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Ruling Compendium – GSTD 2011/3

This is a compendium of responses to the issues raised by external parties to draft GSTD 2011/D2 – Goods and Services Tax: do the acquisitions of the services provided under the arrangement described in Taxpayer Alert TA 2010/1 form part of a reduced credit acquisition made by the financial supply provider under item 9 of the table in subregulation 70-5.02(2) of the A New Tax System (Goods and Services Tax) Regulations 1999?

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	Whether a determination is appropriate 1.1 We do not see the requirement for a draft Determination on this topic. The draft Determination is focused on the nature of actual transactions and attempts to characterise those transactions, rather than provide guidance as to the interpretation or application of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> ('the GST Act'), or the <i>A New Tax System (Goods and Services Tax) Regulations 1999</i> ('the GST Regulations'). <i>Taxation Ruling TR 2006/10 Public Rulings</i>, sets out that the purpose of public rulings, including determinations, is to explain how a provision(s) of a taxation law are to apply. The focus of the draft Determination is the nature of the contractual arrangements between the parties, and the services provided by the parties. As a result the Commissioner is attempting to rule on what is being supplied between the parties and then overlaying the provisions of the GST Act and GST Regulations. This goes beyond TR 2006/10 and it will be common that the factual circumstances for each M&A transaction involving associated parties will be different.	1.1 The Determination focuses on the application of the GST Act and GST Regulations to the specific arrangement identified in Taxpayer Alert TA 2010/1 and described in paragraph 14 of the Determination. The Determination refers to the Commissioner's interpretation of item 9 of the table in subregulation 70-5.02(2) of the GST Regulations which is set out in <i>Goods and Services Tax Ruling GSTR 2004/1 Goods and services tax: reduced credit acquisitions</i>. However, the Determination addresses the application of the views in GSTR 2004/1 in the context of the specific arrangement. We consider that it is appropriate for the interpretation to be contained in a Determination to assist taxpayers in understanding the Commissioner's views.

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	1.2 If the Commissioner is concerned with matters regarding 'bundling' around M&A transactions, or artificial or contrived arrangements involving associated entities, we recommend that the appropriate provision to deal with such matters is Division 165. A draft Determination ruling on the Commissioner's views as to what is being supplied as a 'general rule' is not the appropriate avenue to deal with these matters.	1.2 As noted at paragraph 27 of the Determination, the Commissioner considers that the correct application of the substantive provisions of the GST Act to the arrangement results in the FSP being entitled to a reduced input tax credit (RITC) for only that part of its acquisition that would be a reduced credit acquisition of an arrangement service had it been acquired by the FSP directly from the relevant service provider/s. Therefore, as noted, it is unlikely that the Commissioner would need to consider the application of Division 165 of the GST Act. We acknowledge that other factual circumstances may lead to different outcomes. However, the scope of the Determination is limited to addressing the specific arrangement that is identified in TA 2010/1.

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Issue No.	Issue raised	Tax Office Response/Action taken
2	Addressing alternative arrangements 2.1 In the event the draft Determination is not withdrawn, and does make its way into a final Determination, then we recommend that the ruling should state that if the nature of the contractual arrangements and the way the parties conduct themselves amounts to a composite supply of arranging a financial supply, then the outcome is X. But if the arrangements do not support a composite supply and the nature of the arrangements amount to individual supplies separately supplied by the associate, the outcome is Y.	2.1 As noted in the response to issue 1, the purpose of the Determination is to address the specific arrangement set out in TA 2010/1 and described in paragraph 12 of the Determination. As explained at paragraph 24 of the Determination, on the facts of this arrangement the tax, legal and public relations advisory services are not integrated by the FSF into the activities of preparing and planning the transaction and are not 'integral, ancillary or incidental' to an arranging service as each of the services is a significant component of the supply. However, the draft Determination paragraph 26 has been clarified in the final Determination paragraph 28 to state that in circumstances where acquisitions from third parties are acquired and consumed by the FSF such that they are integrated into an arranging service, the FSP is entitled to an RITC for those components of the acquisition. Whether the acquisitions made by the FSF are integrated into an arranging service will depend upon close analysis of the terms of the agreement and the way in which it is carried out.

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Issue No.	Issue raised	Tax Office Response/Action taken
3	Nature of supplies 3.1 As stated above, we recommend that the Commissioner include a description of the two alternative arrangements and on the basis of the two different fact patterns (at least two), then apply the relevant legislative provisions to those two different fact patterns. The Commissioner has acknowledged in paragraph 26 of the draft Determination that there is an alternative, and we recommend that this be further expanded and the differences between the two scenarios highlighted. Such matters that may be included within this expanded analysis may include, but are not to be limited to: - the difference (if any) where the FSP is established at the beginning of a potential M&A transaction, or is a long-established investment entity, as opposed to the 11th hour where the FSP is established on the basis that the relevant Corporate Group has agreed to proceed with the transaction; - the difference (if any) where the related entity, the Financial Supply Facilitator (FSF) has a dedicated M&A team and has all the relevant internal infrastructure to evaluate M&A transactions and has a history of doing such activities, including engaging external service providers to assist; and the difference (if any) where there are arrangements in place where the FSF determines a fee for its services with reference to both external costs, internal costs (such as dedicated M&A staff, etcetera) plus an appropriate margin.	3.1 Please refer to the response to issue 2. As noted, the focus of the Determination is on the specific arrangement. As explained in the Determination paragraphs 25 to 27, the relevant factor will be determining whether the advisory services acquired involve preparing and planning the transaction (as with the investment banking services) or if the relevant acquisitions are integrated into the activities of preparing and planning the transaction. The Determination paragraph 26, has been amended to make a more definitive statement regarding other circumstances in which RITCs are available: ...In those circumstances, where the acquisitions from third parties are acquired and consumed by the FSF such that they are integrated into an arranging service, the FSP is entitled to a RITC for those components of the acquisition. Whether the acquisitions made by the FSF are integrated into an arranging service will depend upon close analysis of the terms of the agreement and the way in which it is carried out.

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Issue No.	Issue raised	Tax Office Response/Action taken
4	Acquires and supplies v merely passed on 4.1 The Commissioner has in the draft Determination concluded that in relation to the investment bank services the FSF does acquire and then on-supply these services, but with reference to other services which do not separately qualify for an RITC under item 9, that these are 'merely passed on'. With respect, we do not agree with the analysis that because the FSF has 'passed those services onto the FSP' that in this instance the FSF has supplied the arranging services, and that it equally passes on the other services but these do not form part of the 'broader arrangements'. We do not agree with this approach for the reasons stated above in that it will depend upon the contractual relationship and the nature of the services provided between the parties.	4.1 The Determination paragraphs 1 and 2 have been changed to make it clear that on the facts of the specific arrangement covered by the Determination, the investment banking services and the tax, legal and public relations advisory services are all supplied by way of passing on from the FSF to the FSP. We consider that the passing on of the services by itself does not determine whether the acquisition by the FSP is of an arranging service. As explained in the Determination paragraphs 23 to 25, the relevant factor will be determining whether the services acquired involve preparing and planning the transaction (as with the investment banking services). Where this is not the case (as with the tax, legal and public relations advisory services under the specific arrangement), it is necessary to consider if the relevant acquisitions are integrated into the activities of preparing and planning the transaction. Under the specific arrangement the tax, legal and public relations advisory services are not integrated and are not integral, ancillary or incidental to an arranging service and therefore do not form part of a reduced credit acquisition by the FSP.

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Issue No.	Issue raised	Tax Office Response/Action taken
5	Financial Supply Facilitator entitlement to ITCs 5.1 Under paragraph (a) of Taxpayer Alert TA 2010/1, the issue raised is whether the FSF is entitled to input tax credits included within the acquisitions it makes as part of providing the services to the FSP. This issue is not explicitly addressed within the draft Determination, although we consider it may be implied that if the FSF on-supplies investment banking services and 'passes on' other services, that on the basis these supplies are taxable supplies made by the FSF, that any acquisitions related to these activities should qualify as creditable acquisitions. However we recommend that this issue be specifically addressed given it was raised in TA 2010/1 and is not dealt with in the draft Determination.	5.1 We agree that this matter can be directly addressed in the Determination and have included footnote 8 in paragraph 14 of the Determination. The new footnote explains that the FSF may be entitled to input tax credits on its acquisitions as follows: As these acquisitions do not relate to supplies that would be input taxed, they have been acquired by the associate for a creditable purpose and, assuming the other elements of section 11-5 have been met, the associate is entitled to input tax credits for such acquisitions.