



Draft Addendum

Goods and Services Tax Ruling

Goods and services tax: supplies

This Draft Addendum, when finalised, will amend

Goods and Services Tax Ruling GSTR 2006/9 to reflect:

1. **The reasoning of the Full Federal Court's decision in *Commissioner of Taxation v Secretary to the Department of Transport (Victoria)* 2010 FCAFC 84, 2010 ATC 20-196; (2010) 76 ATR 306 (*Department of Transport*).**

The proposed amendments to reflect the *Department of Transport* reasoning result in a broader approach than that taken by the Commissioner to date to determine if a supplier makes a supply to a third party payer under a tripartite arrangement.

2. **Changes to Division 81 of the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* resulting from *Tax Laws Amendment (2011 Measures No. 2) Act 2011*.**

These changes relate to the GST treatment of payments of certain Australian taxes fees and charges. The former legislative scheme involving a detailed legislative instrument is replaced with broad classes of exemption, in association with the A New Tax System (Goods and Services Tax) Regulations 1999. The amended law applies to payments relating to an Australian tax, or an Australian fee or charge, imposed on or after 1 July 2011. However, the amended law is subject to a 12 month grandfathering provision to provide continued exemption from GST for taxes, fees or charges imposed before 1 July 2012 which are of a kind specified by the Division 81 legislative determination that was in force immediately before Division 81 was amended.

3. **The insertion into the GST Act of Division 134 resulting from *Tax Laws Amendment (2010 GST Administration Measures No. 1) Act 2010* and amendments by *Tax Laws Amendment (2010 GST Administration Measures No. 3) Act 2010* and *Tax Laws Amendment (2010 Measures No. 4) Act 2010*.**

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These changes relate to the GST treatment of certain third party payments (sometimes described as manufacturer's rebates) made on or after 1 July 2010.

4. **Changes to Subdivision 153-B of the GST Act resulting from *Tax Laws Amendment (2009 GST Administration Measures) Act 2010*.**

These changes relate to domestic agency. The changes to Subdivision 153-B broaden the scope of the domestic agent provisions to include representatives that operate in a similar way to, but do not amount to, common law agents. The changes apply to supplies and acquisitions made on or after 1 July 2010

GSTR 2006/9 is to be amended as follows:

1. **Table to paragraph 47**

Omit 'agents' in the last row of the table; substitute 'intermediaries'.

2. **Paragraph 59**

Omit the paragraph; substitute:

59. Division 81, together with the GST Regulations^{22A} made for the purposes of Division 81, provides that certain payments of Australian taxes, fees and charges are not the provision of consideration.^{22B} However for certain other Australian taxes, fees and charges, Division 81 (together with the Regulations) may provide that the payment **is** treated as the provision of consideration. Further, this consideration is taken to be provided to the entity to which the tax, fee or charge is payable for a **supply** that the entity makes. In these circumstances, there is deemed to be a supply, if there was not one, and the payment of the tax, fee or payment is consideration for that supply.

^{22A} A New Tax System (Goods and Services Tax) Regulations 1999.

^{22B} This paragraph refers to Division 81 after amendment by *Tax Laws Amendment (2011 Measures No. 2) Act 2011*. The amended law applies to payments relating to an Australian tax, or an Australian fee or charge, imposed on or after 1 July 2011. However, the amended law is subject to a 12 month grandfathering provision to provide continued exemption from GST for taxes, fees or charges imposed before 1 July 2012 which are of a kind specified by the Division 81 legislative determination that was in force immediately prior to the amendment of Division 81.

3. Paragraph 107A

Omit the paragraph; substitute:

107A. In the Full Federal Court decision of *TT-Line Company Pty Ltd v. Federal Commissioner of Taxation* (2009) 181 FCR 400; 2009 ATC 20-157; (2009) 74 ATR 771, Edmonds J confirmed that given the express statement in subsection 9-15(2), there does not have to be an enforceable entitlement to receive a payment for that payment to be characterised as consideration.^{41A}

4. Paragraph 129

At the end of the paragraph add:

However, if the payment is made on or after 1 July 2010, and the requirements of Division 134 are met, M will be entitled to a decreasing adjustment of 1/11th of the third party payment. If E is making the acquisition wholly for a creditable purpose and is registered or required to be registered E will be subject to an increasing adjustment of 1/11th of the third party payment.

5. Paragraph 133

Omit the last sentence.

6. Paragraph 133

After paragraph 133 insert:

133A. A further example of this distinction, in an Australian GST context, between a supply 'made' to an entity but 'provided' to someone else occurred in *Meridien Marinas Horizon Shores Pty Limited v FC of T*.^{47A} Greenwood J, at paragraph 88, referred to the application of Division 87 of the GST Act to the facts of that case, which is about long-term accommodation in commercial residential premises, provided to individuals. His Honour observed... '[T]here may be a taxable supply of commercial accommodation to a range of entities, provided in commercial residential premises that are predominantly for long-term accommodation, in circumstances where a natural person exercises the right in every case.'

^{41A} See paragraph 47 of the judgment of Edmonds J.

^{47A} [2009] FCA 1594; 2009 ATC 20-158; (2009) 74 ATR 787.

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7. Paragraph 134

After the second dot point 'consideration being 'provided' (subsection 11-30(3));' insert:

- the 'provision' of a permission, exemption, authority or licence (subsection 81-10(4));

8. Paragraph 177A

Omit the paragraph; substitute:

177A. For example in the Full Federal Court decision in *TT-Line Company Pty Ltd v. Federal Commissioner of Taxation*^{52B} the Court observed that the payments made by the government entity formed part of the consideration for the supply of transport made by the ferry operator to the eligible passengers.^{52C}

9. Paragraphs 184 – 191

Omit the paragraphs.

10. Paragraphs 192A – 212

Omit the paragraphs; substitute:

Example 10A: A subsidy payment that a member of the public is entitled to receive, that is assigned to and paid to an entity that makes a relevant supply to the member of the public

212A A subsidy program is managed by a Government Department. The subsidy program is legislatively based and provides that individuals are entitled to a subsidy payment when certain criteria are satisfied. Under the legislation, the amount of the subsidy is payable to the individual. Where a supply is made to the individual, the individual provides the consideration to the supplier for that supply and then claims the subsidy payment from the Department.

212B Alternatively, under the program, an individual and a supplier may enter into an arrangement under which the subsidy payment is paid by the Department directly to the supplier rather than to the individual. Where this occurs, the legislation provides that this is an assignment of the subsidy entitlement by the individual to the supplier and the Department is required by legislation to pay the amount to the supplier.

^{52B} [2009] FCAFC 178; 2009 ATC 20-157; (2009) 74 ATR 771.

^{52C} The Court was not asked to consider whether the ferry operator made a supply to the government entity under the arrangement.

212C Where those payments are to be made directly to the supplier under the subsidy program, the supplier is required to comply with certain rules that the legislation provides for the department to make in respect of its supplies to individuals. These rules include a requirement to accept the amount of the subsidy as full payment for the supply to the individual, which may be less than the amount that the individual would otherwise pay to the supplier if this arrangement was not used. The rules also include a requirement to provide information in relation to the supply to determine the amount that is payable by the department and to be potentially subject to audit or investigation in respect of supplies under these arrangements.

212D While there is a pre-existing framework which requires the supplier and the department to act in a particular way when a payment is made directly to the supplier, including a requirement to accept the amount as full payment, the supplier is not making a supply to the department for which the subsidy payment is consideration. The subsidy payment is an entitlement of the individual and is assigned to the supplier under the subsidy payment arrangement. The payment made by the department to the supplier is made on behalf of the individual, for a liability owed by the individual to the supplier.

11. Paragraph 217

After paragraph 217, insert:

*217A. This proposition is illustrated by *Federal Commissioner of Taxation v. Secretary to the Department of Transport (Vic)*^{63A} (*Department of Transport*), where the activity undertaken by the taxi operator of transporting the eligible passenger resulted in two supplies being made:*

- (i) the supply of transport to the passenger; and*
- (ii) the supply to the Department of the service of transporting the eligible passenger.^{63B}*

12. Paragraph 218

After 'Redrow has', insert 'also'.

13. Paragraph 219

Omit the paragraph.

^{63A} [2010] FCAFC 84; 2010 ATC 20-196; (2010) 76 ATR 306.

^{63B} Per Kenny and Dodds-Streton JJ at paragraph 56.

14. Paragraph 221

After paragraph 221, insert:

Factors that may point to a supply being made to a payer where a supply is provided to a third party

221A. While there was no indication on the facts in *Department of Transport* that there was a binding obligation between the Department and the taxi operator for the latter to provide transport to the eligible passenger, the Full Federal Court concluded that there was a supply of the service of transport of the eligible passenger by the taxi operator to the Department. In practice, whether such a supply can be identified for a particular arrangement will require careful consideration of all the relevant facts and circumstances.

221B. The Commissioner considers that the following factors, in combination, may point to a supply being made by the supplier to the payer under a tripartite arrangement that involves the supplier providing a service or goods to the customer, and where there is no binding obligation between the payer and the supplier for the supplier to provide the service or goods to the customer:

- (a) there is a pre-existing framework or agreement between the payer and the supplier which contemplates that the parties act in a particular manner in respect of supplies that are to be provided by the supplier to particular third parties or a class of third parties;
- (b) the pre-existing framework or agreement:
 - (i) identifies a mechanism by which the particular third parties or the class of third parties are to be identified such that the supplies provided to them come within the scope of the framework or agreement; and
 - (ii) specifies that the payer is under an obligation to pay the supplier if the supplier provides a relevant supply to a third party and also sets out a mechanism by which such payment is authorised;
- (c) the framework or agreement and the mechanism for authorising the payment are in existence before the supplier provides the supply to the third party (that is, the supplier knows in advance that the payer is obliged to pay some or all of the consideration where that supply is provided to the third party);

- (d) the supplier provides the supply to the third party in conformity with the pre-existing framework or agreement between the parties; and
- (e) the obligation of the payer to make payment pursuant to the pre-existing framework or agreement is not an administrative arrangement to pay on behalf of the third party for a liability owed by the third party to the supplier. Rather, once the supply becomes a supply to which the framework or agreement applies, the framework or agreement establishes a liability owed by the payer (not the third party) to the supplier in the event that the supplier provides the relevant supply to the third party.

Pre-existing framework or agreement and requirement for supplier to act in a particular manner

221C. The pre-existing framework or agreement can take various forms, including licence conditions (as occurred in *Department of Transport*). The pre-existing framework or agreement must set out the terms and conditions governing the parties and require the supplier to act in a particular manner with respect to the supplies provided to the third parties. Those requirements may include a binding obligation to make a supply to a third party, complying with licence conditions which are binding on the supplier or a requirement to charge a lower amount to the third party.

221D. If the 'requirement' to act in a particular manner is optional then it is unlikely that a supply would be made to the payer. This situation may arise where the pre-existing framework or agreement allows, but does not require, the supplier to act in a particular manner and the payer makes a payment because the supplier has satisfied eligibility criteria for the payment. In these circumstances there may instead be a third party payment. [*Proposition 14: a third party may pay for a supply but not be the recipient of the supply, paragraphs 177 to 216 of this Ruling.*]

Pre-existing framework or agreement allows for identification of third parties and sets out authorisation process

221E. The pre-existing framework or agreement must:

- be capable of allowing the supplier to identify the third parties (or classes of third parties) and the supplies that come within the scope of the framework and must be in existence before the relevant supply is made; and

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- set out the authorisation process, in advance of the supply, by which the obligation arises for the payer to make payment.

However, if there is no pre-existing framework or agreement which identifies the classes of third parties and which triggers the payer's obligation to make a payment to the supplier where the relevant supplies are provided to those third parties, the mere act of payment, in the absence of anything else, would not give rise to a supply to the payer. There may instead be a third party payment. [*Proposition 14: a third party may pay for a supply but not be the recipient of the supply, paragraphs 177 to 216 of this Ruling.*]

Obligation to pay must be in respect of a liability of the payer and not an administrative arrangement to meet a liability of the third party

221F. The payer's obligation to pay the supplier for a supply being provided to the third party must be a liability that arises for the payer in its own capacity and not an administrative payment arrangement on behalf of the third party. That is, the obligation to pay imposed on the payer must not be for a liability owed by the third party recipient of the supply. The pre-existing framework or agreement surrounding the payment obligation of the payer should be one where the payer (and not the third party) is liable to make the payment to the supplier.^{68A}

221G. Ultimately, it is a question of fact and degree whether a supply to the payer can be identified (and for which the payment is consideration). The factors listed at paragraph 221B of this Ruling provide a guide, but are not conclusive or prescriptive. It is conceivable that despite all of the listed factors being present, there may be some other relevant factor that points to the payment not being consideration for a supply to the payer. Conversely, if one of the listed factors is not fully met, this does not necessarily preclude identifying the payment as being consideration for a supply to the payer.

^{68A} For example, in the Full Federal Court decision in *Department of Transport, Kenny and Dodds-Streeton JJ* at paragraph 45 observed: 'The DOT made a MPTP payment to a taxi-cab operator, or **assumed the liability** to make such a payment, only when the taxi-cab operator made a MPTP trip.' [emphasis added] Their Honours observed at paragraph 47, 'Once the trip became an MPTP trip, the DOT assumed liability to make a MPTP payment.'

Example 11A: provision of services – licensing arrangement with condition requiring the provision of subsidised services in certain circumstances – two separate supplies

221H. A State's legislation provides that certain amusement related services may be provided to school age children only by providers issued with a licence by the relevant State government Minister. The legislation provides that licences may include such conditions that the Minister determines. The State government's policy is that eligible low income residents (E) should have access to such amusement services for their school age children at a scheduled price. In implementing this policy, the State government (G) issues eligibility cards to E.

221I. G provides, through the Minister, a licence to a company (C) enabling it to provide the relevant amusement services to school age children. The licence includes a condition that, where C supplies services to E, C must supply those services to E for a scheduled price provided that E presents their eligibility card to C when the services are provided. The scheduled price is lower than the usual retail price, and in accordance with the licence condition C is entitled to receive from G a specified amount when C provides the services to E for the scheduled price. The specified amount is calculated as the difference between the usual retail price and the scheduled price.

221J. There is nothing in the terms of the licence issued by G to C which binds C to make amusement supplies to E. It is relevant to apply the factors listed at paragraph 221B of this Ruling to the circumstances surrounding the payment by G to C for amusement services provided to E. In particular:

- there is a pre-existing framework, in the form of the licence conditions, that contemplates that the parties act in a particular manner in respect of amusement supplies that are to be made to E (C is required to discount the fee for any supply it makes of amusement service to E. G is obliged to pay C the amount of any such discount); and*
- the pre-existing framework provides a mechanism, that is, a card, for checking of the eligibility of E at the time of the provision of the amusement service. The card, used to ascertain E's eligibility for the lower scheduled fee, is the mechanism by which C, in effect, obtains authorisation from G that it will pay the difference between the usual retail price and the scheduled price.*

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221K *Weighing up the facts against the factors listed at paragraph 221B of this Ruling, a supply is identified as having been made by C to G. The payment by G to C is consideration for the supply by C to G, rather than consideration for the provision of amusement services to E. Assuming the other elements of section 9-5 are met, C makes a taxable supply to G. As the recipient of the supply, G makes a creditable acquisition if the other requirements of section 11-5 are met.*

Example 11B: specialised equipment – two separate supplies

221L. *A State government's policy provides that any eligible resident (E) of specified country areas should have access to telecommunications services that are accessible through specialised equipment, at a scheduled price.*

221M. *The State government (G) enters into a contract with a retailer of specialised equipment (R) where if R sells the specialised equipment to an eligible person, R must charge the eligible person a scheduled price. The scheduled price is lower than the recommended retail price and under the agreement R is entitled to receive from G a specified amount when R sells specialised equipment to E for the scheduled price. The specified amount is calculated as the difference between the recommended retail price and the scheduled price.*

221N. *To assist R in identifying eligible residents, G issues an eligibility card to E that is presented to R when E purchases the specialised equipment.*

221O. *If R does not supply the specialised equipment to E for the scheduled price, for example, because E does not present the eligibility card, and therefore E buys the specialised equipment at the recommended retail price, E cannot seek the specified amount from G.*

221P. *Each time R sells specialised equipment to E for the scheduled price, R will be entitled to claim the specified amount from G. Under the contract between R and G, R makes a supply to G because it enters into and fulfils an obligation to provide specialised equipment to E for the scheduled price.*

221Q. *G's payment of the specified amount to R is the contractual consideration G provides to R under the contract between them in return for R undertaking and fulfilling its contractual obligations. The specified amount received by R from G is consideration for the supply made by R to G.*

221R. If R is registered or required to be registered for GST, R has made a taxable supply to G for consideration which is calculated as the difference between the recommended retail price and the scheduled price charged to E. R issues a tax invoice to G where the specified amount is the GST-inclusive price of the supply to G. R is liable to remit GST and G has made a creditable acquisition and is entitled to claim input tax credits if the requirements of section 11-5 are met.

221S. When R supplies E with the specialised equipment R makes a taxable supply to E for consideration from E of payment of the scheduled price. This is a separate supply to the supply that R makes to G. R issues a tax invoice to E with the scheduled price paid by E as the GST-inclusive price of the supply to E. R is liable to remit GST for this taxable supply and if E is registered or required to be registered for GST then E is entitled to claim input tax credits if the requirements of section 11-5 are met.

15. Paragraph 269

Omit the heading to the paragraph; substitute:

Subsidy payments made to a supplier of services to eligible passengers, within a pre-existing framework for determining eligibility

16. Paragraph 270

Omit the paragraph; substitute:

269A Before commencing the 12 month scheme, the Department enters into a written agreement with the Bus Company under which the Bus Company allows the Department to install a card reader in each bus. Under the agreement, when a student swipes a card and the reader indicates the card is valid, the Bus company will not charge the student and will instead bill the Department which is liable to pay the amount under the agreed formula to the Bus company.

270 In these circumstances there is:

- the establishment of the pre-existing agreement that contemplates that the Bus Company carries out the supply of transport to the students in a particular manner in respect of supplies of transport services to be made to the students; and
- the pre-existing agreement:
 - identifies a mechanism by which the students are to be identified;

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- specifies that the Department is liable to pay the Bus Company; and
- sets out how such a payment is authorised (via the card reader).

Hence, the payments from the Department are consideration for the supplies of a service of transporting the students made by the Bus Company to the Department. *[Proposition 15: one set of activities may constitute the making of two (or more) supplies, paragraphs 217 to 221 of this Ruling.]*

17. Paragraph 270A

Omit the heading to the paragraph; substitute:

Operation of a bus service under contract

18. Paragraph 270C

Omit the paragraph; substitute:

270C. In this arrangement, the top-up payment made by the Department to the Bus Company is part of the total consideration for the taxable supply of operating the bus service, which is made by the Bus Company to the Department. The Department is the recipient of the supply of bus services and makes a creditable acquisition in connection with the payments.

19. Detailed contents list

(1) Delete the entries that refer to paragraph numbers:

192A, 192I, 192P, 193, 198, 205, 269, 270A.

(2) Insert:

<i>Example 10A: A subsidy payment that a member of the public is entitled to receive, that is assigned to and paid to an entity that makes a relevant supply to the member of the public</i>	212A
<i>Factors that may point to a supply being made to a payer where a supply is provided to a third party</i>	221A
<i>Pre-existing framework or agreement and requirement for supplier to act in a particular manner</i>	221C
<i>Pre-existing framework or agreement allows for identification of third parties and sets out authorisation process</i>	221E
<i>Obligation to pay must be in respect of a liability of the payer and not an administrative arrangement to meet a liability of the third party</i>	221F

<i>Example 11A: provision of services – licensing arrangement with condition requiring the provision of subsidised services in certain circumstances – two separate supplies</i>	221H
<i>Example 11B: specialised equipment – two separate supplies</i>	221L
<i>Subsidy payments made to a supplier of services to eligible passengers, within a pre-existing framework for determining eligibility</i>	269
<i>Operation of a bus service under contract</i>	270A

20. Legislative references

Insert:

- ANTS(GST)A 1999 Div 134

21. Case references

(1) Delete:

- Ashfield District Council v. Customs and Excise Commissioners [2002] BVC 212
- London Borough of Camden [2001] BVC 4139
- Suzuki New Zealand Ltd v. C of IR (2001) 20 NZTC 17096
- TT-Line Company Pty Ltd v. Federal Commissioner of Taxation [2009] FCA 658; 2009 ATC 20-210

(2) Insert:

- Federal Commissioner of Taxation v. Secretary to the Department of Transport (Vic) [2010] FCAFC 84; 2010 ATC 20-196; (2010) 76 ATR 306
- Meridien Marinas Horizon Shores Pty Limited v FC of T [2009] FCA 1594; 2009 ATC 20-158; (2009) 74 ATR 787.
- TT-Line Company Pty Ltd v. Federal Commissioner of Taxation (2009) 181 FCR 400; 2009 ATC 20-157; (2009) 74 ATR 771

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Date of effect

It is proposed that when finalised the Addendum will amend GSTR 2006/9 to state the Commissioner's view, subject to the proposed transitional arrangements below, of the law as it applied both before and after the date of issue.

Proposed transitional arrangements

In the context of health services, some entities have treated certain payments as being third party payments for GST-free supplies, based on the existing views in GSTR 2006/9. Some of these arrangements will be affected by the proposed amendments to GSTR 2006/9. In some cases, based on the proposed views in this draft Addendum, such payments should instead be treated as consideration for taxable supplies to the payers. To allow these affected entities sufficient time to make necessary changes to their practices and systems, it is proposed that entities may continue to rely on GSTR 2006/9 in its existing form for a period of 3 months after the issue date of the final Addendum.

In the above circumstances, if an affected supplier relies or has relied on GSTR 2006/9 to determine that they did not make a taxable supply then no GST is payable on that supply. This means that the recipient cannot claim an input tax credit.

GST and certain supplies to health insurers

This draft Addendum is intended to reflect the law as enacted at the time of issue. However a measure has been announced that if enacted may retrospectively affect the GST treatment of certain multiparty arrangements.

In the 2011-12 Federal Budget, the government announced it would amend the goods and services tax (GST) law to ensure that certain supplies made to health insurers in the course of settling health insurance claims are GST-free, with effect from 1 July 2000. For further details about this proposed measure, see the Australian Taxation Office website: www.ato.gov.au.

Your comments

You are invited to comment on:

- this draft Addendum;
- the date of effect; and
- the proposed transitional arrangements and any other arrangements that are appropriate in implementing the final Addendum.

Please forward your comments to the contact officer by the due date.

A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers.

An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Australian Taxation Office website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 16 September 2011
Contact officer: Garry King
Email address: garry.king@ato.gov.au
Telephone: (07) 3213 5692
Facsimile: (07) 3213 5061
Address: Australian Taxation Office
GPO Box 9997
Brisbane QLD 4001

Commissioner of Taxation

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ATO references

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