



GST on mortgagee sales - Edgewater update

“The Court of Appeal confirmed that mortgagees are personally liable for GST on mortgagee sales.”



Willy Sussman - Partner

Yesterday the Court of Appeal handed down its eagerly awaited decision in *Commissioner of Inland Revenue v Edgewater Motel Limited*.

As many readers will know, the High Court found that monies received from a mortgagee sale had to be paid to fixed charge holders ahead of GST payable to Inland Revenue.

The case was taken on appeal and a full bench of five judges has unanimously reversed the High Court’s decision.

The Court of Appeal confirmed that the selling mortgagee was “obliged to pay the GST charged on the supply of the land, in priority to any payment in respect of secured debts”.

In analysing the competing arguments, the Court of Appeal made the following observations:

- GST is a tax on supplies and there is no reason why a tax payable on a supply made in respect of a mortgagee sale could not be regarded as an “expense occasioned by the sale”. As such, it is payable in priority to amounts due to mortgagees in terms of section 104(1)(a) of the Land Transfer Act 1952 (“**the LTA**”).
- Section 104 deals with the application of the proceeds of a mortgagee sale of land. While section 104 does not specifically deal with taxes, this does not necessarily mean that they do not qualify as “expenses occasioned by the sale”.
- Section 104 is merely a general provision that gives priority to “expenses occasioned by the sale”. By imposing a tax on the mortgagee sale, the Goods and Services Tax Act 1985 (“**the GST Act**”) creates an “expense of the sale” that ranks ahead of the mortgage debt.
- There is no settled policy evident in section 104 that supports the view that a mortgage debt ought to have priority over a tax payable as a result of a mortgagee sale.
- The GST Act shifts the burden of the GST liability in a mortgagee sale from the mortgagor to the mortgagee.

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- There is no sound reason to depart from the plain language of section 17. The High Court decision was wrong in saying one needed to adopt a “strained” interpretation of section 17 in order to be consistent with section 104 of the LTA.

Some taxpayers may have not returned GST on mortgagee sales. Others may have paid the GST but objected to this (through filing a Notice of Proposed Adjustment).

These positions will obviously need to be reviewed in light of the Court of Appeal’s decision. It is not yet clear whether the Court of Appeal decision will itself be appealed to the Privy Council.

For further information about this newsletter, please contact:

AUCKLAND

Willy Sussman – willy.sussman@bellgully.com
Graeme Olding – graeme.olding@bellgully.com

WELLINGTON

Graeme Smail – graeme.smail@bellgully.com

Auckland

Royal & SunAlliance Centre, 48 Shortland Street
PO Box 4199, Auckland, New Zealand, DX CP20509, www.bellgully.com
Telephone 64 9 916 8800, Facsimile 64 9 916 8801

Wellington

HP Tower, 171 Featherston Street
PO Box 1291, Wellington, New Zealand, DX SX11164, www.bellgully.com
Telephone 64 4 473 7777, Facsimile 64 4 473 3845

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