jessup and Gilmour JJ

Judgment Date: 8 December 2010

Appeals on Foot: No.

ADMINISTRATIVE TREATMENT (Implication on current Public Rulings and Determinations)

Relevant Rulings/ Determinations:

GSTR 2000/20

Impacted Practice Statements:

N/a

Subject References:

Goods and services tax (GST)

Meaning of 'residential premises'

Whether property was residential premises 'to be used predominately for residential accommodation'

Whether the test is to be determined by reference to the use to which the purchaser intends to put the property, or the characteristics of the property at the time of the supply.

Précis for the web page index:

Whether property purchased was residential premises 'to be used predominantly for residential accommodation' within the meaning of subsection 40-65 (1) of the A New Tax System (Goods and Services Tax) Act 1999, so that the supply of the property would be input taxed.

Decision Outcome:

Taxpayer's appeal dismissed





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Special points of interest:

- Brief summary of facts
- Issues decided by the court
- Tax office view of decision
- Administrative treatment

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Brief Summary of Facts

The taxpayer purchased a property located at 117 Bridge Street, Port Macquarie, pursuant to a contract for the Sale of land exchanged on 8 August 2006. The completion date was 20 September 2006.

At the time of settlement a single storey house with carport was located on the property and the property was being occupied by a tenant pursuant to a residential tenancy agreement. The contract provided that the sale of the taxpayer was subject to the existing tenancy. The tenancy continued until at least 29 November 2006.

The property was also the subject of a development approval allowing the construction of a five-storey residential building with strata sub-division. The benefit of the vendor's interest in the development approval was assigned to the taxpayer under the contract of sale. The taxpayer gave evidence that at the time of settlement the taxpayer intended to develop the property in accordance with that development approval.

Issues decided by the court

The Court held that the phrase 'to be used predominantly for residential accommodation' in subsection 40-65 (1) of the A New Tax System (Goods and Services Tax) Act 1999

is only concerned with the attributes of the property at the time it is supplied, and to what use those attributes or characteristics are suited. Given this, it was concluded that in determining whether a property is 'residential premises to be used predominantly for residential accommodation' the intention of the future owner is irrelevant. In so concluding the Court clarified that the approach adopted in the decision in Toyama Pty Ltd v Landmark Building Developments Pty Ltd [2006] NSWSC 83, which involved a prediction as to future use which could include consideration of subjective intention, is not correct.

In reaching its decision, the Court considered whether the use of 'intended to be occupied' in the definition of residential premises or the use of 'to be used' in subsection 40-65 (1) meant that the subjective intention of the purchaser was relevant. The Court concluded that 'intended to be occupied' and 'to be used' were, in the context, synonymous and both were used in the sense of suitable or apt and hence were directed at determining the characteristics of the property rather than the subjective intention of any party.

Tax Office view of Decision

The decision confirms the long-held ATO view that subsection 40-65(1) requires an objective assessment of the nature of the premises rather than a prediction of future use or consideration of the subjective intention of the future owner.

Administrative Treatment

As the decision confirms the ATO view, there will be no changes to ATO administrative practice as a result of the decision.

Implications on current Public Rulings & Determinations

Reference to the decision will be included in GSTR 2000/20 as part of the current review of that Ruling. No other implications for Public Rulings or Determinations have been identified.

Implications on Law Administration Practice Statements

None

