GSTD 2013/D1 - Goods and services tax: whether item 32 of the table in subregulation 70-5.02(2) of A New Tax System (Goods and Services Tax) Regulations 1999 applies to some extent in respect of an acquisition for a single fee by a managed investment fund that is a recognised trust scheme from a Responsible Entity.

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Draft Goods and Services Tax Determination

Goods and services tax: whether item 32 of the table in subregulation 70-5.02(2) of *A New Tax System (Goods and Services Tax) Regulations 1999* applies to some extent in respect of an acquisition for a single fee by a managed investment fund that is a recognised trust scheme from a Responsible Entity.

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Ruling

1. Yes. In the circumstances covered by this Determination, item 32 of the table in subregulation 70-5.02(2) (item 32) of the *A New Tax system (Goods and Services Tax) Regulations 1999* (GST Regulations) applies to some extent to an acquisition by a managed investment fund that is a recognised trust scheme from a Responsible Entity (RE).

2. For the purposes of this draft Determination:

- the 'managed investment fund' is a public unit trust in which investors purchase units for the intended purpose of obtaining returns through the collective investment in transferable securities. The fund is a managed investment scheme as defined by section 9 of the *Corporations Act 2001* and is regulated under Chapter 5C of that Act;
- the managed investment fund is registered for GST;

- the fund makes input taxed financial supplies[1] and exceeds the financial acquisition threshold[2]. The fund is not a securitisation entity or a mortgage scheme as defined in subregulation 70-5.02(4) of the GST Regulations;
- the RE is the trustee of the managed investment fund and carries on, in its own capacity, an enterprise that includes making taxable supplies of services to the fund. These services are performed, and therefore supplied, to the fund after 1 July 2012;
- the RE performs its duties in accordance with the fund's Constitution and associated Product Disclosure Statement (PDS). The duties performed by the RE include, but are not limited to, providing investment management services and supporting administrative functions in relation to the investment of assets held by the of the fund, and undertaking functions in compliance with Chapter 5C of the *Corporations Act 2001* concerning the governance of the fund. The RE may perform other services or functions in its role as trustee of the fund; and
- the RE charges a single fee for managing the fund which is calculated as a percentage of the total asset value of the managed investment fund.

3. In calculating its entitlement to a reduced input tax credit under section 70-15 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), it is necessary for the managed investment fund to determine the extent to which its acquisition is covered by item 32 (in which case the percentage of the reduced input tax credit is 55%) and the extent to which its acquisition is covered by other reduced credit acquisition items (in which case the percentage of the reduced input tax credit is 75%). The fund can apply any fair and reasonable methodology to determine the value of the part to which item 32 applies and the value of any other part to which other reduced credit acquisition items apply.

4. A 'deductive benchmarking methodology' is fair and reasonable where it reasonably approximates the respective values of the parts of the acquisition. Under this methodology, the arm's length value of these parts is calculated by reference to the market rates of providing the services to a broadly comparable managed investment fund (with respect to the type of fund and portfolio risk).[3] These market rates are typically expressed as a number of basis points[4] which are applied against the total asset value of the managed investment fund. Once these amounts are deducted from the single fee, the remainder of the fee is allocated to the part of the acquisition that is covered by item 32.

5. The steps of undertaking this methodology may be summarised as:

Step 1

Determine the benchmark market value expressed as basis points (bps) of the parts excluded from item 32 – for example Investment Portfolio Management (IPM) and Administrative functions (A)

[1] Pursuant to section 40-5 of the GST Act and regulation 40-5.09 of the GST Regulations.
[2] Pursuant to section 189-5 of the GST Act.
[3] In identifying whether a managed investment scheme is broadly comparable to the fund, an exact match of circumstances is not required.
[4] Unit of 1/100th of 1% (for example 150 basis points equals 1.5%).

Step 2

Apply the benchmark market values for these parts as a percentage of the total number of basis points to the single fee as follows:

$$\frac{\text{IPM bps + A bps}}{\text{Total bps acquisitions}} \times \text{single fee} = \text{proportion of fee for 75\% reduced credit}$$

Step 3

Deduct the proportion of the single fee allocated to the 75% reduced credit acquisitions from the total single fee. This is the amount allocated to the part of the supply covered by item 32.

6. The managed investment fund can then calculate its entitlement to reduced input tax credits on the acquisition it makes from the RE based on these outcomes.

7. Benchmarking the value of the part of the acquisition to which item 32 applies by reference to the fees charged for what is commonly referred to as an 'RE for hire' service to a broadly comparable managed investment fund (with respect to the type of fund and portfolio risk)[5] also can form the basis of a fair and reasonable methodology where the part of the acquisition to which item 32 applies reasonably approximates the services provided by the RE for hire.

Example

8. Boulder Management Ltd (Boulder) is the responsible entity (RE) of the Slate Growth Fund (Slate).

9. Slate is a managed investment scheme as defined by section 9 of the Corporations Act 2001 and is regulated under Chapter 5C of that Act. It is not a securitisation entity or mortgage fund as defined by subregulation 70-5.02(4) of the GST Regulations. Slate is structured as a public unit trust which is governed by a Constitution and a PDS. For GST purposes Slate is registered as a trust entity that carries on an enterprise through the legal capacity of Boulder. Slate makes financial supplies and exceeds the financial acquisitions threshold.

10. Boulder carries on an enterprise in its personal capacity that includes making taxable supplies to Slate. The taxable supplies are made from 1 July 2012.

11. Under the terms of the Constitution, Boulder is entitled to be remunerated for acting as the RE of Slate.

12. The duties performed by Boulder include, but are not limited to, providing investment management services and supporting administrative functions in relation to the investment of assets held by the fund, and undertaking functions in compliance with Chapter 5C of the Corporations Act 2001 concerning the governance of the fund.

13. *Slate is a recognised trust scheme as it is a trust that is a managed investment scheme and Boulder is carrying on, in its own capacity, an enterprise that includes making taxable supplies to Slate.*

14. Slate's acquisition of the supplies made by Boulder relates to it making input taxed financial supplies for the purposes of paragraph 11-15(2)(a) of the GST Act. Slate exceeds the financial acquisitions threshold pursuant to section 189-5 of the GST Act for the purposes of subsection 11-15(4) of the GST Act.

[5] In identifying whether a managed investment scheme is broadly comparable to the fund, an exact match of circumstances is not required.

15. Slate's acquisition of a taxable supply from Boulder is a reduced credit acquisition where it falls within an item listed in the table in subregulation 70-5.02(2) of the GST Regulations. To the extent that the acquisition falls within item 32, the reduced input tax credit for the reduced credit acquisition is calculated under section 70-15 applying a percentage credit reduction of 55%. To the extent that the acquisition is excluded from item 32 and falls within another item, the reduced input tax credit for the reduced credit acquisition is calculated applying a percentage credit reduction of 75%.

16. Slate determines that the supply of services it acquires can be identified as falling within three parts for the purposes of subregulation 70-5.02(2): the management of Slate's investment portfolio that falls within item 23(b), administrative functions that fall within item 24 (excluding item 24(h)), and other services that fall within item 32 that are performed by Boulder in its role as the RE (or trustee) which include, but are not limited to, undertaking functions in compliance with Chapter 5C of the Corporations Act 2001 concerning the governance of the fund.

17. Slate uses a 'deductive benchmarking methodology' as a fair and reasonable methodology to apportion the single fee in order to identify the GST payable on the item 32 part and the GST payable on the other parts of the acquisition.

Date of effect

18. When the final Determination is issued, it is proposed to apply from 1 July 2012. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
8 May 2013

Appendix 1 – Explanation

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

Background

19. Acquisitions that relate to making input taxed supplies are not made for a creditable purpose under paragraph 11-15(2)(a) of the GST Act. Accordingly, if not for Division 70 of the GST Act, a managed investment fund that only makes input taxed financial supplies, would not be entitled to input tax credits for the acquisition it makes of supplies made by the relevant RE in administering the fund in accordance with the fund's Constitution and PDS.

20. Subsection 70-5(1) of the GST Act states that the GST Regulations may provide that acquisitions of a specified kind that relate to making financial supplies can give rise to an entitlement to a reduced input tax credit. Subregulation 70-5.02(1) of the GST Regulations provides that an acquisition mentioned in subregulation 70-5.02(2) 'that relates to making financial supplies' gives rise to this entitlement. Such acquisitions are referred to as reduced credit acquisitions.[6]

21. Division 70 of the GST Regulations contains an exhaustive list of reduced credit acquisitions. Item 32 in the table to subregulation 70-5.02(2) covers supplies acquired by a recognised trust scheme, to the extent that the supplies are acquired on or after 1 July 2012 not subject to any exclusions. Relevantly to this draft Determination, item 32 excludes:

- a service covered by paragraph (a), (b) or (e) of item 23 (item 32(b)(iii)) – concerning certain investment portfolio management functions;
- a service covered by paragraph (a), (b), (c), (d), (e), (f), (g) or (i) of item 24 (item 32(b)(iv)) – concerning certain administrative functions in relation to investment funds); and
- a custodial service covered by item 29 (item 32(v)).

22. To the extent that an acquisition falls within these exclusions, the acquisition will be a reduced credit acquisition under the item set out in the relevant exclusion and not item 32.

23. A 'recognised trust scheme' is defined in subregulation 70-5.02(4) of the GST Regulations to include a trust that is a managed investment scheme (excluding a securitisation entity or mortgage scheme[7]) where the entity that acts in the capacity as trustee or responsibility entity of the trust, is carrying on, in its own capacity, an enterprise that includes making taxable supplies to the trust. Subregulation 70-5.02(4) defines a managed investment scheme as having the same meaning as in the *Corporations Act 2001*.

[6] Subsection 70-5(1) of the GST Act and subregulation 70-5.02(2) of the GST Regulations.
[7] A securitisation entity and a mortgage scheme are both defined in subregulation 70-5.02(4) of the GST Regulations.

24. For the purposes of calculating the reduced input tax credit for the reduced credit acquisition pursuant to section 70-10 of the GST Act, the percentage credit reduction is 55% to the extent that the acquisition is covered by item 32, and 75% to the extent that the acquisition is not covered by item 32 but is covered by another item of the table in subregulation 70-5.02(2) of the GST Regulations.

Characterising the acquisition of the supply made by the RE

25. Goods and Services Tax Ruling GSTR 2002/2 *Goods and services tax: GST treatment of financial supplies and related supplies and acquisitions* refers to mixed and composite acquisitions in the context of determining whether an acquisition is a reduced credit acquisition.[8] Paragraph 228 of GSTR 2002/2 notes that these terms are used to describe an acquisition that contains parts that are reduced credit acquisitions and parts that are not. The terms are intended to be similar to the concepts of a mixed supply and a composite supply and to adopt similar principles.[9] GSTR 2002/2 refers to a mixed acquisition as containing separately identifiable parts where one or more of the parts are a reduced credit acquisition and one or more of the parts are not a reduced credit acquisition.[10] However, the concept of a mixed acquisition can equally apply to an acquisition that consists of a number of parts that are reduced credit acquisitions subject to different percentage credit reductions.

26. GSTR 2002/2 provides that in a mixed acquisition, no part is dominant, and each part has a separate identity. A composite acquisition is an acquisition of one dominant part and includes other parts that are not treated as having a separate identity as they are integral, ancillary or incidental to the dominant part of the acquisition.[11]

27. It is a matter of degree whether the parts of an acquisition are separately identifiable, and retain their own identity or alternatively characterised as being integral, ancillary or incidental to a dominant part of the acquisition. Having regard to all the circumstances of the transaction, indicators that a part may be integral, ancillary or incidental include where:

- it represents a marginal proportion of the total value of the package compared to the dominant part;
- it is necessary or contributes to acquisition as a whole, but cannot be identified as the dominant part of the acquisition;
- it contributes to the proper performance of the contract to acquire the dominant part; or
- an acquirer would reasonably conclude that it does not constitute for customers an aim in itself, but is a means of better enjoying the dominant thing acquired.[12]

28. In considering whether part of the acquisition made by the managed investment fund from the RE falls within item 32, it is appropriate to characterise the acquisition in a manner that promotes the purpose of the item.

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[8] See paragraphs 223 to 256 of GSTR 2002/2.
[9] See 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*.
[10] See paragraph 232 of GSTR 2002/2.
[11] See paragraphs 232 to 233 of GSTR 2002/2.
[12] See paragraph 250 of GSTR 2002/2.

29. Item 32 is structured so as to cover the acquisition of all supplies made by a recognised trust scheme unless specifically excluded. Relevantly to this draft Determination, item 32 excludes a service covered by paragraph (a), (b) or (e) of item 23 (concerning certain investment portfolio management functions)[13], a service covered by paragraph (a), (b), (c), (d), (e), (f), (g), or (i) of item 24 (concerning certain administrative functions in relation to investment funds)[14], and a custodial service covered by item 29[15] of the table in subregulation 70-5.02 of the GST Regulations. It is notable that these exclusions do not cover all services that fall within these items such as acting as trustee of a trust or superannuation fund (item 23(c)), acting as a single responsible entity (item 23(d)), compliance with industry regulatory requirements (item 24(h)) and trustee services (item 29). Further, the exclusions from item 32 do not include item 31 which covers single responsible entity services. Paragraph 526 of Goods and Services Tax Ruling GSTR 2004/1 *Goods and services tax: reduced credit acquisitions* sets out the view that trustee duties that relate to *acting as a single responsible entity* are the fiduciary obligations owed by an entity as a consequence of having scheme property vested in them, on behalf of the scheme members.

30. It can be inferred from the structure of exclusions that services not expressly excluded are intended to be separately recognised as being covered by item 32. Further, item 32 recognises that an acquisition of a supply may only partially be covered by the express use of the words 'to the extent that' in qualifying the application of paragraphs 32(a) and 32(b). Similarly, in setting the percentage credit reduction, regulation 70-5.03 of the GST Regulations specifically refers to a reduced credit acquisition covered by item 32 and one or more other items.

31. The structure of the managed investment fund as a trust that is regulated by Chapter 5C of the *Corporations Act 2001* results in the RE being required to perform a number of services in order to satisfy its duties to the fund. These services include the management of the fund's investment portfolio for the purposes of item 23(b) and the administrative functions set out in item 24 (excluding item 24(h)). Although these services are performed by the RE in its capacity as an RE or trustee, to the extent that the services fall within these items, the acquisition of the service will not fall within item 32.

32. However, the acquisition of other services performed by the RE in its capacity as trustee including, but not limited to, undertaking functions in compliance with Chapter 5C of the *Corporations Act 2001* concerning the governance of the fund[16] is sufficiently significant to be a separately identifiable part of the supply that falls within item 32.

33. In *Brighton RV Syndication Pty Ltd and Anor v. Australian Securities & Investments Commission*, the Administrative Appeals Tribunal considered the policy context for the introduction of Chapter 5C of the *Corporations Act 2001* and observed the emphasis Parliament placed on the protection of the interests of investors and the protection of scheme property rather than upon economic benefits to individual investors.[17]

[13] See item 32(b)(iii).
[14] See item 32(b)(iv).
[15] See item 32(b)(v).
[16] See subsection 601FC of the *Corporations Act 2001*.
[17] [2007] AATA 1305 at [100] to [107].

34. Recognising the part of the supply made by the RE that falls within item 32 is also consistent with the policy intent for the introduction of item 32 as articulated in the Explanatory Statement to *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No. 1)* which states:

> Bundling supplies into a single trustee service for a single 'trustee fee' allows these entities to claim a RITC of 75 per cent for the acquisition, regardless of whether acquisitions of the individual components of the trustee service would otherwise be eligible for a RITC under an item in the table in subregulation 70-5.02(2).
>
> …
>
> Item [7] reduces the advantages associated with bundling by inserting new item 32 into the list of reduced credit acquisitions. The new reduced credit acquisition covers certain supplies acquired by a 'recognised trust scheme' to the extent the supplies are acquired on or after 1 July 2012. Acquisitions covered by item 32 are subject to a RITC at a rate of 55 per cent.

35. In explaining the meaning of a 'recognised trust scheme', the Explanatory Statement specifically refers to a managed investment fund as an example of a managed investment scheme. Further, Example 7 of the Explanatory Statement demonstrates the intention that trustee services be recognised separately to the investment portfolio management functions supplied by the trustee.

36. In considering the text of item 32 and regulation 70-5.03, the significance of the services that the RE supplies to the managed investment fund which include, but are not limited to, undertaking functions in compliance with Chapter 5C of the *Corporations Act 2001* concerning the governance of the fund, and the underlying policy context referred to in the Explanatory Statement, the acquisition made by the managed investment fund is properly characterised as an acquisition of a mixed supply made by the RE, part of which falls within item 32.

Apportionment of the single fee

37. Paragraph 70-5.03(b) of the GST Regulations provides that the percentage credit reduction for a reduced credit acquisition covered by item 32 and one or more other items of the table in subregulation 70-5.02(2) is:

(i) to the extent that the acquisition is covered by item 32 – 55%; and

(ii) to the extent that the acquisition is not covered by item 32 – 75%.

38. In calculating the reduced input tax credit available for each part of the acquisition made by the managed investment fund from the RE, the consideration for the acquisition (that is, the single fee) needs to be apportioned to the different parts according to their respective value. This should be done on a fair and reasonable basis.[18]

39. In the context of apportioning the single fee paid by the managed investment fund to the RE, a deductive benchmarking method as discussed at paragraphs 4 to 6 of this draft Determination can provide a fair and reasonable apportionment of the value of the respective parts of the acquisition.

[18] See the Explanatory Statement that refers to a single trustee fee being apportioned on a fair and reasonable basis. This approach is also consistent with the approach adopted at paragraph 81M of GSTR 2001/8.

40. Benchmarking the value of the part of the acquisition to which item 32 applies by reference to the fees charged for what is commonly referred to as an 'RE for hire' service to a broadly comparable managed investment fund (with respect to the type of fund and portfolio risk)[19] also can form the basis of a fair and reasonable methodology where the part of the acquisition to which item 32 applies reasonably approximates the services provided by the RE for hire.

[19] In identifying whether a managed investment scheme is broadly comparable to the fund, an exact match of circumstances is not required.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.

Composite acquisition

41. An alternative characterisation of the service acquired by a managed investment fund from an RE in the circumstances set out in paragraph 2 of this draft Determination is that the acquisition is a composite acquisition of investment portfolio management functions covered by item 23(b) of the table in subregulation 70-5.02(2) of the GST Regulations and therefore is excluded in its entirety from item 32. Under this characterisation, any parts of the acquisition made by the managed investment fund that, if considered in isolation, would not fall within item 23(b) are to be characterised as ancillary, incidental or integral to the item 23(b) characterisation consistent with the indicators outlined in paragraph 27 of this draft Determination. Under this characterisation, the entire acquisition made by the managed investment fund is excluded from item 32 by operation of paragraph 32(b)(iii) and therefore is a reduced credit acquisition subject to a credit percentage reduction of 75%.

42. Textual support for this characterisation can be drawn from item 2 of Part 5 of Schedule 8 to the GST Regulations which refers to 'acting as the trustee of an entity' as an example of 'Management of the assets or liabilities of another entity, including investment portfolio management' within item 12 in the table in regulation 40-5.12.

43. Characterising the acquisition as a composite acquisition that can only fall within one item listed in the table in subregulation 70-5.02(2) raises issues as to why the acquisition should be properly described as a composite acquisition of investment portfolio managed functions covered by item 23(b), rather than a composite acquisition of services such as acting as a trustee of a trust covered by item 23(c), acting as a single responsible entity covered by item 23(d), trustee services covered by item 29, or single responsible entity services covered by item 31.

44. For the reasons articulated in this draft Determination, it is considered that the view that the managed investment fund acquires a mixed supply from the RE, part of which is subject to item 32 is to be preferred over the view that the fund makes a composite acquisition of investment portfolio management services and is fully excluded from item 32.

No supply of services as trustee

45. A further alternative argument is that the RE does not supply the managed investment fund any services merely by performing the role of the RE other than supplying investment portfolio management functions covered by item 23(b) of the table in subregulation 70-5.02(2) of the GST Regulations.

46. The Commissioner's view is that the RE does make a supply of services to the managed investment fund in administering the fund which includes, but is not limited to, undertaking functions in compliance with Chapter 5C of the *Corporations Act 2001* concerning the governance of the fund. This view is consistent with inclusion of item 23(b), item 23(c), item 29, and item 31 within the table in subregulation 70-5.02(2) of the GST Regulations. It is also consistent with item 15 of the table in regulation 40-5.12 which includes the supply of trustee services as a supply that is not a financial supply.

Appendix 3 – Your comments

47. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

48. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**5 June 2013**
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; GSTR 2001/8; GSTR 2002/2; GSTR 2004/1

Subject references:

GST financial supplies
reduced credit acquisitions

Legislative references:

ANTS(GST)A 1999 11-15(2)(a)
ANTS(GST)A 1999 11-15(4)
ANTS(GST)A 1999 40-5
ANTS(GST)A 1999 Div 70
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Corporations Act 2001 Chapter 5C
Corporations Act 2001 9
Corporations Act 2001 601FC

Case references:

Brighton RV Syndication Pty Ltd and Anor v. Australian Securities & Investments Commission [2007] AATA 1305

Other references:

Explanatory Statement to A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No.1)

ATO references

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