

SST 9 - Sales tax: retention of title or Romalpa clauses



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Taxation Ruling

Sales tax: retention of title or *Romalpa* clauses

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Chapter 1: What this Ruling is about

Introduction

- 1.1 Sales tax is a self-assessing tax. Essentially, this means that the responsibility for determining the extent of any liability for sales tax and for remitting any tax to the Australian Taxation Office (ATO) rests with the taxpayer, rather than being dependent on any assessment made by the Commissioner. To assist taxpayers to determine their sales tax liability, this Ruling sets out how the sales tax law applies where a retention of title clause (also known as a reservation of title clause and in this Ruling referred to as a *Romalpa*¹ clause) is included in a contract of sale of goods. The Ruling also provides a lower cost alternative method for accounting for sales tax in returns where goods are sold under contracts which include a *Romalpa* clause.

Date of effect

- 1.2 This Ruling confirms previous ATO advice and is effective immediately. It replaces any previous public or private Rulings to the extent that they are inconsistent with it.

When does a liability for sales tax arise?

- 1.3 The general rules covering liability for sales tax are set out in Division 1 of Part 3 of the *Sales Tax Assessment Act 1992* (STAA). Section 16 of the STAA outlines the general rules for taxing assessable dealings.²
- 1.4 Liability for sales tax arises at the time when an assessable dealing occurs as set out in Table 1 in Schedule 1 to the STAA. The time of dealing, as specified in column 4 of Table 1, depends upon the nature of the particular transaction and may be the time of sale, time of 'AOU',³ time of delivery, time of removal or time of local entry. In the case of an assessable dealing involving the sale of goods, the liability arises at the time of sale. However, the time of sale may be affected by the existence of an effective *Romalpa* clause in the contract of sale.

¹. So named after the case of *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd* [1976] 2 All ER 552.

². An assessable dealing is defined in section 5 of the STAA to mean any dealing covered by Table 1 in Schedule 1 to that Act.

³. 'AOU' means application to own use and is defined in section 5 of the STAA.

- 1.5 A *Romalpa* clause is a term or condition found in certain contracts of sale of goods.⁴ In their simplest form, such clauses⁵ are designed to ensure that ownership of the goods is retained by the seller until the buyer has paid the contract price in full. As *Romalpa* clauses may affect the time of a sale of goods, it follows that they may also affect the timing of liability for payment of sales tax.
- 1.6 A mere statement in a sales invoice that 'property in the goods is retained until payment is received in full' may not, of itself, be sufficient to incorporate that condition into the contract for sale⁶ and may not, therefore, be effective in deferring the time of sale and liability for payment of sales tax.

Chapter 2: When does a sale take place?

Sales tax legislation

- 2.1 The term 'sale' is defined in section 5 of the STAA as including barter or exchange. Because the definition is inclusive in nature, a sale is not limited to barter or exchange transactions. To ensure that the purposes of the STAA are promoted,⁷ the word 'sale' also assumes its legal meaning.⁸

Sale of goods legislation

- 2.2 The law relating to contracts for sale of goods has been codified in basically identical form throughout the various States and Territories of the Commonwealth.⁹ A contract of sale is dealt with in section 6 of the *Goods Act 1958 (Vic)* (the Goods Act).¹⁰ A contract of sale includes an agreement to sell as well as a sale. Subsection 6(3) states that where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale. Where the

⁴ A 'contract of sale' is defined in subsection 3(1) of the *Goods Act 1958 (Vic)* to include an agreement to sell as well as a sale (see Chapter 2 of this Ruling). For equivalent legislation in other jurisdictions, refer to the Comparative Table of Sale of Goods Legislation in Appendix A of this Ruling.

⁵ Various types of *Romalpa* clauses are listed in Chapter 3 of this Ruling. The express aim of each *Romalpa* clause varies upon a common theme, that being to protect the interests of a seller of goods, where the goods are sold on credit.

⁶ See, for example, the summary at page 63 in G C Lindsay, 'Contract', (3rd ed, Law Book Co, 1992).

⁷ As required by section 15AA of the *Acts Interpretation Act 1901*.

⁸ Where words have been used which have acquired a legal meaning it will be taken, *prima facie*, that the legislature has intended to use them with that meaning unless a contrary intention appears from the context: refer *The Attorney-General for the State of New South Wales v. The Brewery Employees' Union of New South Wales* (1908) 6 CLR 469 per O'Connor J at 531.

⁹ For the purposes of this Ruling, a reference to the Goods Act should be read as a reference to the corresponding sale of goods legislation of the various States and Territories of the Commonwealth as set out in Appendix A.

¹⁰ The Goods Act does not cover all aspects of contracts for the sale of goods. Subsection 4(2) saves those principles of contract law that are consistent with its express provisions.

transfer of the property in the goods is to take place at a future time or subject to some condition being fulfilled, the contract is called an agreement to sell.

Transfer of property between seller and buyer

2.3 As the transfer of property¹¹ is the cornerstone of a sale, it is necessary to determine when property passes in order to determine the time of a sale. Section 21 of the Goods Act deals with the sale of unascertained goods¹² and states that property in such goods is not transferred to the buyer unless and until the goods are ascertained. Section 22 states that where there is a contract for the sale of specific¹³ or ascertained goods,¹⁴ the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of determining the intention of the parties, subsection 22(2) of the Goods Act requires that regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

2.4 Where no intention can be determined from the above factors, section 23 of the Goods Act sets out five rules for determining the intention of the parties as to the time when the property in the goods is to pass to the buyer.¹⁵ The first four rules apply to contracts for the sale of specific or ascertained goods and the fifth rule applies to contracts for the sale of unascertained or future goods by description. In the absence of a contractual stipulation (such as a *Romalpa* clause), most ordinary contracts for sale of goods will come within the ambit of Rule 1, which states:

'Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.'

2.5 Subsection 24(1) of the Goods Act allows a seller of specific goods to reserve the right of the disposal of the goods until certain conditions are fulfilled. In such a case, property in the goods does not pass to the buyer until the conditions are fulfilled, notwithstanding the delivery of the goods to the buyer. A *Romalpa* clause is an example of the conditions referred to in subsection 24(1).

¹¹ Property is defined in subsection 3(1) of the Goods Act to mean the general property in the goods and not merely a special property.

¹² Unascertained goods are goods not identified or agreed upon at the time of making the contract, such as an agreement to purchase a new suit from a tailor of a certain type that is yet to be made: refer K C T Sutton, Sales and Consumer Law in Australia and New Zealand, (Sydney: Law Book Co, 1995) 54.

¹³ Specific goods are goods that are identified and agreed upon at the time the contract is made, e.g., A agrees to sell his or her car to B: refer Sutton, *op. cit.* 445.

¹⁴ Ascertained goods are specific and can be identified as existing goods that form the subject of the contract: refer Sutton, *op. cit.* 445.

¹⁵ Sections 41 and 42 of the Goods Act may be relevant in determining when a sale is concluded.

Distinction between property and title

- 2.6 While it has been suggested that the terms *title* and *property* are distinguishable,¹⁶ for the purpose of this Ruling, the words *title* and *property* are treated as being interchangeable.¹⁷ Consequently, all *Romalpa* clauses that purport to reserve title, ownership or property in goods until the seller has been paid are treated the same for sales tax purposes.

Chapter 3: Sales tax implications of a *Romalpa* clause

Purpose of a *Romalpa* clause

- 3.1 The purpose of a *Romalpa* clause is to protect the seller in the event that the buyer fails to pay for the goods at the agreed time or is unable to pay the contract price in full due to insolvency. In order to achieve this, a *Romalpa* clause relies on two basic mechanisms.¹⁸ Firstly, the seller seeks to reserve property¹⁹ in the goods until payment is received. Often, an attempt is also made to create a fiduciary relationship between the seller and the buyer in relation to the goods. The purpose of reserving property and creating a fiduciary relationship is to enable the seller to rely on the equitable doctrine of tracing in the event of the buyer becoming insolvent. Secondly, a *Romalpa* clause often seeks to create proprietary rights for the seller over assets into which the goods might be transformed or with which they might be mixed.

Types of *Romalpa* clause

- 3.2 There are several types of *Romalpa* clause. All have a common theme - to protect the interests of the vendor where goods are sold on credit. The more common variations can be categorised²⁰ as:

¹⁶ Refer to P S Atiyah, *The Sale of Goods*, (6th ed, London, Pitman, 1980).

¹⁷ It has been suggested that the words 'property' and 'title' are interchangeable for the purposes of the Goods Act, whilst acknowledging the focal nature of the concept of property in the legislation: refer B Collier, *Romalpa Clauses: Reservation of Title in Sale of Goods Transactions*, (Melbourne: Law Book Co, 1989) 43.

¹⁸ S Gageler, 'Retention of Title Clauses', (July 1989) *Jnl of Contract Law* 34.

¹⁹ A discussion of the meaning of 'property' is in Chapter 2 of this Ruling.

²⁰ For a categorisation of the various types of *Romalpa* clauses refer to J Parris, *Retention Of Title On The Sale Of Goods*, (London: Granada, 1982) 23-32.

- **The simple *Romalpa* clause**

Here the clause merely provides that the buyer shall not become the owner of the goods until the seller has been paid.

- **The current account *Romalpa* clause**

This clause stipulates that property is not to pass until all other goods sold by the seller to the buyer have been paid for in full.

- **The continuing *Romalpa* clause**

The intention of this clause is to extend the *Romalpa* clause from the buyer to any purchaser from that buyer and provide that such later purchasers shall not get ownership until the purchase price has been paid by the original buyer.

- **The proceeds of sale *Romalpa* clause**

This clause authorises the buyer to resell the goods but provides that the proceeds of sale shall be held by the original buyer as an agent or trustee for the seller until the price owed by the buyer has been paid in full. It is supplemented frequently by the provision that the buyers' rights against the sub-purchaser shall be held in trust for the seller and/or shall be assigned by the buyer to the seller on demand.

- **The aggregation *Romalpa* clause**

The purpose of this clause is to permit the buyer to use the goods to make other products from them or to incorporate the goods into composite products. It purports to vest the ownership of the resulting composite products in the seller to the exclusion of all other suppliers, or as an owner of the products in common with the buyer and all other parties who have reserved similar rights in proportion to the value of the goods supplied by them respectively.

Effect of a *Romalpa* clause on the time of sale

- 3.3 The ability of a seller to retain title beyond delivery to the buyer is governed by the intention of the parties.²¹ The intention of the parties is determined not only from the terms of the contract, but also by the conduct of the parties and the circumstances of the case.²² While subsection 24(1) of the Goods Act recognises that sellers can reserve the right of disposal of goods after delivery to the buyer, the effectiveness of a *Romalpa* clause in reserving ownership depends on its consistency with the rest of the contract of sale, read as a whole.

²¹ Section 22(1) Goods Act.

²² Section 22(2) Goods Act.

- 3.4 In support of a substance over form approach, Lord Herschell in *Alexander Knox McEntire and John Arthur Maconchy v. Crossley Brothers Limited* [1895] AC 457 stated at 462-463:

'... the agreement must be regarded as a whole - its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is.'

- 3.5 An example of a *Romalpa* clause that was held to run contrary to the substance and reality of the agreement is found in *The South Australian Insurance Company v. William Beavis Randell and Samuel Randell* [1869] 3 LR 101. In this case, the Privy Council held that corn which was delivered to a miller for the general purpose of his trade became his property on the basis that, at 112:

'... having the power to use property as his own for his own purposes is wholly irreconcilable with the notion of his being a Trustee of the property ...'

- 3.6 See also the judgment of Vinelott J *In re Peachdart Ltd* [1984] 1 Ch 131 at 142:

'To my mind it is impossible to suppose that ... the parties intended that until a parcel of leather had been fully paid for the company would remain a bailee of each piece of leather comprised in the parcel throughout the whole process of manufacture, that [the sellers] should have the right until the parcel had been fully paid for, to enter the company's premises and identify and take away any partly or completely manufactured handbag derived from it, and that on the sale of a completed handbag the company would be under an obligation to pay the proceeds of sale into a separate interest bearing account and to keep them apart from their other moneys and not employ them in the trade.'

- 3.7 As the complexity of a *Romalpa* clause increases, its effectiveness in reserving ownership may decrease and establishing the time of sale becomes more difficult. Normally, it might be assumed that the time of sale under a contract of sale of goods with a *Romalpa* clause is as stipulated in the clause. However, contrary indications in the rest of the contract or in the conduct of the parties may suggest a different result.
- 3.8 There are potentially four situations where the ability of the owner of goods to retain title to those goods will be lost. Those four situations are:²³

²³. For a discussion of these four situations refer to Collier, *op. cit.* 56 and 65.

- where the goods become fixtures;
- where the goods are commingled²⁴ with other goods so as to lose their identity;
- where the goods are irretrievably affixed to other goods; and
- where the goods are sold to third party purchasers.²⁵

3.9 In the ordinary course, where goods are not on-sold, not commingled with other goods so as to lose their identity,²⁶ do not become irretrievably affixed to other goods or do not become fixtures in their own right, property in the goods passes to the buyer according to the terms of the *Romalpa* clause. A liability to sales tax which depends on the time of sale (see paragraphs 1.3 to 1.5) arises at that time.

The effect of section 17 of the Sales Tax Assessment Act

3.10 Section 17 of the STAA ensures that the time of sale cannot be deferred for sales tax purposes beyond the time of first use. The purpose of section 17 is explained in the explanatory memorandum to the Sales Tax Assessment Bill 1992 at page 72:

'If the purchaser of goods is allowed to use the goods before the time that title passes, then the time of first use by the purchaser is to be treated as the time of sale. This provision is designed to ensure that the time of sale cannot be deferred, for sales tax purposes, beyond the time of first use.'

3.11 The effect of section 17 is to bring the time of sale forward to when the purchaser first uses the goods, which is a time after the contract is made but before the time when title is to pass under the contract. If title passes to the purchaser under the contract before the purchaser first uses the goods, that is the time of sale and section 17 has no application.

3.12 An example of the effect of section 17 is where a manufacturer of refrigerated display cabinets sells a cabinet to a milk bar proprietor on credit under a contract of sale that contains a *Romalpa* clause. The milk bar proprietor installs the cabinet, stocks it with soft drink and switches it on. Under section 17, the time when the cabinet is installed and stocked by the milk bar proprietor, i.e., the time when it is

²⁴. Collier (footnote 17) states that where goods are commingled with other goods so as to completely lose their identity, the owner of the original goods cannot trace his or her ownership into the end product.

²⁵. Vendors may be unable to retain title to goods that are subject to a third party sale by virtue of section 31 of the Goods Act, which is conditional in its operation. The third party purchaser must be a *bona fide* purchaser without notice of the original vendors interest(s) in the goods: refer *Four Point Garage Ltd v. Carter* [1985] 3 All ER 12. Refer also to D Everett, 'Romalpa Clauses: The Fundamental Flaw', (July 1994) ALJ 404 at 407.

²⁶. Refer to *Borden (UK) Ltd v. Scottish Timber Products Ltd and Anor* [1981] 1 Ch 25.

first used,²⁷ is taken to be the time of sale and therefore the time when the manufacturer would be required to account for sales tax.

- 3.13 The STAA does not define the term *use* and it therefore takes its usual or ordinary meaning. The mere placing of trading stock on a shelf does not constitute a use of the stock that will trigger the effect of section 17. However, a commingling of the stock with other goods may affect the reservation of title unless the seller is able to trace his or her ownership of that stock.²⁸

Chapter 4: Accounting for sales tax in returns

General responsibilities

- 4.1 Section 61 of the STAA requires a person who has a liability to sales tax to lodge a return within 21 days after the end of the month or quarter in which the liability arose, that is, when the sale took place. As previously mentioned, taxpayers supplying goods on credit subject to an effective *Romalpa* clause are not liable for sales tax at that stage²⁹ as the contract formed is a contract of sale that has not, as yet, ripened into a sale.³⁰
- 4.2 To comply with the requirements of section 61, the taxpayer needs to determine the fate of every item delivered, including whether any item has either been used by the purchaser (section 17) or has been on-sold³¹ prior to payment. In order to achieve this, the taxpayer would have to be able to establish which of the following events occurs first and account for tax accordingly:
- the time when title passes to the purchaser under the contract;
 - the time when the purchaser first uses the goods; or
 - the time when the purchaser on-sells the goods.

²⁷. The 'use' of the cabinet by the milk bar proprietor occurs when he or she makes a conscious decision to use the goods, judged on an objective basis. Evidence of an intention to use the goods would include the stocking of the cabinet and its subsequent 'switching on' so as to cool the soft drink to the desired temperature.

²⁸. Refer to *Scott v. Surman* (1742) Willes 400; 125 ER 1235.

²⁹. The treatment for income tax purposes (pursuant to the *Income Tax Assessment Act 1997*) of goods supplied on credit differs from the sales tax treatment as each respective statute imposes different tests. For income tax purposes, the most relevant question usually is that of 'derivation of income' which requires the seller to have done all that they need to do to become entitled to payment and for there to be a debt, being a fixed sum presently owing to the seller, but which may not be immediately payable (refer to Taxation Ruling TR 97/9). For sales tax purposes the relevant question is the determination of the time of 'sale'.

³⁰. Refer to paragraphs 2.2-2.4 and 3.3.

³¹. Reservation of title will generally be extinguished once goods are on-sold to third parties who acquire property in them in good faith. Refer section 31 of the Goods Act and footnote 25.

Even with regular monitoring this is difficult to accomplish in most situations, unless the goods are clearly identifiable, for example, by serial number.

- 4.3 The rate of sales tax applicable to goods sold subject to a *Romalpa* clause is the rate of tax that is in force under the STAA at the time a sale occurs. This may be different (higher or lower) than the rate of sales tax in force at the time goods are invoiced or delivered.

The Commissioner's alternative method

- 4.4 It is recognised that taxpayers who sell goods under contracts containing a *Romalpa* clause may face practical difficulties and significant costs in maintaining systems to enable them to trace the fate of those goods so as to determine the time of sale. The compliance costs associated with this requirement may lessen the commercial benefits that the taxpayers seek to achieve by the use of *Romalpa* clauses.
- 4.5 As an alternative, a taxpayer selling goods under contracts containing a *Romalpa* clause is permitted to account for sales tax on those goods as if the relevant time of sale was at the time of invoicing or at the time of delivery of the goods, whichever occurs first. The rate of sales tax applicable to those goods is the rate in force at the time of invoicing or delivery as the case may be. Any subsequent change in the rate of sales tax does not lead to any change in liability for sales tax.
- 4.6 This alternative method retains for the taxpayer the commercial benefits associated with the use of *Romalpa* clauses while avoiding the difficulties and compliance costs associated with tracing the fate of every item sold subject to a *Romalpa* clause.³²
- 4.7 This alternative method of accounting for sales tax liability is an exercise of the general powers of administration of the sales tax law conferred on the Commissioner by section 111 of the STAA. The courts have interpreted this power to include the ability to enter into any agreement that is necessary for fair and reasonable administration, but not to extend to the ability to remit or relieve from taxation, or to collect more taxation than the STAA imposes.³³
- 4.8 Some taxpayers who sell goods under contracts that include a *Romalpa* clause have sought agreement to lodge returns and to account for sales tax either on a cash received basis or, more generally, according to the payment patterns of their

³². The Australian Accounting Standards are silent on the matter, but a 'Statement of Guidance' issued by the Council of the Institute of Chartered Accountants in England and Wales advises:

'... it is considered that the omission of stock (or, if resold, the debtors) and of the corresponding liabilities from the balance sheet of the customer would prevent it from showing a true and fair view of the state of affairs. Similarly, the accounts of the supplier would also be distorted by the omission of such goods from sales and debtors. Accordingly, it is recommended that in such circumstances the goods should be treated as purchases in the accounts of the customer and as sales in the accounts of the supplier.'

³³. Refer to *Queensland Trustees Limited v. Fowles* (1910) 12 CLR 111 at 122.

customers, for example, on the basis of average debtor turnover. Neither of these bases is acceptable. They are unlikely to be a true reflection of 'the time of sale' of the goods because they do not take into account any use of goods by the purchaser or any sales of goods to third parties prior to payment. Furthermore, determining sales tax liability on such bases is not likely to result in equity between competitors in business because of the variations in credit terms and other factors affecting payment. However, the ATO will consider submissions for alternative methods, on a case by case basis, from taxpayers who can demonstrate that they employ effective *Romalpa* clauses and can trace the fate of the goods, but are incurring unreasonable administrative costs in meeting their obligations under the law.

The inclusion of delivery charges in the taxable value

- 4.9 As a general rule, all amounts charged by the seller in relation to the supply of goods up to the point when property in the goods passes to the buyer, form part of the price and therefore the taxable value of goods sold by wholesale. The mere presence of a *Romalpa* clause does not automatically mean that charges for delivery form part of the taxable value of the goods. If delivery charges³⁴ need to be paid for the purchaser to get good title in the goods, those charges form part of the price of the goods and should be included in their taxable value. Where delivery is the subject of a separate contract, delivery charges do not form part of the taxable value, provided that the parties genuinely intend property in the goods to pass without delivery at the prices stated and the amount for delivery is a competitive commercial charge. A fuller explanation of the treatment of delivery charges is provided in Taxation Ruling SST 6 at paragraphs 2.5 to 2.8.

Commissioner of Taxation**29 April 1998**

³⁴. See *Commonwealth Quarries (Footscray) Pty Ltd v. FCT* (1938) 59 CLR 111.

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- AIA 15AA
- ITAA
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- Goods Act 1958 (Vic) 4(2)
- Goods Act 1958 (Vic) 6
- Goods Act 1958 (Vic) 6(3)
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- STAA 5 Table 1 Schedule 1
- STAA 16 Table 1 Schedule 1
- STAA 17 Table 1 Schedule 1
- STAA 61 Table 1 Schedule 1

case references

- Alexander Knox McEntire and John Arthur Maconchy v. Crossley Brothers Limited [1895] AC 457
- Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd [1976] 2 All ER 552
- Borden (UK) Ltd v. Scottish Timber Products Ltd and Anor [1981] 1 Ch 25
- Commonwealth Quarries (Footscray) Pty Ltd v. FCT (1938) 59 CLR 111
- Four Point Garage Ltd v. Carter [1985] 3 All ER 12
- In re Peachdart Ltd [1984] 1 Ch 131
- Queensland Trustees Limited v. Fowles (1910) 12 CLR 111
- Scott v. Surman (1742) Willes 400; 125 ER 1235
- The Attorney-General for the State of New South Wales v. The Brewery Employees' Union of New South Wales (1908) 6 CLR 469
- The South Australian Insurance Company v. William Beavis Randell and Samuel Randell [1869] 3 LR (PC) 101

Appendix A

Comparative table of sale of goods legislation

Goods Act 1958 (Vic)	Sale of Goods Act 1923 (NSW)	Sale of Goods Act 1895 (SA)	Sale of Goods Act 1895 (WA)	Sale of Goods Act 1896 (QLD)	Sale of Goods Act 1896 (Tas)	Sale of Goods Act 1954 (ACT)	Sale of Goods Act 1972 (NT)
Section	Section	Section	Section	Section	Section	Section	Section
3	5	60	60	3	3	5	5
4	4	59	59	61	5	62	4
6	6	1	1	4	6	6	6
21	21	16	16	19	21	21	21
22	22	17	17	20	22	22	21
23	23	18	18	21	23	23	22
24	24	19	19	22	24	24	24
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