



Draft Addendum

Goods and Services Tax Ruling

Goods and services tax: insurance settlements and entitlement to input tax credits

This draft Addendum, when finalised, will amend Goods and Services Tax Ruling GSTR 2006/10 to reflect 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 results in a broader approach than that taken by the Commissioner to date to determine if a supplier makes a supply to an insurer for a payment that an insurer makes to the insured or a third party.

GSTR 2006/10 is to be amended as follows:

1. Paragraph 35

Omit the paragraph; substitute:

35. If the insurer merely facilitates the payment as part of the settlement of an insurance claim or provides consideration for a supply by a supplier to the insured or a third party (which does not give rise to a taxable supply to the insurer), the insurer is not making a creditable acquisition and, therefore, has no entitlement to an input tax credit. However, the insurer may be entitled to a decreasing adjustment.

2. Paragraph 41

Omit the paragraph; substitute:

41. An examination of the surrounding circumstances, which together with the agreement form the total fact situation, is relevant for determining whether the agreement correctly records the supplies that are being made between the parties. This is discussed in Proposition 16 at paragraphs 222 to 246 of GSTR 2006/9.

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3. Paragraph 46

Omit the paragraph; substitute:

46. The identification and characterisation of supplies in tripartite transactions have received judicial consideration in the United Kingdom (UK), New Zealand (NZ) and in the recent Australian Full Federal Court decision in *Federal Commissioner of Taxation v. Secretary to the Department of Transport (Vic)*^{21A} (*Department of Transport*). Some of these cases are discussed in this Ruling. We consider that a principle that can be derived from UK cases such as *Customs and Excise Commissioners v. Redrow Group plc*²² (*Redrow*) is that the entity that contracts for a supply from a supplier is the recipient of that supply, even if the supply is provided to another entity.

4. Paragraph 47

After the paragraph; insert:

47A. Alternatively, an insurer may enter into a pre-existing framework or agreement with a supplier which contemplates that the parties act in a particular manner in respect of supplies that are to be provided by the supplier to the insured or third party and which establishes a liability owed by the insurer to the supplier (not the insured or third party) in the event that the supplier provides the relevant supply to the insured or third party (see paragraph 64B of this Ruling).

5. Paragraph 48

Omit the paragraph; substitute:

48. In these cases, the insurer makes an acquisition as defined in section 11-10 and the acquisition is a creditable acquisition for the purposes of section 11-5.

6. Paragraphs 49 to 54

Omit the paragraphs.

7. Paragraph 55

Omit the paragraph; substitute:

55. When identifying to whom a supply is made, it is necessary to look at the whole arrangement, including the

^{21A} [2010] FCAFC 84; 2010 ATC 20-196; (2010) 76 ATR 306

²² [1999] 2 All ER 13; [1999] STC 161; [1999] 1 WLR 408.

contractual and other agreements made between the parties. In *WHA Limited and Viscount Reinsurance Company Limited v. HM Commissioners of Customs and Excise (WHA Ltd)*,^{24A} Lord Justice Neuberger said that 'one must look at the way the parties have actually structured, and indeed, expressed, their transaction or transactions'.²⁵ He also agreed with the observation by Justice Lloyd that:

the contractual position is not conclusive as to what taxable supplies are made to whom, but it must be the starting point.²⁶

8. Paragraph 60

Omit the paragraph; substitute:

60. A supplier may undertake a single activity that results in more than one supply being made (see Proposition 15, paragraphs 217 to 221S of GSTR 2006/9). This is illustrated in *Department of Transport and Redrow*.

9. Paragraph 60

After paragraph 60 insert:

60A In *Department of Transport* 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.^{26A}

10. Paragraphs 64

After paragraph 64 insert:

Identifying a pre-existing framework or agreement

64A. Having regard to all of the facts and circumstances, a supply may also be made to the insurer where there is a pre-existing framework or agreement between the insurer and the supplier.

64B. In the context of an insurance claim and having regard to the relevant factors and discussion listed at

^{24A} [2004] EWCA Civ 559; [2004] BVC 485.

²⁵ Paragraph 29 of *WHA Ltd*.

²⁶ Paragraph 35 of *WHA Ltd*.

^{26A} See paragraph 56 of the Full Federal Court judgment.

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paragraphs 221A to 221G of GSTR 2006/9, we consider that the following factors, in combination, may point to a supply being made by the supplier to the insurer under a tripartite arrangement:

- (a) there is a pre-existing framework or agreement between the insurer 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 the insured or third party;
- (b) the pre-existing framework or agreement:
 - (i) identifies a mechanism by which the insured or third party is to be identified such that the supplies provided to the insured or third party come within the scope of the pre-existing framework or agreement; and
 - (ii) specifies that the insurer is under an obligation to pay the supplier if the supplier provides a relevant supply to the insured or 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 insured or third party (that is, the supplier knows in advance that the insurer is obliged to pay some or all of the consideration where that supply is provided to the insured or third party);
- (d) the supplier provides the supply to the insured or third party in conformity with the pre-existing framework or agreement between the insurer and the supplier; and
- (e) the obligation of the insurer to make payment pursuant to the pre-existing framework or agreement is not an administrative arrangement to pay on behalf of the insured or third party for a liability owed by the insured or third party to the supplier. Rather, once the supply becomes a supply to which the pre-existing framework or agreement applies, the pre-existing framework or agreement establishes a liability owed by the insurer (not the insured or third party) to the supplier in the event that the supplier provides the relevant supply to the insured or third party.

64C. Ultimately, it is a question of fact and degree whether a supply to the insurer can be identified (and for which the payment is consideration). If such a supply is identified the payment by the insurer is consideration for an acquisition

made by the insurer. See *Example 16A* in paragraphs 132A to 132D of this Ruling.

11. Paragraph 66

Omit the paragraph; substitute:

66. A feature of these arrangements is that the agreement for the supply of the goods or services is between the supplier and the insured and that an obligation to pay remains with the insured. The fact that the insurer meets the insured's liability does not alter this. There is no binding obligation between the supplier and the insurer for the supply of goods or services to the insured, nor a pre-existing framework or agreement which establishes a liability owed by the insurer to the supplier (not the insured or third party) in the event that the supplier provides the relevant supply to the insured or third party (see paragraph 64B of this Ruling). The arrangement between the supplier and the insurer remains that of a payment arrangement.

12. Paragraph 67

Omit the paragraph; substitute:

67. Typical of a payment arrangement is where a person is injured at work and seeks medical treatment under a workers' compensation scheme. In some cases, workers' compensation insurers will have administrative arrangements in place where the invoices for supplies of hospital and ambulance services made to the injured person are sent directly to the workers' compensation insurer (though the obligation to pay remains with the insured). The supply of the medical and ambulance services can nevertheless be made to the injured person and not to the insurer, with consideration for these services being provided by the insurer on behalf of the insured.

13. Paragraph 117

Omit the paragraph; substitute:

117. If an employee makes a compensation claim against the employer and the employer's workers' compensation insurer accepts liability for the workplace injury, then the insurer may pay for certain goods and services to be provided to the employee. The same issues in relation to the payment of similar benefits as for other general insurance settlements arise. Whether the payment is subject to Division 11 or Division 78 depends on whether there is a binding obligation between the insurer and the supplier to provide goods and/or services to the insured's employee or a pre-existing

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framework or agreement between the insurer and the supplier (see paragraph 64B of this Ruling) which results in a supply being made by the supplier to the insurer.

14. Paragraph 131

Omit the paragraph; substitute:

131. *As part of Nick's therapy, he goes to a masseuse. The workers' compensation insurer informs Nick that he should attend a masseuse mentioned on the insurer's list of approved masseuses because the insurer has an arrangement with each of those masseuses to forward invoices to the insurer for payment. However, Nick still has the liability to pay for the supply made to him. There is no pre-existing framework or agreement which contemplates that the insurer (payer) and supplier act in a particular manner with respect to the supply to Nick and establishing that the insurer has requisite the liability to pay. The arrangement is not for a supply to the insurer to have services provided to workers' compensation patients. It is merely a payment arrangement.*

1. Paragraph 132

Omit the paragraph; substitute:

132. *The supply of the massage services by the masseuse to Nick is a taxable supply.⁴⁴ The arrangement between the insurer and the masseuse is merely a payment arrangement and does not give rise to any supply to the insurer. Therefore, the insurer is not entitled to an input tax credit in respect of payments to the masseuse. Also, there is no entitlement to decreasing adjustment as the employer is entitled to a full input tax credit for its workers' compensation premium.*

15. Paragraph 132

After the paragraph; insert:

Example 16A: Massage services

132A. *In contrast to Example 16 above, the workers' compensation insurer informs Nick that he should attend a masseuse mentioned on the insurer's list of approved masseuses because the insurer has an agreement with each of those masseuses. Under the agreement with the masseuse the insurer is liable to pay the masseuse an agreed fee if a relevant service is provided to the insured's employee.*

⁴⁴ These services do not meet the requirements of section 38-10 and therefore are not GST-free.

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132B. When Nick goes to the masseuse, the masseuse seeks authorisation from the worker's compensation insurer (pursuant to the agreement) that the insurer will pay the relevant fee applicable to the massage service before the service is provided to the insured's employee. Upon receipt of the authorisation, the masseuse duly provides the massage services to Nick for the agreed fee.

132C. In view of the pre-existing agreement which contemplated that the parties act in a particular manner with respect to massage supplies to third parties, including the processes for authorisation of the payment by the insurer and the fact that the insurer is liable for such payment (once authorised), the circumstances surrounding the payment by the insurer to the supplier are such that there is a supply of the service of providing a massage made by the masseuse to the insurer.

132D. Assuming the other elements of section 9-5 are met, the supply by the masseuse to the insurer is a taxable supply. The insurer, in turn, is entitled to an input tax credit under Division 11 for the fee paid to the masseuse, assuming the other elements of section 11-5 are met.

16. Detailed contents list

(1)	Insert:	
	Identifying a pre-existing framework or agreement	64A
	<i>Example 16A: Massage services</i>	132A
(2)	Delete	
	<i>WHA Ltd</i>	50

17. Subject references

Delete:

- contractual obligation
- third party payer

18. Case references

- | | |
|-----|---|
| (1) | Insert: |
| | - Commissioner of Taxation v Secretary to the Department of Transport (Victoria) 2010 FCAFC 84, 2010 ATC 20-196; (2010) 76 ATR 306. |
| (2) | Delete: |
| | - WHA Ltd & Anor v. Customs and Excise Commissioners [2003] BVC 537; [2003] EWHC 305 (Ch) |

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Date of effect

It is proposed that when finalised, the Addendum will amend GSTR 2006/10 to state the Commissioner's view, subject to the proposed transitional arrangements, 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 2006/10. 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 these entities may continue to rely on GSTR 2006/10 in its existing form for a period of 3 months after the issue date of the final Addendum.¹

In the above circumstances, if an affected supplier relies or has relied on GSTR 2006/10 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.²

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 Tax Office website: www.ato.gov.au.

¹ The final Addendum is expected to issue on 14 December 2011.

² Section 11-25 of the GST Act and subsection 357-60(3) of Schedule 1 to the *Taxation Administration Act 1953*.

Your comments

You are invited to comment on this draft Addendum and the date of effect. Please forward your comments to the contact officer by the due date.

A compendium of comments is also 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.

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Commissioner of Taxation

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ATO references

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