GSTD 2003/D5 - Goods and services tax: can the sale of an interest in leased commercial property be the supply of a going concern?

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Draft Goods and Services Tax Determination

Goods and services tax: can the sale of an interest in leased commercial property be the supply of a going concern?

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling or advice for the purposes of section 37 of the ***Taxation Administration Act 1953.*** *The final Determination will be a public ruling for the purposes of section 37 and may be relied upon by any entity to which it applies.*

1. Yes. The sale by an entity of an interest in leased commercial property can be a supply of a going concern.

2. The sale of an interest in leased commercial property, under an arrangement,[1] is capable of being a supply of all things necessary for the continued operation of an enterprise. The sale will be a supply of a going concern for purposes of subsection 38-325(2) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) where the supplier also carries on the enterprise until the day of the supply.

Background

3. For GST purposes, a sale of a co-owner's interest in property may be a supply, either by a tax law partnership, or by the co-owner in their own capacity.[2] This is because the co-owner may hold an interest in property either as a partner in the tax law partnership or in their own capacity. However, regardless of how the property is held, where it is used in carrying on a joint activity, such as leasing, from which income is received jointly, it is the tax law partnership that carries on the enterprise.

[1] The meaning of 'under an arrangement' is discussed at paragraphs 19 to 20 of GSTR 2002/5: when is a 'supply of a going concern' GST-free?

[2] A tax law partnership is an association of persons in receipt of ordinary income or statutory income jointly but not a company: section 195-1 of the GST Act and section 995-1 of the *Income Tax Assessment Act 1997*.

4. In contrast, under property law, it is the co-owner that sells their interest in the property, regardless of whether the interest is held as a tenant in common or as a joint tenant. A tenant in common has a right to sell, transfer, gift or deal in an interest in a property without reference to the other tenants in common.[3] A joint tenant may also sell an interest in a property, resulting in the severance of the joint tenancy.[4] When an interest in a property is sold to a third party, the new co-owner becomes a tenant in common with the other co-owners even if some of the other co-owners remain joint tenants.

5. Further, under property law, one co-owner, whether as a tenant in common or as a joint tenant, may grant a lease of his or her interest in the property.[5] This grant of a lease is binding on the other co-owners unless it interferes with their own rights of occupation or other rights of enjoyment of the property. In addition, the other co-owners may not interfere with the lessee's rights of occupation granted under the lease.[6]

Explanation

6. The difference between property law and GST law arises because property law does not recognise a tax law partnership whereas the GST Act treats a tax law partnership as an entity. The entity is taken to be carrying on an enterprise in those cases where the co-owners jointly carry on an activity, for example, the leasing of property.

7. We consider that where a co-owner, in a tax law partnership, sells their interest in a leased commercial property, the sale results in a supply by the tax law partnership. We accept that this supply can be the supply of a going concern.

8. We accept that a leasing enterprise can be carried on in relation to each co-owner's interest in a leased commercial property. This view is supported by the position under property law as discussed in paragraphs 4 and 5. In the case of tax law partnership, the partnership carries on an enterprise in relation to each partner's interest in a leased commercial property as part of a larger enterprise involving all the interests.

9. Paragraph 38-325(2)(a) of the GST Act requires that the supply be under an arrangement under which the supplier supplies to the recipient all things necessary for the continued operation of an enterprise. The sale of an interest by a co-owner in leased commercial property meets the requirements of paragraph 38-325(2)(a) because the purchaser acquires the reversionary interest in the property, which includes the rights and obligations pursuant to the existing lease. It does not matter whether the supply is taken to be made by a tax law partnership or by the co-owner in their own capacity.

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[3] Teh, G, and Dwyer, B, 1992, *Introduction to Property* Law, 2nd edn, Butterworths, Sydney, see paragraph 1136.

[4] Bradbrook, A, MacCallum, S, and Moore, A, 1991, *Australian Real Property Law*, Law Book Company Ltd, Sydney, see paragraph 12.19.

[5] See, for instance, paragraph 1434, Butt, P, 2001, *Land Law*, 4th edn, Thompson Legal and Regulatory Ltd, Pyrmont, N.S.W., or paragraph 12.20, Bradbrook, A, MacCallum, S, and Moore, A, 1991, *Australian Real Property Law*, The Law Book Company Ltd, Sydney.

[6] See *Catanzariti v. Whitehouse* (1981) 55 FLR 426, where a wife left a jointly owned home. The husband subsequently leased the home for twelve months. The wife moved back into the house and interfered with the tenant's rights of occupation. The Court held that the wife had right of entry but could not prevent the tenant from exercising his own rights of occupation.

10. Paragraph 38-325(2)(b) of the GST Act requires that the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as part of a larger enterprise carried on by the supplier). We consider that, where commercial property is leased at the time of the sale of an interest in that property, the supplier of the interest carries on the enterprise until the day of the supply.

11. We consider that where there is a sale of an interest in leased commercial property, the requirements of subsection 38-325(2) are satisfied. The sale of an interest in leased commercial property, therefore, results in the supply of a going concern. The supply is GST-free if the requirements of subsection 38-325(1) are also met.

12. The principles outlined in paragraphs 6 to 11 also apply equally where part of an entity's interest in leased commercial property is sold. We consider that the supplier of the part interest carries on a leasing enterprise in relation to that part, as part of a larger enterprise.

Date of effect

13. This draft Determination represents the preliminary, though considered view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Determination is officially released, it will explain our view of the law as it applies from 1 July 2000.

14. The final Determination will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

15. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of effect of the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Your comments

16. We invite you to comment on this draft Goods and Services Tax Determination. Please forward your comments to the contact officer by the due date.

Due Date: **2 February 2004**

Contact officer: **Nick Curry**

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Commissioner of Taxation
10 December 2003

Previous draft:
Not previously issued in draft form.

Related Rulings/Determinations:
GSTR 1999/1; GSTR 2002/5

Subject references:
- enterprise
- goods and services tax
- GST free
- GST going concern
- tax law partnership

Legislative references:
- ANTS(GST)A 1999 38-325(1)
- ANTS(GST)A 1999 38-325(2)
- ANTS(GST)A 1999 38-325(2)(a)
- ANTS (GST)A 1999 38-325(2)(b)
- ANTS(ANTS (GST)A 1999 195-1
- ITAA 1997 995-1
- TAA 1953 37

Case references:
- Catanzariti v. Whitehouse (1981) 55 FLR 426

Other references:
- Bradbrook, A, MacCallum, S, and Moore, A, 1991, Australian Real Property Law, The Law Book Company Ltd, Sydney
- Butt, P, 2001, Land Law, 4th edn, Thompson Legal and Regulatory Ltd, Pyrmont, N.S.W.
- Teh, G, and Dwyer, B, 1992, Introduction to Property Law, 2nd edn, Butterworths, Sydney

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