GST risks for property and investment syndicates

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Many property and investment syndicates are described as joint ventures but do not actually qualify as joint ventures for tax or GST purposes because of the narrow scope of the definition of joint venture in the legislation.

For tax purposes, most of these 'joint venture' structures are in fact partnerships or, in cases where a nominee holds the syndicate property, may actually constitute a separate trust estate.

If the parties do not understand what sort of 'tax entity' they have created they may trigger unexpected tax and GST outcomes. These risks have been illustrated by two recent decisions.

In *Yacoub v Commissioner of Taxation*, Mr and Mrs Yacoub entered into a property development 'syndicate agreement' with a third party. The parties referred to their arrangement as a 'syndicate' and there was an express clause in the document that 'no partnership shall exist between the parties'.

The project was unsuccessful and the third party became insolvent as a result.

The syndicate was registered for GST purposes but incorrectly described as a limited partnership.

The Australian Tax Office (ATO) issued a GST assessment for approximately $610,000 representing input tax credits that the syndicate had incorrectly claimed.

Mr and Mrs Yacoub paid 50% of that assessment and argued that was the limit of their liability under the joint venture arrangement.

However, the court held that, notwithstanding the denial of partnership in the agreement, other terms of the document meant there was in fact a general law partnership and the result was that Mr and Mrs Yacoub, as partners, were 100% liable for the GST assessment.

The decision in *Wynnum Holdings No. 1 Pty Ltd v Commissioner of Taxation* is even more concerning.

That case involved a common syndicate structure where a group of investors formed a syndicate to develop a retirement village and established a company to hold the real estate as a nominee for the syndicate members.

The nominee entity made a claim for input tax credits in relation to the acquisition

and development costs of the retirement village but the ATO argued that the nominee could not claim input tax credits because the syndicate (and not the nominee) was carrying on the enterprise.

The Administrative Appeals Tribunal accepted the ATO arguments that the nominee was not carrying on an enterprise and therefore was not entitled to claim input tax credits. It was the syndicate that was carrying on the enterprise and the parties had failed to register the correct entity for GST purposes.

Implications for advisers

Both cases illustrate that advisers establishing syndicated investment structures need to be very clear about exactly what type of structure they have created and must ensure that the correct entity registers and accounts for GST.

Also, advisers who act for existing syndicates should check that the syndicate is correctly registered for GST.

If there is any doubt as to exactly what entity should be registered for GST, taxpayers should consider applying for a private ruling to avoid the prospect of missing out on input tax credits or incurring penalties because the incorrect entity is registered.