GSTR 2001/8EC - Compendium

Ruling Compendium – GSTR 2001/8A

This is a compendium of responses to the issues raised by external parties to draft GSTR 2001/8DA – Draft Goods and Services Tax Ruling Addendum

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	**What is Mixed Supply?** The term "mixed supply" has been coined by the Commissioner in GSTR 2001/8 and does not appear in the *A New Tax System (Goods and Services Tax) Act* 1999 (GST Act)*. The concept does not appear to have any foundation in the relevant domestic or international case law. In the legislative context, the term may be implied by section 9-10, section 9-5 and section 9-80 of the GST Act. If section 9-80 provides the legislative basis for the "mixed supply" concept, this should be stated in the draft Ruling in the definitions included in paragraphs 16 and 43. If there is some other legislative basis on which the term is founded, this should be described accordingly. We assume, for this submission, that the term "mixed supply" is a term used for convenience to describe a single supply made up of components that are not incidental, integral or ancillary (i.e. comprising a single, composite supply) where those components would, if	It is agreed that the characterisation of single, composite supplies, mixed supplies and multiple supplies must be carried out at the outset in accordance with section 9-10 (the meaning of supply) in order to determine whether section 9-80 will apply. The term 'mixed supply' was used in the Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 that amended section 9-80. The Ruling uses the term 'mixed supply' to refer to supplies that contain taxable and non-taxable parts (paragraph 2 of the Ruling). The use of the term is not confined to supplies that are valued under section 9-80. It is also referring to supplies where the non-taxable part is not GST-free or input taxed. Valuation of the taxable part of these 'mixed supplies' falls under section 9-75. In preparing the draft addendum consideration was given to limiting the scope of the term 'mixed supply' to those supplies that fall under section 9-80. However, external feedback indicated that 'mixed supply' was a term commonly used to refer to all supplies that have a taxable and non-taxable part and not just to those supplies falling under section 9-80. The terms 'mixed supply' and 'composite supply' are used in the Ruling for convenience to describe a single supply which is either partly taxable (because it is a mixed supply) or wholly taxable or non-taxable because it is a composite supply. The terms are not found in the legislation but are used

* All legislative references in this compendium are to the GST Act unless otherwise indicated.

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	recognised separately, attract different treatment under the GST Act.	as a way to conveniently describe the effect of provisions of the GST Act on single supplies. That is, a composite supply has a single tax treatment whereas a mixed supply is partly taxable and partly non-taxable. The judgement in *Talacre Beach Caravan Sales Ltd v C&E Commissioners* (Case C-251/05) [2006] ECR I-6269 arguably results in a single supply which would be described in Australia as a 'mixed supply'. The Court found that the elements of the supply excluded from the relevant exemption could be taxed separately. Therefore even though there was a single supply part of the supply was taxable. The Tribunal in *Commissioner of Taxation v Luxottica Retail Australia Pty Ltd* [2011] FCAFC 20; 2011 ATC 20-243; (2011) 79 ATR 768 (*Luxottica*) described the mixed supply in the following way at paragraph 36: > The "actual supply" must be "partly a taxable supply" and "partly a supply that is GST-free or input taxed", and yet it is still only one supply. The Tribunal at paragraph 34 also said: > We are inclined to the view that the Applicant made one supply, which could perhaps be described as a pair of spectacles, comprising two components, the frame and a pair of lenses. That seems to us to be the more commonsense outcome, and one which sits more comfortably with the "practical business tax" approach to GST which has been favoured by the Federal Court: *Sterling Guardian Pty Limited v Commissioner of Taxation* [2005] FCA 1166; (2005) 220 ALR 550 and *Saga* provide but two examples of this approach. The alternative characterisation of the transaction as two supplies – a frame, on the one hand, and a pair of lenses, on the other – must necessarily require there to be a third supply (although one without consideration), being the service of fitting the lenses to the frame. Why a commonplace transaction such as this would need to be disaggregated in this way is not readily apparent.

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2	**Absence of Multiple Supplies Analysis** There are two questions that must be addressed when more than one thing is supplied in a single transaction: 1. Does the transaction comprise of a single supply or multiple supplies?; and 2. If it is a single supply, is it a single, composite supply or a single, mixed supply? There is no guidance in respect of the first, threshold question: When is the giving or doing of multiple things amalgamated into the making of a single supply? The draft Ruling suggests that the only relevant analysis in relation to bundles of items sold together is the differentiation between single, composite supplies and mixed supplies. It is implied that if one component is not "integral, ancillary or incidental" to the other, it is, by default, a single, mixed supply. This is a misguided approach as it suggests that sales of some items can never constitute separate supplies in their own right.	Paragraphs 5A and 19 have been changed to make it clear that the Ruling does not deal with the question of whether, when more than one thing is supplied in a single transaction, the transaction should be characterized as a single supply or multiple supplies. However, it is noted from a practical point of view whether something is a single 'mixed supply' or multiple supplies, the tax outcome will be the same. This was emphasised by the Full Federal Court in *Luxottica* at paragraph 14 noting the Tribunal's comments on the issue: Despite finding that the sale of spectacles was a single supply the Tribunal observed that this was not a particularly critical issue and that "the same result would be reached on the alternative scenario involving two supplies, and valuation under s 9-75."
3	**Case Law and Multiple Supplies** The cases referred to have been applied in order to answer the question as to whether the supply is a single, composite supply or a single, mixed supply, where in fact they specifically answer the question as to whether there is a single supply or multiple supplies. The draft Ruling should not use these cases to support a principle that they do not stand for (i.e. whether a supply is a single, composite supply or a single, mixed supply) and, it fails to use them to support the proposition that they do stand for, which is whether	The Ruling when originally drafted in 2001 relied on overseas cases in the absence of other authority to assist in deriving some principles that could be applied in determining when a single supply has a taxable and non-taxable part. It is accepted that the relevant question in those cases was whether there was a single supply or multiple supplies. While the Ruling when originally drafted referred to some of the multiple supplies in these cases as mixed supplies, these references have been corrected in the addendum. It is not agreed that the Ruling is suggesting that the finding of multiple supplies in the UK and European VAT context is analogous to a single mixed supply in the Australian context. It is considered that paragraph 45B as inserted by the addendum will make it quite clear that the UK and European cases relate

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	numerous items supplied together constitute one single supply or multiple supplies. The draft Ruling is incorrect in suggesting that an analysis that results in a finding of *multiple supplies* in the UK and European VAT context could or should be applied analogously to give rise to a *single mixed supply* in the Australian context.	to their specific statutory context. Comments made by Australian Courts on the reliance made on cases from overseas jurisdictions (paragraph 45B of the Ruling) have also been noted. In particular it is noted the comments of the High Court in *Avon Products Pty Limited* v *Commissioner of Taxation* 2006 ATC 4296; (2006) 227 ALR 398 at [28] about the considerable caution that must be exercised before relying on international authorities that deal with different statutory regimes. The approach taken in the Ruling (paragraph 44) in working out whether you are making a mixed or composite supply, is to ask whether the supply should be regarded as having more than one separately identifiable part, or whether it is essentially a supply of one dominant part with one or more integral, ancillary or incidental parts. It is also noted that what appears to be a single supply may be in fact multiple supplies. The Ruling at paragraphs 45 to 54C provides guidance on when parts are separately identifiable. The conclusion reached in paragraph 52 of the Ruling is that a supply has separately identifiable parts where the parts require individual recognition and retention as separate parts, due to their relative significance in the supply. At paragraphs 55 to 63 of the Ruling guidance is provided on when parts are integral, ancillary or incidental. A conclusion as to the relevant factors is provided at paragraph 59 of the Ruling. The overseas cases have now been used with the addition of Australian cases to provide guidance on both the determination of separately identifiable parts and integral, ancillary or incidental parts. The choice was made not to update the overseas case with cases you have suggested as these cases do not provide any new principles that would assist in an Australian context. Greater emphasis has been placed on the available Australian cases. It is noted that the *Talacre Beach Caravan Sales Ltd v C&E Commissioners* (Case C-251/05) [2006] ECR I-6269 case could be viewed as a 'mixed

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		supply'. The court found that even though the supply maybe a single supply of a caravan including contents the contents could be taxed because they were specifically excluded from the exemption. This is similar to the example provided in paragraph 23 of the Ruling when referring to paragraph 38-90(2)(b) where food is excluded from GST-free treatment when included as part of an education excursion/ field trip.
4	**Updating Foreign Case Law** If the draft Ruling is to include authorities from the UK and the European VAT regimes, these should be updated. We submit that, at a minimum, some reference to the following cases should be made: • *Aktiebolaget NN v Skatteverket* [2007] All ER (D) 478 • *Beynon and Partners v Customs and Excise Commissioners* [2005] STC 55 • *C&E Commissioners v FDR Ltd* [2000] EWCA Civ 216 • *College of Estate Management v C&E Commissioners* [2005] All ER (D) 219 • *De Montfort University Students' Union v The Commissioners of Customs and Excise* MAN/2002/0523 • *Levob Verzekeringen BV and another v Staatssecretaris van Financien* (Case 41/04) [2005] All ER (D) 328 • *Faaborg-Gelting Linie A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 • *Talacre Beach Caravan Sales Ltd v C&E Commissioners* (Case C-251/05) [2006] ECR I-6269	These cases have been considered, but, given the comments to Issue 3 of this compendium, it is not believed necessary to refer to these cases in the Ruling.

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	We note that this list is not exhaustive. It may be appropriate to substitute some of the earlier cases with these or other more recent authorities.	
5	**Section 9-80 of the GST Act** The draft Ruling fails to acknowledge the full implication of the Full Federal Court's decision in *Luxottica* in respect of the formula set out in section 9-80(2) of the GST Act. The words "the value of the taxable supply is determined", in paragraph 30 of the draft Ruling, should read "the value of the taxable part of the supply is determined", since the apportionment exercise is carried out in respect of components of a single supply (this is also the case in respect of proposed paragraph 30A. It is misleading to suggest that the value of the taxable supply must still be determined in accordance with the formula in section 9-80(2). The Full Federal Court has stated that the formula is circular and does not work. (See Ryan, Stone and Jagot JJ statements at paragraph 26 and 30 of *Luxottica*), and as a result proposed paragraphs 30 and 81C should be amended. We agree with the comments set out in proposed paragraph 30A as to how the taxable proportion of a "mixed supply" should be calculated and consider these to be sufficient in the absence of a comprehensible formula in section 9-80(2).	In relation to the application of section 9-80, the Tribunal made the following comment at paragraph 44: > We have one final comment to make about s 9-80. Where the prices of the taxable and non-taxable components are known, the formula in s 9-80(2) presents an unnecessary complication, for, once the taxable proportion is calculated from the known prices, the remaining arithmetic in the formula necessarily leads to the striking of a value of the taxable part of the supply which is equivalent to ten-elevenths of its price. This tends to suggest that the formula in s 9-80 need not be resorted to in cases where the prices of the components have been separately established (subject always to the qualification that there is no suggestion of tax avoidance or sham). We note that the corresponding valuation provision in the former sales tax law, s 95 of the *Sales Tax Assessment Act 1992*, contained the introductory words "If there is a need to know the price for which particular goods were sold, but the parties have not allocated a particular amount to those goods ...". There is a good deal of logic in reading that same qualification into s 9-80, although we decline to express a final view on that question. Changes have been made to more clearly articulate the difficulties with the formula in subsection 9-80(2). A number of the references to the formula have been removed and many of the examples amended. An approach has essentially been taken as outlined by the Tribunal. That is, where the price of the taxable part is known and that allocation has been made on a reasonable basis GST can be calculated as 1/11 of that amount.

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6	**If *Luxottica* Not Considered Commercial** More consideration must be given to the ongoing application of section 9-80 of the GST Act and the outcomes in *Luxottica*, including how those outcomes may have been different if the court had **not** identified sound commercial reasons for the arrangement. Arguably, if the arrangement in *Luxottica* had not been commercial and was, instead, contrived in order to minimise the GST payable, there would have been nothing in section 9-80 to preclude this outcome. Instead, the anti-avoidance provisions at Div 165 of the GST Act would have operated in order to deny the taxpayer the GST benefit. Div 165 is the appropriate test going forward until the requisite legislative amendments are made to restore the efficacy of section 9-80. This approach would give effect to the Full Federal Court's views in *Luxottica* and the views in proposed paragraph 30A.	The Commissioner recognises that each case will need to be determined based on its own facts and circumstances. Division 165 may have application in some cases where apportionment is unreasonable, and this is expressly recognised in the Ruling at paragraph 96. However, in the Commissioner's view, there may also be cases where it is possible to hold that an apportionment is unreasonable or incorrect, without the need to apply Division 165.
7	**Food Supplier and 'Conditionality'** We disagree with the comments at paragraphs 65, 65A, 66 and 81O of the draft Ruling, and the ongoing relevance of the comments made in *Food Supplier v Commissioner of Taxation* [2007] AATA 1550; 2007 ATC 157; (2007) 66 ATR 938 (*Food Supplier*) in light of the Full Federal Court decision in *Luxottica* should be considered. Even accepting the comments at 81X to 81Z and 89 (based on the findings of fact in *Food Supplier*), it does not follow that a supplier can *never* provide something to a purchaser that is free. It must be conceded and acknowledged in the draft	The comment of the Tribunal in *Luxottica* [2010] AATA 22 at paragraph 51 regarding distinction between *Food Supplier* and *Luxottica* is noted: > In *Food Supplier* there were two items sold for one composite price. The distinction between *Food Supplier* and this case is that in this case there were two items or components and in respect of each of those components there was an agreed price which was in no way artificial or contrived. By contrast, in *Food Supplier* there was one undissected price in respect of the supply of two items. It follows that *Food Supplier* is distinguishable. Changes have been made to the Ruling to emphasise the need to consider each case on its own facts and circumstances. It is also recognised that there may be cases where 'free' goods are included as part of a package

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	Ruling that the conditionality argument failed in *Luxottica* (note the references to 'conditionality' in paragraph 66 of the draft Ruling).The conclusion regarding conditionality made by the Administrative Appeals Tribunal (AAT) in *Luxottica Retail Australia Pty Limited and Commissioner of Taxation* [2010] AATA 22, was acknowledged at [41] of the Full Federal Court decision in *Luxottica*. We submit that paragraphs 64 to 69 of the draft Ruling should be deleted.	and the facts and circumstances support a different approach to that taken in *Food Supplier.* Conceivably, this reasoning might extend to cases where something was given away for free as part of a promotional package, perhaps as a genuine loss leader or goodwill promotional gesture.