Ruling Compendium – GSTD 2012/5

This is a compendium of responses to the issues raised by external parties to draft GSTD 2011/D5 – Are acquisitions related to an entity's retail foreign currency exchange transactions with customers in Australia made solely for a creditable purpose under section 11-15 of the *A New Tax system (Goods and Services Tax) Act 1999* (GST Act)?

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	ATO Response/Action taken
1	**THERE IS NO ACQUISITION-SUPPLY (A-S)**	
1.1	An A-S of Australian currency banknotes (AUD) on the outbound transaction is not a financial supply because there is no consideration for the A-S.	It is the Commissioner's view that there is consideration for the A-S in this transaction: Where consideration is given for the 'first' supply, there is no need to identify consideration specific to the acquisition-supply (the 'second' supply), as the acquisition will have been made for consideration.[1] Further, the *AXA*[2] decision is authority for the view that the consideration provided for the first supply may also be consideration for the A-S.
1.2	In the *AXA* case, there was no 'natural' supply. AXA simply paid money for the acquisition of trust units. Here, Travelex made a 'natural' supply of foreign currency banknotes (FX) and received payment for it.	While the different nature of the transaction in *AXA* is acknowledged, we do not consider the judgment in that case would support the view that no A-S arises in the context of a retail currency exchange.
1.3	An acquisition-supply of AUD is not a financial supply where the provision is not a financial supply, for example, where the customer providing the AUD is not registered for GST.	We note that subregulation 40-5.06(2)[3] talks about 'the entity that *acquires the interest*', not 'the entity that acquires the financial supply of the interest'.

[1] GSTR 2002/2: *GST treatment of financial supplies and related supplies and acquisitions* [35]
[2] *AXA Asia Pacific Holdings Limited v. Commissioner of Taxation* [2008] FCA 1834

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1.4	Receipt of money as consideration for the supply of currency cannot also be an acquisition. Consideration is the benefit from the supply – it is not a supply as an object in itself.	We consider that this view is not supported by subsection 11-10(3),[4] which is the corollary of subsection 9-10(4) for acquisitions. Consideration is also a supply where it is in a non-monetary form. In a currency exchange, the plain language of the GST Act and GST Regulations recognises the acquisition of monetary consideration as an A-S.
1.5	If the primary supply is GST-free, there seems no policy reason to assign the A-S with a different GST treatment.	While this view is acknowledged, the plain language of the GST Act and GST Regulations recognises the acquisition of monetary consideration as an A-S.
1.6	All entities in business require monetary consideration for supplies made and that consideration is not seen as a supply For payments of money, status as consideration negates the possibility that it has a character of its own. The transaction should not be 'atomised', but should be viewed as one overall supply with the primary (actual) supply determining the appropriate GST categorisation.	The GST Act ensures that monetary consideration for a supply other than money is not itself a supply. However, it does not allow this outcome where money is supplied for monetary consideration.
1.7	The examples in the GST Regulations show there was no contemplation of acquisition of consideration amounting to a separate supply.	We agree the examples do not go to that level of specificity. As such the examples equally do not rule out this possibility.
1. 8	Characterising the AUD as a separate acquisition-supply is an over zealous approach to the interpretation of the GST Regulations and is not consistent with the treatment of an A-S as a supply of itself (and capable of being GST-free) in GSTR 2002/2.	The clear language of the GST Act and GST Regulations requires recognition of the acquisition of monetary consideration in a currency exchange transaction as giving rise to an A-S.

[3] Of the GST Regulations – the A New Tax System (Goods and Services Tax) Regulations 1999.
[4] Of the GST Act – the *A New Tax System (Goods and Services Tax) Act 1999.*

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2	**IF THERE IS AN ACQUISITION-SUPPLY, IT IS ANCILLARY**	
2.1	If the A-S is to be recognised in this transaction, it should be treated for GST purposes as an ancillary part of a composite supply of FX.	While acknowledging this view, we consider the better view to be that an acquisition-supply should not be treated as an ancillary part of a composite supply. In GSTR 2001/8, which sets out the ATO view on mixed and composite supplies, a composite supply is a supply that contains a dominant part and includes something that is integral, ancillary or incidental to that part. A composite supply is treated as a supply of a single thing provided by the supplier to the acquirer. We consider it would be difficult to accommodate an acquisition-supply within the concept of a composite supply as it is explained in GSTR 2001/8.
2.2	Inconsistent with *Card Protection Plan* and *Saga Holidays* to separately recognise the A-S.	For the reasons set out at 2.1 above, we think the better view is that the acquisition-supply cannot be considered as part of a composite supply.
3	**IF THE A-S IS INDEPENDENTLY RECOGNISED, IT IS NONETHELESS GST-FREE**	
3.1	The supply of FX is a supply made in relation to rights. Therefore the rights in relation to which the A-S is made are those same rights, NOT to the rights attaching to the AUD.	While acknowledging this view, we consider that if the provision of the FX is a supply made in relation to the rights attaching to the FX, then to the extent the A-S is also a supply made in relation to rights, for consistency the relevant rights must be the rights attaching to the AUD.

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3.2	It would be strange if share brokerage had sufficient connection to a supply of shares, but payment for the supply of FX did not have sufficient connection to the FX. GSTD 2011/D5 does not address 3.2	It is the Commissioner's view that an A-S of AUD in the context explained in the draft GSTD can be distinguished from share brokerage services supplied in relation to a GST-free supply of shares (for example to a counter-party outside Australia). For an A-S of banknotes to be GST-free, the bundle of rights from which the banknotes exclusively or almost exclusively derive their value need to be for use outside Australia. It is the Commissioner's view that these rights are the rights attaching to the banknotes that are the subject of the A-S.
4	**ACQUISITIONS SHOULD NOT BE TREATED AS RELATING TO THE A-S**	
4.1	Receipt of an input taxed supply (partnership interest) as consideration for a taxable supply does not alter the ITC entitlement for acquisitions relating to the taxable supply (GSTR 2003/13 [60-81]).	We agree that the GSTD requires greater focus on paragraph 11-15(2)(a) and due consideration of that relationship between acquisitions and an acquisition-supply.
4.2	The character of consideration for a taxable or GST-free supply is irrelevant when determining ECP of acquisitions. The fact that the consideration may constitute an A-S does not alter the fundamental relationship of the acquisition, being to the supply made.	If, for example, an entity acquired shares as consideration for a taxable or GST-free supply it made, we consider that creditable purpose of relevant acquisitions may indeed require due consideration to be given to the relationship of the acquisitions to both the taxable (or GST-free) supply and the A-S of shares.
4.3	Even if there is an A-S, a court would prefer a construction that does not limit ITC entitlement on account of a 'second' deemed transaction. A deemed A-S has no role to play in determining entitlement to ITCs. Where there is an 'actual' supply, there is no requirement to also attribute acquisitions to a deemed A-S.	We agree that the GSTD requires greater focus on paragraph 11-15(2)(a) and due consideration of the relationship between acquisitions and an acquisition-supply. However, it is the Commissioner's view that such due consideration would not necessarily lead to the outcomes suggested.

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4.4	A fictitious supply does not change the relationship of acquisitions to (provision) supplies.	We agree that the GSTD requires greater focus on paragraph 11-15(2)(a) and due consideration of the relationship between acquisitions and an acquisition-supply. However, it is the Commissioner's view that such due consideration would not necessarily lead to the outcome suggested.
4.5	To assert that an acquisition made to make the supply also relates to the receipt of the consideration is at odds with GSTR 2008/1, the 'context' referred to in *HP Mercantile*, and the policy behind the treatment of exports in *Travelex*.	We agree that the GSTD requires greater focus on paragraph 11-15(2)(a) and due consideration of the relationship between acquisitions and an acquisition-supply.
4.6	The GSTD 2011/D5 conclusion that acquisitions relate equally to the actual supply and the A-S is 'contrary to the clear intent of the Act, contrary to the decision of the High Court, and without precedent'.	We agree that the GSTD requires greater focus on paragraph 11-15(2)(a) and due consideration of the relationship between acquisitions and an acquisition-supply.
4.7	The High Court was clear in its construction of the provision, in the knowledge that the availability of input tax credits was at the core of the arguments being advanced.	We agree that the GSTD requires greater focus on paragraph 11-15(2)(a) and due consideration of the relationship between acquisitions and an acquisition-supply.
4.8	To undermine the above outcome by artificially double counting an actual supply and a deemed A-S is contrary to the intent of the provisions.	We agree that the GSTD requires greater focus on paragraph 11-15(2)(a) and due consideration of the relationship between acquisitions and an acquisition-supply.
4.9	The observation is made that the Commissioner has the power of general administration to make a determination under subsection 11-30(5) for attribution purposes.	The GSTD seeks to address concerns raised through a greater focus on analysis of paragraph 11-15(2)(a) and consideration of the relationship between acquisitions and an A-S.

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5	**USE OF THE RIGHTS**	
5.1	GSTD 2011/D5 interprets the term 'rights for use' as the subjective intention of the purchaser. This is not supported by *Travelex*. The terms 'are to be used' and 'intended to be occupied' are interpreted differently for residential premises purposes, from the view taken for 'rights for use' in the draft GSTD. *Sunchen* supports the view that the FX in the GSTD 2011/D5 is a bundle of rights that the holder is entitled to 'draw upon' in the country in which the currency is legal tender.	The High Court at [36] did refer by way of obiter, to the transaction before them as one *where the use to be made of the rights turns on the recipient's intention*. This approach is consistent with the ATO view as set out in GSTR 2003/8.
5.2	The only right attaching to the FX that can be exploited in Australia is an entitlement or a right (or at least no prohibition on that right) to transfer the currency to another.	We agree that the right to transfer the currency to another is a right attaching to the currency. We consider that resale of the currency within Australia amounts to use of this right in Australia.
5.3	The rights are only for use in Australia where the intention is to use the currency in Australia and not simply to re-sell to a retail customer.	The High Court at [36] referred by way of obiter, to the transaction before them as one *where the use to be made of the rights turns on the recipient's intention*. This approach is consistent with the ATO view as set out in GSTR 2003/8.
5.4	Inconsistency is asserted between GSTD 2011/D5 and ATOID 2012/1 – the ATOID is said to focus on the objective attributes of the shares and not on the subjective intention of the supplier or acquirer.	We note that ATOID 2012/1 does in fact rely on intended use, as illustrated in the following excerpt: It is the *intended use of the rights* attached to the shares that is relevant in assessing the application of paragraph (a) of Item 4 to the supply of the brokerage services to buy or sell shares. [emphasis added]
5.5	The Commissioner's view means that cost recoverability for foreign currency sales would be determined by the onshore or offshore routing of customer receipts. This does not reflect the purpose of the legislation.	To the extent that this distinction reflects the difference between re-selling the receipts in Australia and not doing so, GSTD 2011/D5 is consistent with the ATO view expressed in GSTR 2003/8 in treating re-sale in Australia as amounting to 'use of the rights' in Australia.

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5.6	The principles contained in GSTD 2011/D5 would distort the foreign exchange market and encourage the larger financial institutions to recycle customer monies outside Australia in order to increase their GST recovery.	The GSTD in its final form should address any such concerns.
6	**PRACTICAL BUSINESS TAX COMMENTS**	
6.1	Recognition of the A-S is not consistent with a 'practical business tax' view. GSTD 2011/D5 violates the practical business tax doctrine.	We agree that technical legal analysis of a provision needs to take account of the context of the provision under consideration.
6.2	The ATO approach is inconsistent with *International All Sports* case.	*International All Sports* adopted the approach to interpretation urged by the Commissioner. However, that did not lead the Court to find that the Commissioner's view of the meaning of the legislation was correct. It is uncontroversial that we adopt a purposive approach, but that still requires that we interpret the words of the legislation, having regard to the policy and surrounding legislative context.
6.3	The ATO is requested to 'clarify in considerable detail whether the practical business tax doctrine is to be applied consistently'.	The GSTD in its final form takes account of the context of the provisions under consideration.
7	**APPORTIONMENT**	
7.1	A 50% ECP is highly arbitrary and has no legal basis. This approach bears no correlation to the actual use of acquisitions related to operating the FX business.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.
7.2	In the context of outbound transactions, the only revenue earned is from the FX sale. Hence for commercial and accounting purposes, no acquisitions are allocated to the A-S, which is merely a fiction of the GST law.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.

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7.3	Costs such as rent, telephony etcetera are directed towards the business activity of selling the FX, and are not directed towards receiving the consideration.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.
7.4	There is no activity based, or other costs allocation system for that matter, that allocates costs to acquisitions supplies of FX. Applying a direct estimation method as stipulated by GSTR 2006/3, there would be no costs that are allocated to the A-S. From a purely practical perspective, it would be difficult if not impossible to develop a 'fair and reasonable' apportionment model to calculate ECP.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.
7.5	The use of a transaction count is a recognised and justified apportionment methodology. Is it logical to assume a commodity transaction should be counted as one supply but that a currency transaction should be counted as two transactions?	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.
7.6	Where 9-10(4) does not apply, the provision of money as consideration for a supply is not itself a supply for GST purposes. Is there a secondary purpose for all supplies for which money is received?	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.
7.7	It is inconsistent with the policy underlying the GST-free provisions of the GST Act to deny a proportion of input tax credits that would otherwise be available to a supplier of GST-free supplies.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.
7.8	Should GST-free suppliers of FX be treated differently to all other GST-free suppliers? The A-S of AUD could only ever arise in respect of the GST-free sale of FX.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.

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7.9	It would, if correct, produce the anomalous result that the sale of AUD in exchange for FX would give rise to a GST-free A-S of the FX, increasing the recovery of input tax credits for costs in relation to such activities.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.
7.10	The approach in GSTD 2011/D5 implies that at least one purpose of the enterprise of selling FX is to make an A-S of AUD. This confuses the purpose of the business, which is to make supplies at a profit, and the means by which they profit is derived by way of receipt of AUD.	The GSTD in its final form addresses concern over establishment of paragraph 11-15(2)(a) relationships.