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Ruling Compendium – GSTR 2010/1

This is a compendium of responses to the issues raised by external parties to draft GSTD 2009/D2 – Goods and services tax: are there GST consequences where a land owner engages the services of an associate to arrange construction of residential premises for lease under an arrangement described in Taxpayer Alert TA 2009/5?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft determination.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	The approach adopted in GSTD 2009/D2 to the existence of an enterprise or the exclusion of certain activities from an existing enterprise in the circumstances outlined is both inconsistent with the legislation and at odds with the spirit of the legislation and current practice. Support should be included as to the broad definition of the term 'enterprise' – for example, Explanatory Memorandum to the <i>A New Tax System (Goods and Services Tax) Act 1999</i>, as follows: <i>Enterprise is defined widely because the GST is intended to have a broad base. Certain things are included as enterprises so that input tax credits are available to them.</i> Given the broad definition, the activities conducted by the associate would likely constitute 'an adventure or concern in the nature of trade'. This would generally equate to there being a profit making intention in relation to an isolated transaction (as outlined in paragraph 12 of GSTD 2009/D2).	The final form of GSTD 2009/D2 is issued as a GST Ruling, and it concentrates on the application of Division 165 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> to the arrangements described in Taxpayer Alert TA 2009/5. TA 2009/5 broadly describes features of arrangements which the Commissioner was examining. The final Ruling has been developed in response to TA 2009/5, and adopts an approach which identifies the key factors to consider in determining whether Division 165 will apply to the arrangements described in TA 2009/5.

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Issue No.	Issue raised	ATO Response/Action taken
2.	The comments made at paragraphs 7 to 10 of the draft Determination assume a specific set of circumstances which would give rise to the associate not carrying on an 'enterprise'. Namely, the specific characteristics include: • The services are provided by the associate solely to the land holder and nobody else. • There do not appear to be any contractual arrangements allowing the associate to sue for payment. • The lack of commercial substance. These characteristics do not reflect the broad features contemplated at paragraph 3 of the draft Determination. It would be prudent for the ATO to acknowledge that an enterprise (in the nature of trade) would generally arise and that certain specific circumstances may prevent the undertakings from being classified as an enterprise (as opposed to noting that it is not an enterprise from the outset). In particular, the funds made to the associate to fund the building and services may be considered to be consideration and therefore may be of a profit making nature.	The final Ruling now concentrates on describing the application of Division 165 to the arrangements outlined in TA 2009/5. There is a footnote included within the final Ruling that the Commissioner will apply the published ATO view (MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purpose of entitlement to an Australian Business Number) to the facts and circumstances surrounding an arrangement in order to determine whether the associate is carrying on an enterprise.
3.	The comments at paragraphs 7 to 10 of the draft Determination may cause confusion to users. This approach is considered unnecessary where the parties are associates, as application of the provisions of Division 72 is more appropriate.	The final Ruling now concentrates on describing the application of Division 165 to the arrangements outlined in TA 2009/5. It is noted in the final Ruling that the Commissioner will apply the published ATO view to the facts and circumstances surrounding an arrangement in order to determine whether the associate is carrying on an enterprise.

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4.	Concur that any other act, payment or forbearance may be appropriately treated as <i>consideration</i> in respect of the supply of building/construction services where no other explanation exists. Agree with the ATO's comments in respect of bona fide loans which would not otherwise constitute consideration. The Commissioner should however outline circumstances/indicia where the provision of funds would be considered to be a bona fide loan (that is, presence of loan agreement, et cetera).	The final Ruling now concentrates on describing the application of Division 165 to the arrangements outlined in TA 2009/5.
5	Given that in all circumstances the parties will be associates (as defined for GST purposes), the most appropriate approach by the ATO is considered to be the application of Division 72 to impute market value <i>consideration</i> in the appropriate period.	The final Ruling now concentrates on describing the application of Division 165 to the arrangements outlined in TA 2009/5. Whether there has been a supply for consideration is to be determined by reference to the facts and circumstances surrounding an arrangement.
6.	It is requested however that the ATO make it clearer that the draft Determination will <u>only</u> apply in circumstances where the parties are associates or at the very least are not dealing at <i>arms-length</i> . Even in such circumstances however, there may be <i>bona fide</i> arrangements involving associates where a delayed payment arrangement occurs, yet this is done on commercial and <i>arms-length</i> terms with appropriate loan agreements in place.	The final Ruling now concentrates on describing the application of Division 165 to the arrangements outlined in TA 2009/5. As such, discussion as to whether a payment is at arms-length will be taken into account as part of that analysis.

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Issue No.	Issue raised	ATO Response/Action taken
7.	It is requested that the draft Determination include a number of examples (as set out in the comments paper) that would, and would not, be impacted in the ATO view to provide clarity to taxpayers and advisors.	The final Ruling now concentrates on describing the application of Division 165 to the arrangements outlined in TA 2009/5 and focuses the discussion on the specific facts outlined in the final Ruling.
8.	The final Determination should confirm the date of effect of the Determination.	Date of effect inserted into the final version of the Ruling at paragraph 15.
9.	It is also suggested that a comment should be inserted after paragraph 34 of the draft Determination noting that the application of Division 165 may differ to the extent that the scheme described in paragraph 34 changes.	Paragraphs 7 and 8 clarify the scope of the final Ruling. The final Ruling also now contains a more detailed explanation of the application of Division 165 to the arrangements described in TA 2009/5.