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Public advice and guidance compendium – GSTR 2006/6

This is a compendium of responses to the issues raised by external parties to the draft update GSTR 2006/6DC *Goods and services tax: improvements on the land for the purposes of Subdivision 38-N and Division 75*

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised	ATO response / action taken
1	There is no objection to the updating of GSTR 2006/6 to incorporate the principle that a human intervention can be an improvement on the land if it added to or increased the usefulness of the land.	Noted.
2	<p>One of the fundamental principles in the application of tax laws is that the form in which a transaction occurs should not trump the substance of that transaction. Even when two titles are supplied under a single contract of sale, they still clearly involve two separately identifiable supplies.</p> <p>This can be evidenced by the fact that:</p> <ul style="list-style-type: none"> • each separate title can be clearly identified by its Lot details • each separate title may have separately identifiable consideration in the contract of sale • each separate title may have separately agreed terms and conditions (conditions precedent etc), and • one title may be sold subject to lease, but not the other. 	<p>We agree that the interpretation should not involve form over substance. Identifying the land that is being supplied for the purposes of the sections, that is, the subject matter of the supply, should not be determined conclusively based on the contracts for sale or the legal titles alone. It is necessary to consider the total fact situation and the documentation is a logical starting point (compare with Goods and Services Tax Ruling GSTR 2006/9 <i>Goods and services tax: supplies</i> proposition 16, paragraph 222).</p> <p>In <i>ATS Pacific Pty Ltd v Commissioner of Taxation</i> [2014] FCAFC 33 Edmonds J at [64], with whom Pagone and Davies JJ agreed, noted the need to consider the entire factual matrix and not just the terms and conditions of the contract (at [29] and [37–39]).</p> <p>Therefore, it is necessary to identify, as a matter of substance, the land that is being supplied.</p> <p>Further, we consider that the position in the draft update to GSTR 2006/6 is consistent with other public guidance on circumstances where there may be a single supply of separately titled lots. For example, Goods and Services Tax Ruling GSTR 2012/5 <i>Goods and services tax: residential</i></p>

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		<p><i>premises</i> at paragraph 16 deals with a supply of a residential apartment and a separately titled garage, car-parking space or storage space and characterises the supply as a single supply of residential premises to be used predominantly for residential accommodation.</p> <p>For the final Ruling, paragraph 47A of the draft update to the Ruling has been amended and paragraphs 47B and 47C inserted. New examples 1 and 2 have been added.</p>
3	<p>While an 'interest in land' is not defined for GST purposes, under property law an interest in land is evidenced by a certificate of title, which outlines that land's boundaries. Each separate certificate of title represents a separate interest in a particular parcel of land. A number of certificates of title may be aggregated to comprise a larger parcel of land, however the legal interests in that larger parcel of land are still referable to each individual certificate of title (rather than the larger parcel itself, even where this is described as a street address for example). For this reason, each and every certificate of title that is capable of being supplied should be considered as a separate supply for GST purposes.</p>	<p>We consider that determining whether a transaction is a single supply or multiple supplies by reference to each certificate of title would be taking a form over substance approach. It is necessary to consider the total fact situation. See also the response provided to Issue 2 in this Compendium.</p>
4	<p>The provisions which would be impacted by the proposed amendments also contemplate that a supply of a piece of land as evidenced by a certificate of title is its own supply for GST purposes.</p> <p>The legislation refers to 'a freehold interest' and clearly envisages that a singular freehold interest in land will be a single supply for GST purposes (whether that single freehold interest in land is sold individually under one land sale contract or whether that freehold interest is sold under a land sale contract that also includes other freehold interests).</p>	<p>Unless contrary intention appears, as a matter of interpretation words in the singular number include the plural (paragraph 23(b) of the <i>Acts Interpretation Act 1901</i>). It is not clear that the Act envisages that a singular freehold interest in land must always be a single supply for GST purposes.</p> <p>Where there are multiple contracts, these will form part of the factual matrix in determining whether there is in substance a single supply or multiple supplies.</p> <p>See also the response provided to Issue 2 in this Compendium.</p>
5	<p>The suggested approach is inconsistent with the statutory regime underlying the margin scheme, which requires eligibility</p>	<p>Eligibility for the margin scheme depends on section 75-5 of the <i>A New Tax System (Goods and Services tax) Act 1999</i> (GST Act). The single</p>

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	<p>and cost base to be determined by reference to individual lots as separate supplies.</p> <p>This can best be considered by reference to a single sale contract involving a vendor that includes the following lots:</p> <ul style="list-style-type: none"> • Lot A – a lot that is margin scheme eligible (owned at 1 July 2000) with no improvements as at that date, and • Lot B – a lot that is not margin scheme eligible that did contain improvements as at 1 July 2000. <p>The approach proposed in GSTR 2006/6DC would produce a very unusual outcome that eligibility would be determined on a lot by lot basis but cost base would be determined by reference to both parcels of land. In other words, even though Lot B is otherwise wholly irrelevant to the operation of the margin scheme, it somehow ‘infects’ the correct GST treatment of Lot A.</p>	<p>supply of Lots A and B together is a supply that the margin scheme can apply to. The Supplier did not acquire the entire interest (Lots A and B) through a supply that was ineligible for the margin scheme (subsection 75-5(2)).</p> <p>Paragraph 75-16(1)(b) of the GST Act acknowledges that the margin scheme can apply where ‘the interest ... in question is one that you acquired through 2 or more acquisitions ...’.</p> <p>The single supply approach is consistent with the statutory regime underlying the margin scheme, which allows for the margin scheme to apply where there are different acquisitions combined and supplied together.</p>
6	<p>In the edited version of a private ruling (authorisation number 79097) the ATO ruled that:</p> <ul style="list-style-type: none"> • the supply of the vacant lots were not taxable supplies because the vendor was not carrying on an enterprise, and • the supply of the lot containing the living area and workshop was a mixed supply (partly input taxed and partly taxable). <p>The private ruling contained the following remark (emphasis added):</p> <p style="padding-left: 40px;">Therefore we consider that when you sell all X lots together under the contract for sale of land, you supply X different properties, rather than making a single supply of the X properties together for a total amount per your contract.</p> <p>In another edited version of a private ruling (authorisation number 1013070325108), the ATO ruled that where a</p>	<p>Edited versions of private rulings are edited to ensure confidentiality and to protect the privacy of the applicant, and the applicant has the opportunity to review the edited version before it is published. Edited versions cannot be relied on as precedent or used for determining how we will apply the law.</p> <p>Identifying the substance of the supply is a question of fact. In respect of both edited private rulings, the statements in these edited versions of private rulings should not be taken to represent a view that individual lots will always be separate supplies. See also the response provided to Issue 2 in this Compendium.</p>

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	<p>commercial building and a separate carpark (two separate properties) are both sold subject to a single lease and under a single contract, the supplier is making two separate supplies of a going concern. This confirms the ATO's view that, even where multiple titles are being supplied under one contract, the supply of each property is a separate supply and each should be considered separately from a GST perspective.</p>	
7	<p>Comments were raised about the neutral evaluation's lack of judicial authority / weight and weakness in the reasoning in the neutral evaluation.</p>	<p>Unimproved land is relevant only for supplies made by the States and Territories. Where the GST amount is notional, the issue cannot be resolved through litigation.</p> <p>The ATO has sought to resolve these disputes through an alternative dispute resolution process (neutral evaluation) endorsed by the GST Administration Subcommittee (GSTAS) and the GST Administration Subgroup.</p> <p>Following a neutral evaluation decision on 15 April 2015, GSTAS determined that government entities will apply the principles established in the evaluation. The neutral evaluator took into account the relevant facts and circumstances in making the decision.</p> <p>See also the response provided to Issue 2 in this Compendium.</p>
8	<p>The supply of multiple titles under a single contract should be a mixed supply for GST purposes, where each component of that mixed supply can have its own GST treatment. This is consistent with:</p> <p>(a) Policy intent and provisions of the GST Act</p> <p>The GST Act has been drafted to specifically account for situations where a single supply can be comprised of a number of different components.</p> <p>The proposed amendments are contradictory to the objects of section 9-80 of the GST Act. The proposed amendments would mean that, despite the fact that an entity that sells multiple titles under one contract of sale</p>	<p>We acknowledge that the GST law provides for circumstances where a single supply can be a mixed supply with separately identifiable taxable and non-taxable parts.</p> <p>However, for the purposes of sections 38-445, 38-450 or subsection 75-10(3) of the GST ACT the statutory question being asked is whether there is a 'supply of land', or whether there is a supply of the 'land or premises in question', on which there are no improvements. This makes it necessary to identify the land that is being supplied and then consider whether there is an improvement on any part of the land supplied. The sections do not contemplate only part of the land being land on which there are improvements. For instance, once it is identified that any part of the land being supplied has an improvement on it, then it</p>

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	<p>(for example, some of which are GST-free under section 38-445 of the GST Act, and some of which are taxable), the whole supply would be taxable, and the apportionment exercise contemplated by section 9-80 would not be required.</p> <p>Division 75 of the GST Act</p> <p>The proposed amendments are inconsistent with the intention and operation of various provisions in Division 75 (that is, the margin scheme provisions).</p> <p>The provisions require the application of the margin scheme to be done on a 'lot by lot' basis (based on certificates of title), rather than a 'contract by contract' basis).</p> <p>Section 14-250 of Schedule 1 to the Tax Administration Act 1953 (TAA)</p> <p>Subsection 14-250(10) of Schedule 1 to the TAA operates so that, where a supply does not solely consist of one or more supplies for which there is a GST withholding obligation (that is, for new residential premises or subdivided lots), the consideration for the supply must be apportioned against the properties for which there is a GST withholding obligation (for example, new residential premises) and those for which there is not (for example, commercial premises). The portion of the overall consideration apportioned to the supply of the new residential premises will be subject to a GST withholding payment, and the remainder will not.</p> <p>The legislative intention is that, where there is a supply of multiple properties being made under a single contract, the nature of each property being supplied (each title) must be assessed to determine whether a GST withholding obligation applies, and in that case, the</p>	<p>fails the requirement in section 38-445 and is not a GST-free supply to any extent.</p> <p>That is, we consider that the specific context for the question in sections 38-445, 38-450 and subsection 75-10(3) of the GST Act is distinguishable from other provisions in the GST Act which contemplate a single supply having separately identifiable components.</p> <p>Accepting a view that a supply of land could involve separately identifiable components of land that contains improvements and land that does not would lead to inappropriate apportionments. For example, if a single title was supplied and had a fence that was an improvement, it would be inappropriate to break this down to only the area of the land containing the fence posts being treated as having improvements with the balance being treated as having no improvements.</p>

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	<p>amount of the GST withholding.</p> <p>(b) Applicable case law – Commissioner of Taxation v Luxottica Retail Australia Pty Ltd [2011] FCAFC 20 The proposed amendments are in contradiction with the leading GST case law on the issue (that finds that a single supply can have multiple components, some of which are taxable, and some of which are GST-free or input taxed).</p> <p>(c) Applicable ATO Rulings Goods and Services Tax Ruling GSTR 2001/8 Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts Broadly speaking, the ATO confirms at paragraph 12 that, where an entity makes a supply that is a combination of separately identifiable taxable and non-taxable parts (that is, a ‘mixed supply’), the entity needs to identify the taxable part of the supply. The entity can then apportion the consideration for the supply and work out the GST payable on the taxable part of the supply (noting that no GST should be payable on the non-taxable component of the supply). The ATO also outlines its views in respect of ‘composite supplies’, which are treated as a supply of a single thing. In the present circumstances, we do not consider that the supply of multiple titles under one single contract is a ‘composite supply’ for GST purposes, as it is unlikely that any of the relevant factors are present. The proposed amendments are inconsistent with the ATO views contained in GSTR 2001/8. GSTR 2006/9 GSTR 2006/9 contains an explicit proposition that a supply may be mixed, composite, or neither (Proposition 3</p>	

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	<p>– paragraphs 63 to 66). Where a supply is a mixed supply (that is, is comprised of taxable and non-taxable components), an apportionment exercise (under section 9-80 of the GST Act) is required to calculate the GST payable on the taxable component of the supply.</p> <p>Goods and Services Tax Ruling GSTR 2006/7 Goods and services tax: how the margin scheme applies to a supply of real property made on or after 1 December 2005 that was acquired or held before 1 July 2000 and Goods and Services Tax Ruling GSTR 2006/8 Goods and services tax: the margin scheme for supplies of real property acquired on or after 1 July 2000.</p> <p>The ATO specifically acknowledges at paragraphs 101 to 103 of GSTR 2006/7 and paragraphs 133 to 136 of GSTR 2006/8 that, where a supply of real property is a mixed supply because it has separately identifiable taxable and non-taxable parts, then the margin scheme can apply to the taxable component. This further evidences the ATO’s view that, where a supply is a mixed supply that consists of both taxable and non-taxable parts (that is, taxable supply of vacant land and a GST-free supply of unimproved land), the consideration should be apportioned across the two components to ascertain the GST payable on the supply.</p> <p>This is contradictory to the proposed amendments, which would not allow an entity to undertake this apportionment exercise across the various titles that comprise the parcel of land being supplied (and instead would treat the entire supply as fully taxable).</p> <p>(d) Other public ATO guidance</p> <p>The proposed amendments are inconsistent with the</p>	

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	<p>ATO's Fact Sheet '<i>GST at settlement – a guide for purchasers and their representatives</i>' (in respect of the new GST withholding measures),</p> <p>The ATO states:</p> <p style="padding-left: 40px;">If you are acquiring multiple supplies of different kinds under a single contract for an unapportioned amount (for example, a supply that is partly a supply of new residential premises and partly a supply of commercial premises), you and your supplier should determine a reasonable apportionment of the amount so as to determine the proportion that relates to the supply to which the withholding obligation applies.</p>	
9	<p>GST outcomes are the same under both approaches – that is, the multiple supplies approach and the mixed supply approach.</p>	<p>Noted. However, we do not agree that either submission is necessarily correct in all cases involving multiple titles – that is, it may be a supply of a single piece of land, being land on which there are improvements.</p>
10	<p>The ATO's proposed amendments, if incorporated, will cause government suppliers significant commercial and financial burden and cost in acting in accordance with the proposed amendments.</p> <p>Under the previously established GSTR 2006/6, the supplier would be able to prepare one single contract of sale for the sale of each of the certificates of title, and GST would only be calculated on the lot that is improved at settlement (that is, because the balance of the titles are unimproved at settlement and therefore GST-free under section 38-445 of the GST Act).</p> <p>Under the proposed amendments, the supplier will now need to prepare two separate contracts of sale – one for the improved lot, and one for the 19 unimproved lots. This represents an additional (and unnecessary) cost for the supplier.</p>	<p>This argument suggests a form over substance approach, which we do not consider to be the correct approach. The total fact situation will determine whether there is a single supply even if supplied under two or more contracts.</p> <p>See also the response provided to Issue 2 in this Compendium.</p>

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11	In the event that the ATO chooses to incorporate the proposed amendments into GSTR 2006/6, some form of transitional relief should be granted to entities that have previously exchanged contracts prior to the introduction of the proposed amendments in reliance on the previously published GSTR 2006/6.	The previously published GSTR 2006/6 does not contain anything which can be relied on in respect of single or multiple supplies where there is a single parcel of land. Inclusion of confirmation in GSTR 2006/6 does not mean that the additional content should only apply from the date of publication. Generally the ATO specifies that public rulings have both a past and future application. This is because they represent the Commissioner's opinion as to what the correct interpretation of the law has always been.