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Ruling Compendium – GSTD 2009/1

This is a compendium of responses to the issues raised by external parties to draft GSTD 2008/D2 – Goods and services tax: is a supply by way of an *in specie* distribution of an asset that is applied or intended to be applied in an enterprise carried on by a discretionary trust to a beneficiary of the trust made ‘in the course or furtherance of’ the trust’s enterprise?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1	Wished to confirm the operation of Division 72 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (GST Act) if the supply is made in the course or furtherance of the discretionary trust’s enterprise. Agreed with the approach taken in GSTD 2008/D2.	The Tax Office notes that the comment agreeing with the approach taken in the draft Determination. The application of Division 72 of the GST Act is outside the scope of this Determination which is limited to the application of paragraph 9-5(b) of the GST Act. However, footnote 3 has been added to highlight the potential application of Division 72 in the circumstances the subject of this Determination. It is noted that guidance on Division 72 in this context is provided in ATO Interpretative Decisions (ATO ID 2001/503, ATO ID 2001/504 and ATO ID 2001/505) and Goods and Services Tax Advice GSTA TPP 049 Goods and services tax: Is a trustee’s <i>in specie</i> distribution to a beneficiary a taxable supply? The potential application of Division 72 was discussed with the entity providing the comment.
2	Sought clarification on treatment of an <i>in specie</i> distribution of assets that are not applied in the enterprise carried on by the discretionary trust (for example shares).	Under this Determination, an <i>in specie</i> distribution of an asset that is not applied in the enterprise carried on by the trust will not be a supply made in the course or furtherance of the enterprise carried on by the trust. It will be a question of fact as to whether the asset has been applied in the enterprise carried on by the trust. See Example 2 in paragraphs 16 to 17 of this Determination.

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Issue No.	Issue raised	Tax Office Response/Action taken
3	Query as to whether the distribution of assets upon the winding up of the enterprise carried on by the discretionary trust would not be in the course or furtherance of the enterprise carried on by the trust as the enterprise will have ceased.	Paragraph 9-5(b) of the GST Act requires that the supply is made in the course or furtherance of an enterprise that you carry on. The term 'carrying on' an enterprise is defined in section 195-1 of the GST Act as including doing anything in the course of the commencement or termination of the enterprise (see paragraphs 120 to 121 and 140 to 148 of Miscellaneous Taxation Ruling MT 2006/1). It is therefore possible for a supply to be made 'in the course or furtherance of' an enterprise that terminates as a result of the supply. This is illustrated by the insertion of footnote 2 in paragraph 3 of this Determination.
4	Questioned whether the supply of an asset of the discretionary trust to a beneficiary as a result of a contractual or loan agreement between the trust and the beneficiary is subject to GST.	The treatment of a supply of an asset of the discretionary trust to a beneficiary as a result of a contractual or loan agreement between the trust and the beneficiary is outside the immediate scope of this Determination as the supply is not an ' <i>in specie</i> distribution' made by the trustee. The <i>Encyclopaedic Australian Legal Dictionary</i> (LexisNexis AU, 2009) defines a 'distribution' as the transfer of cash or other property where the transfer does not arise from a contractual relationship but the recipient is entitled to the cash or property because of the recipient's status as a shareholder or beneficiary of a trust or under a will. However, the principle that the supply of an asset that has been applied in an enterprise carried on by an entity will be a supply in the course or furtherance of the entity's enterprise will be applicable to such cases.
5	Advised that the entity providing the comment had always been under the impression that a net distribution by a trust to a beneficiary is excluded from GST and was not in the course or furtherance of the enterprise.	The principle contained in this Determination is the preferred Tax Office view. Paragraph 7 of this Determination has been amended to clarify that a supply may be made in connection with the relevant enterprise, and hence be made in the course or furtherance of the enterprise, without the supply furthering or achieving the goals of the enterprise.
6	Advised agreement with the position taken in GSTD 2008/D2.	The Tax Office notes that the comment agrees with the approach taken in the draft Determination.

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Issue No.	Issue raised	Tax Office Response/Action taken
7	Advised that Examples 2 and 3 in GSTD 2008/D2 are incorrect. This is because a beneficiary of a discretionary trust will often be either an employee of the discretionary trust or an associate of an employee. It is therefore likely that the operation of the Fringe Benefits Tax system will be triggered in the scenarios described in Examples 2 and 3. This would mean that the car and the boat in the examples will be applied in the enterprise carried on by the discretionary trust. Example 2 is therefore incorrect and the reasoning in Example 3 may be misleading. It may be preferable to remove these examples.	The Tax Office agrees with the comments to the extent that the relevant trust has applied the asset to provide a fringe benefit. In section 136 of the <i>Fringe Benefits Tax Assessment Act 1986</i>, the definition of a fringe benefit means a benefit: 'provided to the employee or an associate of the employee...'. The examples have been altered to clarify that the <i>in specie</i> distributions are not made in respect of the employment of either the beneficiary or a person to whom the beneficiary is an associate. There are, therefore, no fringe benefit tax implications resulting from the supply.
8	The application of GSTD 2008/D2 to an <i>in specie</i> distribution by way of a capital distribution to a beneficiary, (or an <i>in specie</i> distribution in satisfaction of an income entitlement of a beneficiary), is not consistent with similar arrangements that result from property distributions under the <i>Family Law Act</i> or in similar circumstances that are discussed in GST Ruling GSTR 2003/6. The submission provides 4 examples to illustrate the inconsistent outcomes that arise from applying GSTD 2008/D2 and GSTR 2003/6. It further states that the focus of the test in GSTR 2003/6 is on the determination made by the trustee to distribute assets consistent with the Family Law Act order whereas the focus of the test in GSTD 2008/D2 is on the distribution.	The principle articulated in the draft Determination is that a connection between the asset being supplied and the enterprise being carried on by the discretionary trust is established where the asset is applied in the trust's enterprise. One limited exception to this principle exists in circumstances where a supply is made pursuant to a marriage property order, as described in Goods and Services Tax Ruling GSTR 2003/6. In those circumstances the necessary connection cannot be established. It is considered that the principle articulated in GSTR 2003/6 is limited to situations that fall within the scope of that Ruling and does not have broad application. Paragraph 12 of this Determination has been inserted to address this issue.

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Issue No.	Issue raised	Tax Office Response/Action taken
9	Guidance is required on the GST implications arising from <i>in specie</i> distributions made by a company to a shareholder by way of dividend or made in the course of winding up a company.	The GST treatment of a supply of an <i>in specie</i> distribution of an asset by a company to a shareholder falls outside the immediate scope of this Determination. However, the principle that the supply of an asset that has been applied in an enterprise carried on by an entity will be a supply in the course or furtherance of the entity's enterprise will be applicable. Please see Question 20 from the Tax and Insolvency Practitioners Issues Register which discusses whether an <i>in specie</i> distribution by a representative of an incapacitated entity (company) to the entity's shareholders is a taxable supply.
10	The position taken by the Commissioner substitutes a different test to that contained in paragraph 9-5(b) of the GST Act. The test under the GST Act is not whether or not the trust property, which has been distributed to the beneficiary, was 'applied or intended to be applied in the [trust's] enterprise'. The test under section 9-5(b) is whether or not 'the supply [was] made in the course or furtherance of an enterprise' carried on by the taxpayer [emphasis added]. There is no authority for the Commissioner to introduce, or substitute, a new test.	The Commissioner's position in this Determination does not seek to substitute a different test to that in paragraph 9-5(b) of the GST Act but rather provides guidance on how he will apply the terms of the provision to the circumstances specified in this Determination. The principle articulated in this Determination is that an asset that has been applied in an enterprise carried on by the discretionary trust will have a sufficient connection with the enterprise for its supply to be made in the course or furtherance of the enterprise carried on by the trust. The question of when a thing is applied in carrying on an entity's enterprise is discussed in further detail in paragraphs 33 to 38 of GSTR 2008/D5: Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose.
11	Absolute rules cannot be applied when seeking to define, or extend, the scope of a provision such as section 9-5(b) of the GST Act. Its application will depend on a proper analysis of certain key facts as well as the review of the drafting, and the effect, of the trust deed in considering the following key questions of fact: - What are the parameters of the 'enterprise' carried on by the trust? - Whether or not the particular supply was one made 'in the course or furtherance of' that enterprise?	Whilst the specific facts of each case must be taken into consideration when applying the test in paragraph 9-5(b) of the GST Act, that test specifies a legal requirement that the supply made by an entity have the requisite connection to the enterprise that the entity is carrying on. In the Commissioner's view that legal requirement is satisfied so long as some connection between the supply and the enterprise is established.

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Issue No.	Issue raised	Tax Office Response/Action taken
12	The draft Determination does not address the importance of having to identify the 'enterprise' of the trust and the need to consider all relevant facts when identifying the exact parameters of a trust's enterprise.	Identifying the 'enterprise' of the trust is required so that the test in section 9-5 can be applied appropriately. This point is highlighted in this Determination through the examples in this Determination where an asset has been applied in an enterprise and where an asset has not been applied in an enterprise.
13	The draft Determination does not correctly address the required nexus which must be established between the supply of the particular asset and the enterprise of the trust. It will not infrequently be the case that a distribution of trust property will not be a supply made in the course or furtherance of that trust's enterprise.	This Determination refers to the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 ('Explanatory Memorandum') and the context of section 9-5 to support the view that the phrase 'in the course or furtherance of' should be given a broad meaning so as to encompass supplies made in connection with the relevant enterprise. The application of the asset in the enterprise being carried on by the discretionary trust establishes a sufficient connection for the supply of the asset to be made in the course or furtherance of the enterprise carried on by the trust.
14	There is no basis in paragraph 9-5(b) for the Commissioner to treat a supply as taxable where an asset has not been used in the enterprise, but is only intended to be used in the enterprise.	The position taken in the draft Determination is that an entity may intend to apply a thing in carrying on an enterprise but may not actually be applying the thing. The Tax Office considers that there will be a sufficient connection between an asset that has been acquired by the discretionary trust with the intention that the asset be used in the enterprise but has merely been held by the trust and not actually used. An example of this is the acquisition of trading stock (see paragraphs 76 to 77 of GSTR 2003/6). See also ATO ID 2003/701. It is noted that in this situation, the discretionary trust may have been eligible to claim input tax credits under Division 11 of the GST Act in relation to the acquisition of the asset.

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Issue No.	Issue raised	Tax Office Response/Action taken
		However, since issuing the draft Determination the Tax Office has published draft Goods and Services Tax Ruling GSTR 2008/D5 Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose. The position taken in this draft Ruling is that a thing held in connection with an enterprise and which is devoted to or put to use in an entity's enterprise will have been applied in the enterprise. Therefore, for example, the holding of trading stock for the purpose of sale in an entity's enterprise will be an application of the trading stock in the course or furtherance of the entity's enterprise (see paragraph 38 of GSTR 2008/D5). For this reason, the references to a thing being 'intended to be applied' in an entity's enterprise are considered no longer necessary in the context of this Determination and have been removed in its finalisation. The Tax Office notes, however, that the position stated in GSTR 2008/D5 is yet to be finalised.
15	Having regard to the points made in issues 10 to 14 above, the Tax Office should either revise its position in GSTD 2008/D2 or abandon altogether the proposal to publish its views on the application of section 9-5(b) of the GST Act to <i>in specie</i> distributions of trust property.	For the reasons provided in response to issues 10 to 14 above, the Tax Office considers the principle contained in this Determination has been correctly articulated.
16	An <i>in specie</i> distribution of property by a partnership or trust cannot be said to be made in the course or furtherance of an enterprise the partnership carries on. The view is consistent with common law and income tax law. For instance, in an income tax context, an <i>in specie</i> distribution of property held by a partnership as trading stock is generally treated as having been disposed of 'outside the ordinary course' of a business under section 70-90 of the ITAA 1997. Yet despite this, the Commissioner says that the same <i>in specie</i> distribution would be 'in the course or furtherance' of an enterprise for GST purposes.	Paragraph 3.10 of the Explanatory Memorandum provides that 'in the course or furtherance of' is broad enough to cover any supplies made in connection with your enterprise. This statement, when considered with the comments of the Full Federal Court in <i>Sterling Guardian v. Commissioner of Taxation</i> (as referred to in this Determination) on the policy of the GST system by reference to supplies made to ultimate consumers, suggests that a disposal of trading stock that is made outside the ordinary course of a business for income tax purposes may still be a supply made 'in the course or furtherance of' an enterprise for the purposes of GST.

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Issue No.	Issue raised	Tax Office Response/Action taken
	It was submitted that a more consistent approach would see the Commissioner applying the change of creditable purpose provisions in Division 129 of the GST Act to an <i>in specie</i> distribution of property by a partnership to a partner rather than applying section 9-5 of the GST Act and making it a taxable supply. Reference was made to a paper prepared by Justice Hill on the Creation of rights: dividends and trust distributions (ATAX UNSW – 14th Annual GST & Indirect Tax Weekend Workshop, 2002) in which he concluded that the declaration of a dividend or the exercise of a power of appointment over income by a trustee would not be in the course of or furtherance of an enterprise so that they do not result in a taxable supply, irrespective of other arguments as to consideration or financial supply.	While the GST system does utilise adjustment provisions, the position adopted in this Determination is conceptually consistent with the framework of the GST legislation when considering the interaction between section 9-5 and Subdivision 72-A. Subdivision 72-A interacts with section 9-5 to ensure that supplies made to associates without consideration are brought within the GST system. An interpretation that an <i>in specie</i> distribution from a discretionary trust to a beneficiary cannot be in the course or furtherance of an enterprise carried on by the trust would result in the supply to the associate not being brought within the GST system and therefore contrary to the underlying policy framework. Section 70-90 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) refers to the expression 'outside the ordinary course of a business' – a concept that is different from a supply made 'in the course or furtherance of' an enterprise. Paragraph 71 of Goods and Services Tax Ruling GSTR 2008/1 Goods and services tax: when do you acquire anything or import goods solely or partly for a creditable purpose? states that in some cases an acquisition can be made in carrying on an enterprise, even if the relevant outgoing is not 'necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income for income tax purposes'. This position highlights a contextual difference between the GST and income tax legislation. Example 18 of GSTR 2008/1 (paragraphs 212 to 214) refers to acquisitions of legal and brokerage services acquired in borrowing funds to pay a dividend being made in carrying on an enterprise. As mentioned above, it is considered that a supply made outside the ordinary course of a business for income tax purposes may still be made 'in the course or furtherance of' an enterprise for the purposes of GST.

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Issue No.	Issue raised	Tax Office Response/Action taken
17	A connection between supply and enterprise should not be found simply by examining past uses or intended uses of the asset that is supplied. The focus instead should be on the supply itself and whether that supply has a commercial connection with an enterprise. This would seem more consistent with the statements in the Explanatory Memorandum, which refer to whether the act is done for the purpose or object of furthering an enterprise, or achieving its goals. Refers to an example of an <i>in specie</i> distribution of a jet plane that is not supplied in the course or furtherance of the enterprise carried on by the trust but does result in an adjustment under Division 130 of the GST Act. GSTD 2008/D2 does not address the issue of whether 'consideration' has been provided where a discretionary trust makes a distribution to a beneficiary and the interaction with Division 72 of the GST Act.	See response to Issue 14. The Explanatory Memorandum uses the circumstance of an act done for the purpose of furthering the enterprise to illustrate the breadth of the phrase. Paragraph 3.10 of the Explanatory Memorandum specifically recognises that an act done in the furtherance of an enterprise may not always be in the course of that enterprise. Equally it could be said that an act can be done in the course of an enterprise but not necessarily in the furtherance of that enterprise. This is illustrated by the situation where a supply causes the termination of an enterprise – such a supply is made in the course of the enterprise but not necessarily in the furtherance of that enterprise. The principle contained in this Determination is the preferred Tax Office view. On that view the <i>in specie</i> distribution would be a supply in the course or furtherance of the trust's enterprise and Division 130 of the GST Act will not apply. See response to Issue 1. ATO IDs 2001/503, 2001/504 and 2001/505 set out the Tax Office view that a beneficiary does not provide consideration in relation to an <i>in specie</i> distribution received from a discretionary trust. Refer also to footnote 3 in this Determination.