CR 2013/13 - Goods and services tax: GST treatment of developer contributions and other dedications of land made to NSW councils

This cover sheet is provided for information only. It does not form part of *CR 2013/13 - Goods and services tax: GST treatment of developer contributions and other dedications of land made to NSW councils*

This Ruling contains references to provisions of the *A New Tax System (Goods and Services Tax) Regulations 1999,* which have been replaced by the *A New Tax System (Goods and Services Tax) Regulations 2019.* This Ruling continues to have effect in relation to the remade Regulations.

Paragraph 32 of TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed and rewritten.

A comparison table which provides the replacement provisions in the *A New Tax System (Goods and Services Tax) Regulations 2019* for regulations which are referenced in this Ruling is available.

Class Ruling

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This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- Division 81 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)
- Division 82 of the GST Act
- Regulation 81 of the A New Tax System (Goods and Services Tax) Regulations 1999 (GST Regulations)

3. Unless otherwise stated, all legislative references in this Ruling are to the GST Act.

Class of entities

4. The class of entities to which this Ruling applies consists of all councils that are members of the Local Government Association of New South Wales (NSW) and the Shires Association of NSW.

5. Within this Ruling the class of entities are collectively referred to as Council.

Qualifications

6. The Commissioner makes this Ruling based on the precise schemes identified in this Ruling.

7. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 11 to 32 of this Ruling.

8. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then this Ruling:

- has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- may be withdrawn or modified.

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Date of effect

10. This Ruling applies from 1 July 2013 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

11. The following description of the scheme is based on information provided by the applicant.

12. Council is registered for goods and services tax (GST).

13. By force of section 220 of the *Local Government Act NSW 1993* (LG Act), Council is a body politic of the State of NSW with perpetual succession and the legal capacity and powers of an individual, both in and outside the State.

14. Council is empowered under the LG Act to:

- provide goods, services and facilities and to carry out activities, appropriate to the current and future needs of local communities and of the wider public;
- maintain responsibility for administering the regulatory systems under the LG Act; and
- manage, improve and develop the resources of their local government areas.

15. Council's regulatory functions include giving approvals as part of the development consent process under Part 4 of the *Environmental Planning Act 1979* (EPA Act) and Part 6 of the *City of Sydney Act 1988* (CS Act).

16. Various provisions of the EPA Act and CS Act provide Council with a formal legal framework for levying contributions on developers designed to recover the public costs incurred in the provision of infrastructure, facilities, services and amenities in relation to developments.

17. Subsection 4(1) of the EPA Act relevantly defines 'development' as 'the use of land, the subdivision of land, the erection of buildings, the carrying out of work, the demolition of a building or work and any other matter or thing referred to in section 26 … '.

18. Council as a 'consent authority' determines a development application by either granting consent to the application, (either unconditionally or subject to conditions) or refusing consent.

19. Council in granting development consent may impose conditions on the grant of that consent which include a requirement to make contributions in the form of:

- *Section 94 contributions* (S94 contributions) – where under section 94 of the EPA Act, Council (as consent authority) may grant development consent subject to a condition requiring dedications of land free of cost, payment of monetary contributions or both.
- *Section 94A levies* (S94A levy) – where under section 94A of the EPA Act, Council may impose a condition of development consent requiring the payment of a levy of a percentage of the proposed cost of carrying out development.
- *Section 61 levies* (S61 levy) – where under subsection 61(1) of the CS Act, a City Council may impose a condition of development consent requiring the payment of a levy similar to a S94A levy of 1% of the cost, as estimated by the consent authority of the proposed development.

20. As an alternative to the imposition of conditions under sections 94 and 94A of the EPA Act, contributions under section 93 of the EPA Act (S93F contributions) can be made by way of voluntary planning agreements which outline the agreed contributions in the form of dedications of land free of cost, monetary contributions or the provision of any other material public benefit or any combination of them.

21. Under subsection 93I(3) of the EPA Act, Council can require a (draft) planning agreement be entered into as a condition of a development consent. Section 79C(1) of the EPA Act provides that Council must take into consideration any relevant planning agreement or draft planning agreement that a developer has offered to enter into under section 93F of the EPA Act when determining a development application.

22. In this Ruling, the contributions described in paragraphs 19 to 21 above are referred to as 'developer contributions'.

23. Council may accept a dedication of land or the provision of a material public benefit (other than land or a monetary contribution) in part or full satisfaction of a condition imposed under subsections 94(1) or 94(3) of the EPA Act.

24. Dedications of land or material public benefits free of cost from developers may be accepted by Council. Under subsection 94(6) of the EPA Act, if Council (as consent authority) proposes to impose a condition in accordance with subsections 94(1) or (3) of the EPA Act in respect of a development, it must take into consideration such dedications of land or other material public benefit or money that the applicant has elsewhere dedicated or provided free of cost within an area or previously paid to the consent authority.

25. Council may accept a S94 contribution from a developer, the value of which is in excess of the value required, to discharge the developer's contribution liability. Council may record this excess as a 'section 94 credit' (S94 credit) which would be offset against the developer's subsequent contribution liability.

26. Similar to excess contributions, Council may record a S94 credit in relation to the value of the dedications of land or material public benefits under subsection 94(6) of the EPA Act.

27. In determining an application for modification of a consent under section 96 of the EPA Act, Council may require contributions under section 94A of the EPA Act or otherwise impose conditions requiring a draft planning agreement offered by the developer (subsection 93I(3) of the EPA Act).

28. In the case of a land rezoning application made to Council, land in the form of public parking facilities or other community infrastructure may be dedicated to Council in connection with the planning proposal prepared by Council under section 55 of the EPA Act.

29. With some development applications, the Minister administering the EPA Act (the Minister) may be the consent authority granting consent and imposing conditions under section 94D of the EPA Act. Any monetary contributions paid to the Minister in accordance with such conditions must be paid by the Minister to Council under subsection 94D(3) of the EPA Act. In practice, the developer may pay the monetary contribution directly to Council.

30. Under the *NSW Crown Lands Act 1989,* the NSW Government is permitted to dedicate land (undeveloped land and sometimes Crown roads) to Council for no consideration (monetary or non-monetary) being paid by Council.

31. When a new highway is constructed, the Roads Traffic Authority (RTA) may dedicate to Council former highways or roads as well as small strips of surplus land resulting from realignment of a road. The dedication may be the result of the operation of the *Roads Act 1993* (which vests local roads in Council). This land is dedicated to Council for no consideration and the dedication is not connected with the grant of development consent.

32. In other instances, a developer will find at the end of a development that there are alienated smaller portions of land often beside a road or on a verge. These parcels of land are dedicated to Council for no consideration. There is no obligation upon the developer to dedicate or transfer these parcels of land to the Council under the development consent.

Ruling

33. This Ruling addresses the GST treatment of:

- developer contributions (monetary or in kind) or other dedications of land made to Council in relation to Council granting a development consent or other approval; or
- dedications of land or infrastructure made to Council (or another entity) for which Council does not grant a development consent and for which consideration is not provided by Council or any other entity.

When is a developer contribution, as a condition of development consent under Part 4 of the EPA Act or under section 61 of the CS Act, imposed?

34. An Australian fee or a charge is taken to have been imposed at the time when the liability arises to pay the fee or charge, rather than when the fee or charge is actually paid.

35. If the liability to make developer contributions arises when the consent is granted, the Australian fees or charges constituted by the developer contributions are imposed when the development consent is granted.

Are developer contributions or other dedications imposed on or after 1 July 2013 in relation to the grant of development consent exempt from GST?

36. Developer contributions (either monetary or in kind) imposed on or after 1 July 2013 in relation to the provision of a development consent are exempt[1] because of subsection 81-10(1) and subsection 81-10(4). They are alternatively exempt under section 81-15 by virtue of paragraph 81-15.01(1)(f) of the GST Regulations. These developer contributions include the following:

- contributions imposed under sections 93F, 94 and 94A of the EPA Act and under section 61 of the CS Act;
- contributions imposed as a result of modifying a consent under section 96 of the EPA Act;
- contributions in excess of the value required as a condition of the development consent; and
- dedications of land or provision of a material public benefit that are taken into consideration when imposing a condition of development consent.

[1] In this Ruling, if a tax, fee or charge is not consideration for a supply and is not subject to GST, it is referred to as being 'exempt'.

Application of Division 82 to in kind developer contributions

37. If a developer contribution is made for the grant of development consent and is in kind (i.e. non-monetary), it is also exempt under Division 82. This would include, for example, an in kind developer contribution paid to Council in part or full satisfaction of a liability to make a monetary contribution under section 94 of the EPA Act. Under subsections 82-5(1) and 82-10(1), a supply made in return for the supply by an Australian government agency of a right to develop land is not treated as consideration for each other. Both the supply of the in kind contribution and the right to develop land are exempt.

Are dedications of land made to Council for rezoning approval exempt from GST?

38. The dedication of land to Council in connection with Council approving the rezoning of land is treated for GST in the same way as a developer contribution made for the grant of development consent. That is, it is exempt as an in kind contribution under Division 82, or alternatively under subsection 81-10(1) or regulation 81-15.01 of the GST Regulations.

Is a monetary contribution received by Council under subsection 94D(3) of the EPA Act exempt from GST if Council is not the consent authority?

39. Where the requirements of subsections 81-10(1) and 81-10(4) are otherwise satisfied, monetary contributions paid in accordance with a condition under section 94 or 94A of the EPA Act to Council by the Minister pursuant to subsection 94D(3) of the EPA Act are exempt from GST. The monetary contribution received by Council from the Minister is not consideration which relates to a supply made by Council, rather, it relates to the consent granted by the Minister.

Are dedications of land or roads to Council not in relation to the granting of development consent consideration for a taxable supply made by Council?

40. Council does not make a taxable supply for receiving land or roads that are dedicated, for no consideration, by:

- the state government under the *Crowns Land Act 1989;* or
- the RTA under the *Roads Act 1993;* or
- a developer.

20 February 2013

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Division 81

41. Division 81 was amended with effect from 1 July 2011 to allow entities to self assess the GST treatment of a payment of an Australian tax or an Australian fee or charge in accordance with certain principles.

42. Under the transitional arrangements, those Australian taxes, fees or charges that were not subject to GST under the *A New Tax System (Goods and Service Tax) (Exempt Taxes, Fees and Charges) Determination 2011 (No. 1)* (Treasurer's Determination) remain not subject to GST until 30 June 2013 and thereafter, are to be assessed under Division 81 as amended.

43. The GST treatment of Australian taxes or Australian fees or charges that were not listed in the Treasurer's Determination will be self assessed under the changes made to Division 81 with effect from 1 July 2011.

Australian tax

44. Section 81-5 considers the effect of the payment of a tax and provides that a payment, or the discharging of a liability to make a payment, is not the provision of consideration to the extent the payment is an Australian tax. An Australian tax is defined in section 195-1 as 'a tax (however described) imposed under an Australian law'.

45. It is accepted that developer contributions and other dedications the subject of this Ruling are not taxes in the context of the GST Act and are to be considered under sections 81-10 or 81-15 which deals with Australian fees and charges.

Australian fees and charges

46. Sections 81-10 and 81-15 consider the effect of the payment of certain fees and charge and state:

> **81-10 Effect of payment of certain fees and charges**
>
> *Certain fees and charges not consideration*
>
> (1) A payment, or the discharging of a liability to make a payment, is not the provision of *consideration to the extent the payment is an *Australian fee or charge that is of a kind covered by subsection (4) or (5).

Prescribed fees and charges treated as consideration

(2) However, a payment you make, or a discharging of your liability to make a payment, is treated as the provision of *consideration to the extent the payment is an *Australian fee or charge that is, or is of a kind, prescribed by the regulations.

(3) For the purposes of subsection (2), the *consideration is taken to be provided to the entity to which the fee or charge is payable, for a supply that the entity makes to you.

Fees or charges paid for permission etc.

(4) This subsection covers a fee or charge if the fee or charge:

(a) relates to; or

(b) relates to an application for;

the provision, retention, or amendment, under an *Australian law, of a permission, exemption, authority or licence (however described). …

81-15 Other fees and charges that do not constitute consideration

The regulations may provide that the payment of a prescribed *Australian fee or charge, or of an Australian fee or charge of a prescribed kind, of the discharging of a liability to make such a payment, is not the provision of *consideration.

47. The term 'Australian fee or charge' is defined in section 195-1 as:

Australian fee or charge means a fee or charge (however described), other than an Australian tax, imposed under an *Australian law and payable to an *Australian government agency.

(* Asterisked terms are defined in section 195-1)

GST Regulations

48. Subregulation 81-10.01(1) of the GST Regulations sets out those Australian fees and charges that are prescribed for subsection 81-10(2) and which constitute consideration. In particular, paragraph 81-10.01(1)(g) of the GST Regulations refers to a fee or charge for a supply of a non-regulatory nature.

49. In contrast, subregulation 81-15.01(1) of the GST Regulations sets out those Australian fees and charges that are prescribed for section 81-15 and which do not constitute consideration. In particular, paragraph 81-15.01(1)(f) of the GST Regulations refers to a fee or charge for a supply of a regulatory nature made by an Australian government agency.

50. Regulation 81-15.02 of the GST Regulations deals with those fees and charges covered by both regulations 81-10.01 and 81-15.01.

51. The term 'regulatory nature' is not defined in the GST Regulations or the GST Act. The explanatory statement to the A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No.2) (Explanatory Statement) relevantly states:

> 'The term 'regulatory' captures those supplies made by a government agency, where that agency is legislatively empowered to make the relevant supply and the supply is to satisfy a regulatory purpose.
>
> In some instances, although the consumer acquires something that may be of intrinsic value to the consumer, the acquisition is made in the context of satisfying a regulatory requirement of an Australian law … '.

52. Under the EPA Act, the grant of a development consent or right to develop land by Council is a supply made by a government agency pursuant to statutory authority in satisfying a regulatory purpose being regulating land use and the development process in NSW.

53. Nothing in Division 81 precludes a developer contribution from being exempt from GST under either subsection 81-10(1) or regulation 81-15.01 of the GST Regulations. Also, developer contributions relating to the development process are not fees or charges prescribed in regulation 81-10.01 of the GST Regulations.

Division 82

54. Division 82 applies to supplies of in kind developer contributions in return for the supply by an Australian government agency of a right to develop land.

55. Sections 82-5 and 82-10 state:

> **82-5 Supplies of rights to develop land do not constitute consideration in certain cases**
>
> (1) The supply, by an *Australian government agency, of a right to develop land is not treated as *consideration for another supply if the other supply complies with requirements imposed by or under an *Australian law.
>
> (2) It does not matter whether the other supply made is made to the *Australian government agency.
>
> (3) This section has effect despite section 9-15 (which is about consideration).
>
> **82-10 Supplies by Australian government agencies of rights to develop land are not for consideration**
>
> (1) The supply, by an *Australian government agency, of a right to develop land is treated as a supply that is not made for *consideration to the extent that it is made in return for another supply that complies with requirements imposed by or under an *Australian law.
>
> (2) It does not matter whether the other supply is made to the *Australian government agency.

(3) If the other supply constitutes the payment of:

(a) an *Australian tax prescribed by regulations made for the purposes of subsection 81-5(2); or

(b) an *Australian fee or charge prescribed by regulations made for the purposes of subsection 81-10(2);

this section overrides those regulations in relation to the payment.

(4) This section has effect despite section 9-15 (which is about consideration).

Australian government agency

56. Both Division 81 and Division 82 apply in relation to an Australian government agency.

57. An Australian government agency is defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) as:

- the Commonwealth, a State or Territory; or
- an authority of the Commonwealth or of a State or a Territory.

58. Parliament's intention about the scope of the definition of Australian government agency in the context of the GST Act can be found in example 1.1 in the explanatory memorandum to the Taxation Laws Amendment Bill (No. 3) 2002 which identifies a local council as an Australian government agency for the purposes of applying Division 82. Further, the Treasurer's Determination specified taxes and charges that specifically relate to local government.

59. For the purposes of Divisions 81 and 82, it is accepted that Council comes within the definition of an Australian government agency.

Imposed under an Australian law

60. An 'Australian law' is defined in section 995-1 of the ITAA 1997 and relevantly includes a State law.

61. Council derives its authority to impose developer contributions and other dedications that otherwise relate to the development process under the EPA Act and the CS Act. These are State laws and therefore Australian laws under which developer contributions are imposed.

62. This interpretation extends to a contribution made pursuant to a voluntary planning agreement in accordance with section 93F of the EPA Act. Support for this can be found in the Explanatory Statement for the introduction of paragraph 81-15.01(1)(f) of the GST Regulations which specifically refers to contributions required to be paid under planning agreements. Contributions under planning agreements are provided as examples of an Australian fee or charge which by its definition is imposed under an Australian law and payable to an Australian government agency.

When is a developer contribution as a condition of development consent under Part 4 of the EPA Act or under section 61 of the CS Act imposed?

63. Paragraph 81-15.01(1)(h) of the GST Regulations refers to other fees or charges:

- specified in the Treasurer's Determination as in force immediately before the commencement of Schedule 4 of the *Tax Laws Amendment (2011 Measures No. 2) Act 2011*, and
- imposed before 1 July 2013.

as not constituting consideration.

64. This raises the issue of when Australian fees or charges (in this case developer contributions under Part 4 of the EPA Act or section 61 of the CS Act) are imposed for the purposes of applying the grandfathering or transitional arrangement.

65. The Explanatory Statement explains that a fee or a charge is taken to have been imposed at the time when the liability arises to pay the fee or charge.

66. Where the grant of the development consent gives rise to the liability to make developer contributions, then the Australian fees or charges constituted by the developer contributions are imposed at the time the consent is granted.

Are developer contributions and other dedications imposed on or after 1 July 2013 in relation to the grant of development consent exempt from GST?

67. As a fee or a charge, a developer contribution is of a kind covered by subsection 81-10(4) if the contribution relates to (or relates to an application for), the provision, retention, or amendment, under an Australian law of, amongst other things, a permission (however described).

68. The term 'permission' is not defined in the GST Act, and is to be construed as having regard to its ordinary meaning, unless the whole context indicates otherwise.

69. *The Macquarie Dictionary*, 2009, 5th edition, the Macquarie Library Pty Ltd NSW (Macquarie) defines 'permission' as:

> **permission** *noun*
>
> 1. the act of permitting; formal or express allowance or consent.
> 2. liberty or licence granted to do something.
> 3. *Computers* a level of access to computing resources…

70. The word 'permission' connotes allowing, permitting or consenting to something being done. Development consent granted to an applicant has the character of a formal permission from the consent authority (Council) to do something (carry out the development). It follows that the development consent comes within the ordinary meaning of 'permission' in the context of the GST Act.

71. With regard to the words 'relate to', paragraph 113 of Goods and Services Tax Ruling GSTR 2008/1 refers to the observations of Hill J in HP *Mercantile Pty Limited v. Commissioner of Taxation* [2005] FCAFC 126:

> 113 ... the words 'relates to' are wide words signifying some connection between 2 subject matters. The connection or association signified by the words may be direct or indirect, substantial or real. It must be relevant and usually a remote connection would not suffice. The sufficiency of the connection or association will be a matter for judgment which will depend, among other things, upon the subject matter of the inquiry, the legislative history, and the facts of the case. Put simply, the degree of relationship implied by the necessity to find a relationship will depend upon the context in which the words are found. …

Contributions imposed under sections 93F, 94 and 94A of the EPA Act and under section 61 of the CS Act

72. Under section 94 of the EPA Act and section 61 of the CS Act, Council's grant of the development consent (permission) is subject to a condition requiring developer contributions. The developer contributions assume a direct connection or relationship with the grant of the development consent. Accordingly, the developer contributions made under sections 94 and 94A of the EPA Act or section 61 of the CS Act relate to an application for the provision of a permission (development consent).

73. By virtue of subsection 93I(3) of the EPA Act, Council can require a planning agreement to be entered into as a condition of a development consent.

74. Further, under subsection 79C(1) of the EPA Act, in determining a development application, Council as a consent authority is to take into consideration, if relevant, any planning agreement that has been entered into under section 93F of the EPA Act, or any draft planning agreement that a developer has offered to enter into under that section.

75. A connection can, therefore, be established between a contribution made under a planning agreement in accordance with section 93F of the EPA Act and the grant of the consent such that the S93F contributions sufficiently relate to, or relate to an application for, the provision, retention or amendment of a permission (development consent).

76. It follows, that where Council is in receipt of S93F and S94 contributions or S94A and S61 levies imposed on or after 1 July 2013 those contributions (whether monetary or in kind) are covered by subsection 81-10(4).

77. Furthermore, the developer contributions are not a fee or charge prescribed by the GST Regulations to be treated as consideration for the purposes of subsection 81-10(2). Therefore, these contributions and levies are exempt from GST.

78. A developer contribution covered by subsection 81-10(4) may also come within section 81-15 being covered by paragraph 81-15.01(1)(f) of the GST Regulations which refers to a fee or charge for a supply of a regulatory nature made by an Australian government agency.

Developer contributions made as a result of modifying a consent under section 96 of the EPA Act

79. Under subsection 96(2) of the EPA Act, Council may modify a consent (S96 modification). Council, in determining an application for modification, may impose a condition requiring a contribution under section 94A of the EPA Act. Alternatively, a contribution may be secured by a condition requiring a draft planning agreement to be entered into by the developer.

80. The modification of development consent pre-supposes that a development application has been made and a consent already granted. Although the modification of consent is taken not to be the grant of consent, any conditions imposed as part of the modification become part of the consent because the consent is taken to be the consent as modified (subsections 96(4) and 96AA(1C) of the EPA Act).

81. A relationship between the contributions and the ‘amendment’ (modification) of a ‘permission’ (development consent) can be established, and as such, those developer contributions are covered by subsection 81-10(4). This is the case, even though the S93F planning agreement is entered into after the development consent is granted and then subsequently modified.

82. Accordingly, S93F developer contributions made to Council as a result of an application to amend (modify) a consent under section 96 of the EPA Act do not constitute consideration and are exempt under subsection 81-10(1) or section 81-15 by virtue of paragraph 81.15.01(1)(f) of the GST Regulations.

83. Where in kind developer contributions are made in response to a modification of a development consent, the operation and effect of subsections 82-5(1) and 82-10(1) are to be considered (see paragraphs 90 to 98 below).

Contributions in excess of the value required to discharge a developer's contribution liability

84. In certain cases, developers may provide material public benefits of a value in excess of their required S94 contributions. This can arise with the provision of infrastructure such as parks or private open spaces where the developer has a commercial incentive, for example, to complete the park even though its completion costs exceed their required S94 contributions. In such a case, Council may give a developer a credit referred to as 'S94 credits' and maintain a register of excess contributions that would be offset against the developer's next development in the local government area.

85. Where Council recognises the excess value of a developer contribution in the form of a S94 credit which is then offset against a subsequent developer contribution liability, the S94 credit is part of the fee or charge that relates to the provision of a permission.

86. The permission to which the S94 credit relates is the subsequent development consent granted by Council. On that basis, the S94 credit is covered by subsection 81-10(4) and is exempt under subsection 81-10(1).

Dedications of land or material public benefits free of cost taken into consideration when imposing a condition of consent

87. If Council proposes to impose a condition under subsection 94(1) or (3) of the EPA Act, it must under subsection 94(6) of the EPA Act take into consideration any land, money or other material public benefit that a developer has elsewhere dedicated or provided free of cost or previously paid to the consent authority.

88. To the extent that Council takes into consideration the value of any dedications of land or other material public benefit that the developer has elsewhere dedicated for imposing developer contributions, those dedications or material public benefits (the value of which may be in the form of a S94 credit) relate to the provision of a permission and are covered by subsection 81-10(4) and are exempt under subsection 81-10(1).

89. For example, a developer lodges an application for a development and is initially assessed for a section 94 monetary contribution of $100,000. The developer has performed gratuitous work in the area having a value of $20,000. Council offsets the $20,000 as a S94 credit against the $100,000 contribution liability assessed and asks the developer to pay $80,000. The total contribution of $100,000 is exempt from GST.

Application of Division 82 to in kind developer contributions

90. As well as being exempt under Division 81, in kind developer contributions and the supply of consent to which they relate may also be exempt under Division 82.

91. The definition of 'supply' in section 9-10 includes the grant of a right to develop land or grant of a development consent by Council as well as non-monetary developer contributions such as land, services or material public benefits (in kind developer contributions). In contrast the payment of a monetary developer contribution does not constitute a supply.

92. Division 82 is concerned with those developer contributions which come within the definition of a supply (in kind contributions), made in return for the supply by an Australian government agency (Council) of a right to develop land.

93. The concept of a right to develop land is not defined in the GST Act. However, paragraph 1.16 in the explanatory memorandum to Taxation Laws Amendment Bill (No. 3) 2002 explains that in respect of Division 82, the supply of a right to develop land includes an approval by an Australian government agency of such things as:

- a re-configuration with no change in use (subdivision)
- no re-configuration, but a material change in use (rezoning)
- re-configuration with use as a right (permitted subdivision), and
- re-configuration with a change of use (subdivision and rezoning).

94. Development consent is defined in section 4 of the EPA Act as a 'consent … to carry out development'. In this context, development consent granted (including a consent which is subsequently modified) by Council answers the description of a right to develop land for the purposes of Division 82.

95. Under subsection 82-5(1), the supply by Council of a right to develop land (encompassed in the development consent) is not treated as consideration for the supply of the in kind developer contributions such as land or material public benefits. This is the case if the supply of the in kind contributions comply with requirements imposed by, or under an Australian law in this case the EPA Act. The supply of an in kind developer contribution is not a taxable supply on which GST is payable.

96. Subsection 82-10(1) provides that the supply by Council of a right to develop land is treated as a supply that is not made for consideration to the extent that it is made in return for the supply of an in kind developer contribution that complies with requirements imposed by, or under, an Australian law. As the contributions comply with the requirements imposed by or under the EPA Act, the supply of the right to develop land by Council (consent) is not a taxable supply on which GST is payable.

97. The effect of subsections 82-5(1) and 82-10(1) is that both the supply of an in kind developer contribution such as S94 or S93F developer contributions of land or material public benefits and the supply of a right to develop land are exempt from GST.

98. Division 82 covers those in kind developer contributions that are made in lieu of a monetary contribution under section 94 of the EPA Act.

Are dedications of land made to Council for rezoning approval consideration for a taxable supply?

99. Land rezoning is about changing its permitted use from one classification to another. Application for rezoning approval and the offer by the applicant to contribute or dedicate land to Council is in connection with a development application or planning proposal. This is because without the rezoning the application for development or planning proposal would not have gone ahead. Therefore, the contribution or dedication of land to Council relates to the provision of a permission to change the use of land; and is a fee or charge covered by subsection 81-10(4). Alternatively, the contributions are a fee or charge for a supply of a regulatory nature under paragraph 81-15.01(1)(f) of the GST Regulations. That being the case, they are exempt from GST.

100. Also, as discussed at paragraph 93 above, the supply of a right to develop land extends to an approval by an Australian government agency for such things as the rezoning of land. Therefore, the supply of the in kind contribution of land and the supply of the approval to rezone the land are not treated as consideration for each other (sections 82-5 and 82-10). Neither supply is a taxable supply as defined in section 9-5 with both exempt from GST.

Is a monetary contribution received by Council under subsection 94D(3) of the EPA Act exempt from GST if Council is not the consent authority?

101. Under subsection 94D(3) of the EPA Act, any monetary contribution paid in accordance with conditions under sections 94 or 94A of the EPA Act must be paid by the Minister who granted the consent 'to … the councils of the areas concerned'.

102. The S94 monetary contributions or 94A levies paid to the Minister relate to the grant by the Minister of the development consent. This is because the contributions are a condition of that consent. The monetary contributions received by Council, either from the Minister under subsection 94D(3) of the EPA Act or as is the practice, directly from the developer, are not consideration for a supply made by Council to either the Minister or the developer. The contributions relate to a supply made by the Minister to the developer of a development consent and not to a supply made by Council. GST is not payable on the contributions received by Council.

103. If the requirements of subsections 81-10(1) and 81-10(4) are satisfied by the Minister, the S94 or S94A monetary contributions received by the Minister also do not constitute consideration for the grant of the development consent. GST would not be payable on the contributions received by the Minister.

104. The requirement under subsection 81-10(4) is that the fees or charges (the developer contribution) relate to the provision, retention or amendment of a permission (development consent). Subsection 81-10(4) does not indicate that there is a requirement that the developer contributions be made to the same Australian government agency that grants the consent.

Are dedications of land or roads to Council not in relation to the grant of development consent consideration for a taxable supply made by Council?

105. An essential requirement for a taxable supply under section 9-5 is that there is a supply for consideration. If Council is not providing any consideration for the land dedicated to it, no supply is made by Council for or in relation to the dedications. Therefore, Council is not making a taxable supply for which the dedications of land are consideration.

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- goods and services tax
- GST consideration
- GST developer contribution
- GST non-monetary consideration
- government entities
- government related entities
- local government

Legislative references:

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- EPA 1979 94
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NO: 1-3Q7THKU
ISSN: 1445-2014
ATOlaw topic: Goods and Services Tax ~~ Government ~~ taxes, fees and charges