GSTR 2004/D5 - Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises

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Draft Goods and Services Tax Ruling

Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises

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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 Ruling will be a public ruling for the purposes of section 37 and may be relied upon by any entity to which it applies.*

What this Ruling is about

1. This Ruling provides the Commissioner's view in relation to arrangements referred to in Taxpayer Alert TA 2004/6: *Use of the Grouping provisions of the GST Act to avoid Goods and Services Tax (GST) on the sale of new residential premises* and Taxpayer Alert TA 2004/7: *Use of the Grouping provisions and The Margin Scheme to avoid or reduce the Goods and Services Tax (GST) on the sale of new residential premises.*

2. In particular it considers:

- whether the intra-group sale of completed premises is the first sale of residential premises for the purposes of Subdivision 40-C of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act);
- whether the acquiring GST group member can apply the margin scheme under Division 75 of the GST Act on the first supply of the new residential premises to third parties;
- the GST effect of the intra-group transfer of substantially completed premises within a GST group;

- whether the representative member of the GST group is entitled to input tax credits on the costs of construction and/or the acquisition of the land; and
- whether the anti-avoidance provisions in Division 165 of the GST Act may apply to the arrangements in the Taxpayer Alerts.

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

Date of effect

4. This draft Ruling 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 Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

5. The final Ruling 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.

6. 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.

Background

7. Taxpayer Alert TA 2004/6 was issued on 7 April 2004. It describes arrangements using the grouping provisions of the GST Act that purport to avoid GST on the supply of new residential premises.

8. The parties to the arrangements in TA 2004/6 use a GST group structure where one group member supplies the completed premises to another group member. It is argued that:

(a) the interposing of a group member is to reduce the commercial risk of the construction activity;

(b) the intra-group transaction is the first sale of ‘new residential premises’;

(c) the sale of the premises by the supplying group member to the acquiring group member is not a taxable supply because of subsection 48-40(2);

(d) the first subsequent supply of the residential premises by the acquiring group member to third parties is an input taxed supply as the premises are no longer 'new residential premises';[1] and

(e) input tax credits are able to be claimed by the representative member in relation to the construction of the premises.

9. Taxpayer Alert TA 2004/7 was also issued on 7 April 2004. It describes arrangements using the grouping provisions and the margin scheme that purport to avoid or reduce GST on the sale of new residential premises.

10. The parties to the arrangements in TA 2004/7 use a GST group structure where one group member supplies substantially completed premises to another group member. It is argued that:

- the interposing of a group member is to reduce the commercial risk of the construction activity;
- the sale of the substantially completed premises by the supplying group member to the acquiring group member is not a taxable supply because of subsection 48-40(2);
- the acquiring group member completes the premises and the first subsequent supply of the premises by this member to third parties is the supply of new residential premises;
- the acquiring group member chooses to apply the margin scheme in relation to the first subsequent supply of the premises to third parties paying GST on the margin between its sale price and the intra-group sale price; and
- input tax credits are able to be claimed by the representative member in relation to the construction or completion of construction of the premises.

11. The effect of the intra-group sale referred to in paragraph 10 is purportedly to reduce the margin for GST on the sale to the third party.

12. The arrangements in TA 2004/6 and TA 2004/7 exhibit one common feature, the intra-group sale of completed or substantially completed residential premises.

[1] Section 40-75, meaning of new residential premises.

Features of the arrangements

13. The arrangements, exhibit some or all of the following features:

- participants are usually introduced to the arrangements by advisers who promote the purported GST benefits of the arrangement;
- two or more entities enter into an arrangement, for the purposes of constructing and marketing residential premises;
- the entities apply for approval as a GST group, or are currently members of a GST group. The entities may be newly created or previously existing;
- a GST group member (the supplying group member) owns or acquires land and:

  (i) constructs or arranges the construction of residential units and/or houses on the land; or

  (i) substantially completes, or arranges the substantial completion of, residential units and/or houses on the land;

- the supplying group member sells:

  (i) the completed premises; or

  (ii) the substantially completed premises;

  to another GST group member (the acquiring group member). Legal title to the premises is transferred and monetary consideration paid. There is no GST paid on the intra-group sale;

- the acquiring group member then:

  (i) sells the completed premises to third parties, and treats the sales as input taxed for GST purposes. Having previously been sold by one GST group member to another, the premises are claimed to no longer be new residential premises; or

  (ii) completes or arranges the completion of the premises or lots and sells them to third parties applying the margin scheme to calculate the GST on the supply; and

- input tax credits in respect of construction and other costs are claimed by the representative member in relation to the supplying and acquiring group entities.

Our view on these arrangements is set out in this Ruling.

14. For details of our view in respect of arrangements where substantially completed premises are supplied between the members of a group where section 38-325 is available and agreed to be used, see draft Goods and Services Tax Ruling GSTR 2004/D6.

Legislative context

Residential premises – Subdivision 40-C

15. Sales of real property are input taxed under section 40-65 to the extent that the property is residential premises to be used predominantly for residential accommodation. However, under paragraph 40-65(2)(b) the sale is not input taxed if the premises are new residential premises.[2] Accordingly, sales of new residential premises are taxable supplies if the requirements of section 9-5 are satisfied.

16. Section 40-75 provides the meaning of 'new residential premises'. Paragraph 40-75(1)(a) provides that residential premises are new residential premises if they have not previously been sold as residential premises.[3] The meaning of residential premises is contained in section 195-1 which provides:

> **residential premises** means land or a building that:
>
> (f) is occupied as a residence; or
>
> (g) is intended to be occupied, and is capable of being occupied, as a residence,
>
> and includes a floating home.

GST groups – Division 48

17. Division 48 provides that entities within the same business structure may apply for approval as a GST group. One member of the GST group, the representative member, then deals with all the GST liabilities, adjustments and entitlements. A principal objective of the provisions in Division 48 is to eliminate the administrative and cash-flow costs associated with transactions between related entities.[4]

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[2] See Goods and Services Tax Ruling GSTR 2003/3 which is about when a sale of real property is a sale of new residential premises.

[3] However, premises are not new residential premises if they have previously been the subject of a long term lease, or have been rented as residential premises for a period of 5 years (subsection 40-75(2)).

[4] Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 paragraphs 11.22 and 11.23. See also the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 paragraph 6.3.

18. Subsection 48-5(1) provides that the Commissioner must approve two or more entities as a GST group if certain requirements are met. These include a requirement that the application nominates one of the entities to be the representative member for the group.[5]

19. Subsection 48-40(1) provides that the GST payable on a taxable supply or taxable importation that a member of a GST group makes:

- is payable by the representative member; and
- is not payable by the member that made it (unless the member is the representative member).

20. Subsection 48-40(2) provides that a supply that an entity makes to another member of the same GST group is treated as if it were not a taxable supply unless:

- it is a taxable supply because of Division 84 (which is about offshore supplies other than goods or real property); or
- the entity is a participant in a GST joint venture and acquired the thing supplied from the joint venture operator for the joint venture.

21. Subsection 48-45(1) gives the representative member the entitlement to input tax credits that would otherwise be an entitlement of the member of the GST group making the creditable acquisitions and creditable importations. Subsection 48-45 (2) provides that those acquisitions and importations are treated as being solely or partly for a creditable purpose if:

- the GST group were treated as a single entity; and
- the GST group were not treated as a number of entities corresponding to the members of the GST group.

22. Despite the representative member's entitlement in subsection 48-45 to group members' input tax credits, paragraph 48-55(1)(a) provides that a GST group is treated as a single entity, and not as a number of entities corresponding to the members of the GST group, for the purposes of working out the amount of any input tax credits to which the representative member is entitled.

23. Subsection 48-50(1) provides any adjustment that a member of a GST group has is to be treated as if the representative member has the adjustment. Subsection 48-55(1) provides that the GST group is treated as a single entity for the purpose of working out any adjustments of the representative member and the amounts of any adjustments.

[5] Paragraph 48-5(1)(c).

Margin scheme – Division 75

24. The margin scheme is a method of calculating the GST payable on the taxable supply of real property. Subsection 75-5(1) states that you may choose to apply the margin scheme in working out the amount of GST on taxable supplies of:

- a freehold interest in land;
- a stratum unit; and
- granting or selling a long-term lease.

25. Subsection 75-5(2) provides that you cannot choose to apply the margin scheme if you acquired the freehold interest, stratum unit or long-term lease through a taxable supply on which GST has been worked out without applying the margin scheme.

26. Subsection 75-10(2) prescribes that the margin for the supply is the amount by which the consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question. The application of subsection 75-10(3) is not relevant to the matters referred to in this Ruling.

Anti-avoidance – Division 165

27. Division 165 operates to deter avoidance schemes that are designed to obtain GST benefits by taking advantage of the GST law in circumstances other than those intended by the GST law. The Division allows the Commissioner to make a scheme ineffective where it is reasonable to conclude that the scheme was entered into or carried out, for the dominant purpose of an entity obtaining a GST benefit, or the scheme had the principal effect of an entity obtaining a GST benefit.[6]

Ruling

Completed premises – intra-group sale and sale to third parties

28. The intra-group sale of completed residential premises, under arrangements of the kind described in paragraph 8 and 13 is not the first sale of new residential premises. The sale of the premises by the acquiring group member to a third party is the first sale of new residential premises and is a taxable supply provided the requirements of section 9-5 are met. GST on the taxable supply is payable by the representative member. The margin scheme may apply to the sale by the acquiring group member if the supplying group member would have been able to choose to apply the margin scheme had it sold the premises directly to the third party. In calculating the margin for the purposes of Division 75, the

[6] Paragraphs 6.303 and 6.305 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

consideration for the acquisition is the supplying group member's acquisition cost and not the acquisition cost of the acquiring group member.

29. The use of a group structure and the grouping provisions does not have any effect on the correct amount of GST payable by the group. The sale of residential premises from the supplying group member to the acquiring group member is not a previous sale of residential premises for the purposes of paragraph 40-75(1)(a).

30. Based on our view in paragraph 28 and 29, the representative member will be entitled to input tax credits under section 48-45 as read in conjunction with section 48-55. However, if contrary to our view, the intra-group sale is the first sale of new residential premises, the representative member will not be entitled to input tax credits for acquisitions that relate to that sale.

31. If, contrary to our view, the intra-group sale is the first sale of new residential premises, the Commissioner would consider the application of Division 165 having regard to all the facts and circumstances of the particular case. On the basis of the facts outlined in this Ruling, Division 165 would apply to the arrangement.

Substantially completed premises – intra-group sale and sale of completed premises to third parties

32. The intra-group sale of substantially completed premises, under arrangements of the kind described in paragraph 13 is not the first sale of new residential premises.

33. Depending on the degree of completion, substantially completed premises are not new residential premises if they are not capable of being occupied as a residence. The sale of completed premises by the acquiring group member to a third party is the first sale of new residential premises and is a taxable supply provided the requirements of section 9-5 are met. The GST on the taxable supply is payable by the representative member. The margin scheme may apply to the sale by the acquiring group member if the supplying group member would have been able to choose the margin scheme had it sold the premises directly to the third party. In calculating the margin for the group the consideration for the acquisition is the supplying group member's acquisition cost not the acquisition cost of the acquiring group member.

34. Based on our view in paragraph 32, the representative member will be entitled to input tax credits under section 48-45 as read in conjunction with section 48-55. However, if contrary to our view, the intra-group sale is the first sale of new residential premises, the representative member will not be entitled to input tax credits in relation to acquisitions that relate to that sale.

35. If, contrary to our view, Division 75 does not operate as we have stated, the Commissioner would consider the application of Division 165 having regard to all the facts and circumstances of the

particular case. On the basis of the facts outlined in this Ruling, Division 165 would apply to the arrangement.

Explanation (this forms part of the Ruling)

Residential premises – Subdivision 40-C

36. The purpose of paragraph 40-65(2)(b), when read in conjunction with the meaning of new residential premises in section 40-75, is to ensure that the first sale of new residential premises by registered entities (such as builders and developers) is subject to GST. The requirement that new residential premises have not previously been sold as residential premises in paragraph 40-75(1)(a), refers to a first sale where there has been a transfer of the full and complete ownership of the property in question where GST has been levied on the sale.

37. It is improbable Parliament intended that a supply between GST group members would be regarded as a previous sale of new residential premises for the purposes of paragraph 40-75(1)(a). The purported result of the arrangement described in paragraph 13 is inconsistent with the evident policy of the legislation that new residential premises first sold after the introduction of GST should bear GST. We consider a Court would prefer a construction of the words 'previously been sold as residential premises' that did not lead to the improbable outcome of the arrangement.

38. The above construction is based on the purposive method of interpreting statutes, whether or not they are taxation statutes. A statement of the principle is to be found in the joint judgement of Brennan CJ, Dawson, Toohey, and Gummow JJ in *CIC Insurance Ltd v. Bankstown Football Club Ltd*[7] where their Honours said:

> …the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a Statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v. Butler Pollnow Pty Ltd*[8] if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the Court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

[7] (1997) 187 CLR 384 at 408.
[8] (1986) 6 NSWLR 363 at 388.

39. The above principle has been applied in *Chaudhri v. FC of T*[9] and *Network Ten Pty Limited v. TCN Channel Nine Pty Ltd*.[10]

40. In relation to substantially completed premises, such premises cannot be regarded as residential premises until capable of being occupied as a residence. Therefore, substantially completed premises, depending on the degree of completion, are not new residential premises for the purposes of Subdivision 40-C.[11]

GST groups – Division 48

41. Under the arrangements of the kind described in paragraph 13, it is argued that there is no GST liability on the sale of the completed premises or substantially completed premises from the supplying group member to the acquiring group member. This view is based on the wording of subsection 48-40(2) that provides '…a supply that an entity makes to another member of the same GST group is treated as if it is not a taxable supply.'

42. Under Division 48 the GST payable on any taxable supply that a group member makes is payable by the representative member and is not payable by the member that made it unless the member is the representative member.[12] The purpose of the grouping provisions is to reduce the cost of accounting for intra-group transactions by ignoring those transactions for GST.[13]

43. The intention of the provisions is based on the assumption of a neutral GST effect within the group and that GST will be payable by the representative member on the added value within the group when a taxable supply is made out of the group. Subsection 48-40(3) provides that section 48-40 has effect despite section 9-40 and 13-15 (that are about liability for GST). However, this only applies to transactions between members of the group. It is improbable that it was ever intended that a transaction out of the group will not be subject to GST because of an intra-group transaction.

44. We consider, given the purpose of the provisions in Subdivision 40-C and our view on the meaning of previously sold in paragraph 40-75(1)(a), the intra-group sale does not prevent GST being payable by the representative member on the sale of the completed premises to a third party.

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[9] [2001] FCA 554; 2001 ATC 4214; (2001) 47 ALR 126.
[10] [2004] HCA 14 at paragraph 11.
[11] The meaning of 'residential premises' and 'new residential premises' was considered by Beaumont J in *Marana Holdings Pty Ltd v. Federal Commissioner of Taxation* [2004] FCA 233. At the time of writing this Ruling, an appeal against this decision is pending in the Full Federal Court.
[12] Subsection 48-40(1).
[13] Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 paragraphs 11.22 and 11.23. See also the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 paragraph 6.3.

45. The grouping provisions provide advantages in relation to administrative and cash flow costs. The choice to use a group structure, the GST grouping provisions and an intra-group transaction do not override the intention of the Act that GST should be payable on the first sale of new residential premises. While the liability for GST is to be ignored in relation to the intra-group transaction, it is payable by the representative member on the taxable supply by a group member to a third party. The group is treated as a single entity for the purposes of input tax credits. It should also be treated as a single entity for construction of premises so that the supply of completed residential premises to a third party is the sale of new residential premises.

46. We consider it is improbable that it was ever intended that the intra-group sale should avoid or reduce the GST on the sale of new residential premises. That would be inconsistent with the evident policy of the legislation that new residential premises first sold after the introduction of GST should bear GST. We consider that a Court would prefer a construction of subsection 48-40(2) that did not lead to that improbable outcome.

Alternative view – intra-group supply is a taxable supply

47. It is suggested the intra-group supply remains a taxable supply despite the words in subsection 48-40(2). It is argued that in the context of Division 48, subsection 48-40 is specifically about the liability of the members of the GST group for GST. Subsection 48-40(1) ensures that the GST liability on a taxable supply is payable by the representative member, rather than the member that makes the supply and would otherwise have the liability.

48. With the understanding that the group member has no GST liability on an intra-group supply, subsection 48-40(2) provides that such supply from one member entity to another member entity incurs a GST liability in only two circumstances. Subsection 48-40(3) provides that the section has effect despite other sections that stipulate who must pay the GST liability on taxable supplies or taxable importations. Therefore, overall subsection 48-40 does not change the supply as a taxable supply and the intra-group supply only defers the GST liability of that supply.

49. On the basis that the intra-group supply is a taxable supply, the margin scheme on the sale to third parties is not available. Rather subsection 75-5(2) applies as GST has not been worked out by applying the margin scheme on the supply by the supplying group member. However, we consider a construction would be preferred that did not lead to this outcome.

Margin scheme – Division 75

50. In the arrangements described in paragraph 13, the margin scheme was not applied to the intra-group sale on the basis that the sale was not a taxable supply. However, the margin scheme was

applied to the subsequent sale to third parties. The margin is purported to be the difference between the consideration for the supply to the third parties and the consideration for the acquisition by the acquiring group member.

51. GSTR 2000/21 Goods and Services Tax: *the margin scheme for supplies of real property held prior to 1 July 2000*; Fact Sheet, *How to use the margin scheme to work out GST when you sell real property that you acquired before 1 July 2004*; and Fact Sheet, *How does the margin scheme apply to supplies of real property acquired on or after 1 July 2000* outline in what circumstances the margin scheme may be used, how valuations are to be made, when you must choose to apply the margin scheme and what documentation is required.

52. Where the premises have been supplied out of the GST group as a taxable supply, the acquiring group member can choose to use the margin scheme if the supplying group member would have been able to choose to apply the margin scheme had it made the supply to the third party. Where the margin scheme is applied to the supply from the acquiring group member to third parties the margin scheme calculation is to be based on the difference between the consideration for the supply to the third parties and the acquisition consideration of the supplying GST group member.

53. However, the margin scheme is not available on the sale of the new residential premises to third parties, if the representative member is entitled to an input tax credit for the acquisition of the land due to the operation of sub-section 75-5(2).

Entitlement to input tax credits

54. In the arrangements outlined in paragraph 13, the representative group member has claimed the input tax credits of the members of the group for acquisition of the land and the construction costs of the completed premises. This is despite some of the participants in the arrangements treating the sales to third parties as input taxed supplies.

55. The representative group member is entitled to input tax credits for creditable acquisitions and creditable importations made by a member of the GST group. However, an acquisition or importation by a member of a GST group is solely or partly creditable only if it would be treated that way if the GST group were a single entity. You look at the creditable purpose of the group, as a whole, in making the acquisition to determine the extent to which it is creditable.[14]

56. In respect of the arrangements outlined in paragraph 13, we consider the overall creditable purpose of the group, in constructing the residential premises was to sell them to third parties. On our view the supply to third parties is of new residential premises. Therefore, the representative member is entitled to any input tax credits in respect of acquisition of land and the construction costs of the premises. This is

[14] See sections 48-45, 48-50 and 48-55.

so whether or not the intra-group sale was of completed or substantially completed premises.

Alternative view – completed residential premises

57. If contrary to our view, the intra-group sale of completed premises is one of new residential premises and the subsequent sale to third parties is input taxed, the representative member is not entitled to the input tax credits. The acquisition is not a creditable acquisition under Division 11. The group cannot acquire a thing for a creditable purpose if the acquisition relates to making supplies that are input taxed. The acquisitions in constructing the premises for sale to third parties relate to making supplies of residential premises that are input taxed. The group as a single entity does not have a creditable purpose.

58. Further, where as part of the arrangements an entity becomes a member of a GST group or an existing GST group admits a new member, an adjustment under Division 129 may be required. A change in a group structure may be a later event that changes the extent of creditable purpose of an acquisition which results in an adjustment of input tax credits.[15]

Division 165 – Anti-avoidance

59. If contrary to our view, the intra-group sale of completed residential premises is determined to be the first sale of new residential premises or the intra-group sale of substantially completed premises does not reduce the margin, consideration will be given to the application of the general anti-avoidance provisions in Division 165. Consideration will also be given to Division 165 in relation to any GST benefit that may be derived from the arrangements outlined in paragraph 13 that is not addressed by our view in relation to the GST treatment of completed or substantially completed premises.

60. Under Division 165, the Commissioner may negate a GST benefit an entity gets from a scheme if it is reasonable to conclude that the dominant purpose or principal effect of the scheme is to secure such a benefit.[16]

61. For the Division to apply, the following four elements need to be satisfied:

- one or more of the steps in the arrangements is a 'scheme' as defined in subsection 165-10(2);
- a 'GST benefit', as defined in subsection 165-10(1) arises under the scheme;
- an entity gets a GST benefit from the scheme;[17] and

[15] See sections 48-45, 48-50 and 48-55.
[16] Section 165-40.
[17] Paragraph 165-5(1)(a).

- it is reasonable to conclude, taking account of the matters described in section 165-15, that the dominant purpose or principal effect of entering into or carrying out the scheme was to get a GST benefit.[18]

62. As the arrangements in paragraph 13 involve a scheme, Division 165 should be considered. In each case, the Commissioner must give proper consideration to the individual circumstances before making a decision on the application of Division 165.

63. If contrary to our view, the intra-group supply of completed premises is a supply of new residential premises under paragraph 40-65(2)(b), a GST benefit arises for the supplying group member as a consequence of the subsequent supply of the premises to the third party being input taxed.

64. In the case of completed premises, the supplying group member gets a GST benefit if it is postulated that, but for the scheme, it would or could reasonably be expected to have sold the completed premises directly to the third party rather than through the intra-group sale to the acquiring group member.

65. If, contrary to our view, the intra-group supply of substantially completed premises is not treated in the manner that we have stated, a GST benefit arises to the acquiring group member on the calculation for the margin scheme between the acquisition consideration of the acquiring group member compared to the sale price to the third party.

66. In the case of substantially completed premises, a GST benefit will arise as a consequence of the first supply of substantially completed residential premises to the acquiring group member being treated as if it were not a taxable supply. The supplying group member gets a GST benefit if it is postulated that, but for the scheme, it would have made a taxable supply of the completed residential premises directly to the third party, rather than through the intra-group sale of substantially completed premises to the acquiring group member. A smaller amount of GST would or could reasonably be expected to have been payable by the supplying group member than would have been apart from the scheme. This is based on the postulation that apart from the scheme, the supplying group member would or could reasonably have been expected to have fully completed the residential premises itself and then sold them directly to third parties.

67. Whether it is reasonable to conclude the dominant purpose or principal effect of the scheme is to get a GST benefit requires an assessment of the scheme against the twelve matters set out in subsection 165-15(1). The references to the particular matters in this Ruling should not be regarded as exhaustive or limiting the Commissioner in the application of Division 165 in other cases.

68. Consideration of some of the matters in subsection 165-15(1) may point in the direction of a tax avoidance purpose or effect, others may point in the opposite direction, and some may be neutral. It is the

[18] Paragraph 165-5(1)(c).

evaluation of these matters, alone or in combination, some for, some against, that section 165-15 requires in order to reach the conclusion to which section 165-5 refers.[19] Considering the matters in subsection 165-15(1), it is the Commissioner's view that Division 165 is likely to apply to the arrangements of the kind referred to in paragraph 13.

Application of Division 165 to the arrangement

Paragraph 165-15(1)(a) – the manner in which the scheme was entered into or carried out

69. Even if the transfer of the completed premises or substantially completed premises were carried out for commercial purposes, the manner in which they were carried out suggests the dominant purpose is to obtain a GST benefit.

70. In particular, the structured way the scheme was entered into and carried out suggests careful planning to get a GST benefit. This includes the sale of completed or substantially completed residential premises within the GST group to alter the GST status of the sale of completed premises to third parties or substantially reduce the GST payable on that sale.

71. In particular, the application for an approval for a GST group, sale of completed or substantially completed residential premises within the GST group, completion of the substantially completed residential premises, and then the on-sale of the completed premises to third parties, give rise to a GST benefit. However, if the completed premises were sold by the supplying group member to third parties or the substantially completed premises were completed before the sale to third parties, no benefit will arise.

72. The manner in which the arrangement is entered into follows the advice of advisers promoting the GST benefits of the arrangements.

73. These factors suggest that the particular way in which the scheme is entered into is explicable only or predominantly by the taxation consequences.[20]

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[19] *C of T v. Hart* [2004] HCA 26, *C of T v. Sleight* [2004] FCA FC 94, paragraph 67 of the Judgement by Hill J. Cases concerning Part IVA of the *Income Tax Assessment Act 1936* provide guidance to the Commissioner in considering Division 165.

[20] *C of T v. Spotless Services Ltd* (1996) 186 CLR 404 at 420 and 423.

Paragraph 165-15(1)(b) – the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme; and

(ii) the economic and commercial substance of the scheme

74. The form of the scheme involves an intra-group transfer of completed or substantially completed premises. The substance of the scheme is that the economic group which includes the supplying group member and the acquiring group member continues to hold the premises and use it for the same purpose in carrying out the group's activities.

75. The acquiring group member does not add genuine commercial value or provide substantial services in connection with its on-sale of the completed premises or completion and on-sale of the premises to third parties. It merely appears as a vendor in the sale contracts to third parties. In relation to substantially completed premises, the acquiring group member engages the supplying group member to complete the premises with the acquiring group member adding little or no genuine commercial value.

76. The supplying group member finances the purchase of the completed or substantially completed premises and any expenses in completing the premises and/or on-selling them. The supplying group member continues to finance insurance on the premises and guarantees the acquiring group member's obligations under the sale contracts to third parties.

77. While these factors in isolation would not be determinative, when combined with the other factors discussed, they would be consistent with a reasonable conclusion that the scheme was entered into with the dominant purpose of obtaining a GST benefit.

Paragraph 165-15(1)(c) – the purpose or object of the [GST] Act... and any relevant provision of this Act… [whether the purpose or object is stated expressly or not]

78. As previously discussed, the purpose of paragraph 40-65(2)(b) is to levy GST on the first sale of new residential premises and a principal objective of Division 48 is to eliminate the administrative and cash flow costs associated with intra-group transactions. Division 48 was not intended to be used as a device for defeating the purpose of paragraph 40-65(2)(b) of Subdivision 40-C by converting supplies of essentially new residential premises into previously sold residential premises where GST has either not been levied or substantially reduced. The purpose of Division 48 is to ensure a GST group is treated as a single entity for the purposes of GST where the value added by group members is represented in the supply by a group member to a third party.

79. The intention of Division 75 is to grant a concession on the sale of real property, in this case new residential premises, by ensuring, if a choice is made to apply the margin scheme, GST is only payable on the value added after the commencement of the GST system. It was not intended to be used by itself, or in combination with the provisions in Division 48 as a device for avoiding the intention of paragraph 40-65(2)(b) by altering the GST levied on the supplies of new residential premises and reducing below the value added after the commencement of the GST, the GST payable on the supply of new residential premises to third parties.

80. It would be contrary to the above purposes for an entity to obtain a GST benefit where GST on the value added after the commencement of the GST is avoided or reduced.

81. We consider this matter points to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(d) – the timing of the scheme

82. Each of the steps in the arrangement occurs either immediately or shortly after one another. In some instances, prior to the introduction of the GST, the structure of the transaction was different to the current arrangements. The supplying group member sold premises directly to third parties or completed or arranged the completion of the premises and sold the completed premises to third parties.

83. The careful attention to timing, points to the scheme being for the dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(e) – the period over which the scheme was entered into and carried out

84. The period over which the scheme was carried out is relatively short especially the period between the sale from the supplying group member to the acquiring group member and the on-sale of the completed residential premises to third parties.

85. The above together with the limited value added by the acquiring group member points to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(f) – the effect that [the GST Act] would have in relation to the scheme apart from this Division

86. Apart from Division 165, in relation to the sale of completed residential premises from the supplying group member to the acquiring group member and the sale to third parties, it is argued there is no GST on either of these sales.

87. Apart from Division 165, in relation to the sale of substantially completed residential premises from the supplying group member to the acquiring group member, it is argued there will be no GST on the sale and the margin on which GST is calculated on the sale by the acquiring group member to third parties is reduced.

88. The Commissioner considers these to be matters pointing to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(g) – any change in the avoider's financial position that has resulted or may reasonably be expected to result from the scheme

89. On behalf of the supplying group member, it is argued there is no GST liability levied on the sale of the completed or substantially completed premises from the supplying group member to the acquiring group member. This intra-group transaction reflects all or substantially all of the added value since the commencement of the GST. It is also argued that where the intra-group sale involves completed residential premises, GST will not be levied on the on-sale of the residential premises by the acquiring group member to third parties because it is an input taxed supply. Where the acquiring group member has chosen to apply the margin scheme to the sale of completed residential premises, it is argued the GST will be levied on a reduced amount based on the acquisition cost of the acquiring group member.

90. On this basis, but for Division 165, the supply by the supplying group member has either not borne GST or GST has been reduced.

91. But for the scheme, the supplying group member would have directly sold the completed premises to third parties or completed the premises and then sold them to third parties. A direct sale by the supplying group entity would have given rise to a GST liability. In other words, the scheme would, but for Division 165, enable the supplying group entity to obtain a significant GST benefit. The financial position of the supplying group member substantially improves.

Paragraph 165-15(1)(h) – any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature

92. The acquiring group member has a relevant connection with the supplying group member as they are members of the same GST group. There has been a change in the financial position of the acquiring group entity. This is because, as a result of the scheme, the supply of the completed residential premises to third parties will either not be subject to GST on the basis that it would be an input taxed supply or, alternatively under the margin scheme, the margin on which GST is levied is significantly reduced.

93. In some cases, the Directors of either, the supplying or acquiring group member, their family members or the advisers can purchase the completed residential premises at below market value.

94. The benefit to the acquiring group member points to the scheme being entered into for the dominant purpose or principal effect of the supplying group member obtaining a GST benefit. This could also be said for the GST group.

Paragraph 165-15(1)(i) – any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out

95. In some cases the supplying group member finances the acquisition by the acquiring group member and all of its related expenses, and arranges for the completion of substantially completed premises. This is inconsistent with the interposition of the acquiring group member to insulate the supplying group member from commercial risk or to conduct its business more efficiently or profitably through an interposed entity. This points to the scheme being entered into for the dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(j) – the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arms length

96. The supplying group member and the acquiring group member are part of the same wholly owned group and are not dealing with each other at arm's length. This association is consistent with what would be expected in the context of a restructure entered into and carried out with or without a dominant purpose of obtaining a GST benefit. That is, it is a neutral matter.

Paragraph 165-15(1)(k) – the circumstances surrounding the scheme

97. The parties were introduced to the scheme by an adviser highlighting the GST benefits that may be obtained by entering into the scheme. While not conclusive, this factor when combined with other matters referred to above, points to a dominant purpose of obtaining a GST benefit.

Paragraph 165-15(1)(l) – any other relevant circumstances

98. The Commissioner will consider any other relevant circumstances. For example, the activities of the parties' advisers in relation to the promotion of the scheme.

Division 165 – conclusion

99. The Commissioner will consider the application of Division 165 to the particular matters having regard to all the facts and circumstances. On the basis of the facts and circumstances outlined in this Ruling, Division 165 will apply to the arrangement.

Alternative view – application of Division 165

100. There is an alternative view that the Commissioner is unable to negate any GST benefit arising from the arrangement. This view is based on paragraph 165-5(1)(b) which provides that Division 165 does not operate if a GST benefit is 'attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law'. Subsection 48-5(1) expressly allows entities to apply for approval as a GST group. It is argued paragraph 165-5(1)(b) will apply as the GST benefit arising under the arrangement will be attributable to the application made under subsection 48-5(1).

101. The Commissioner does not accept this argument. It is the Commissioner's view that any GST benefit arising under the arrangement will not be attributable to the application and approval as a GST group. Rather, it is considered the GST benefit will be attributable to the structuring of the arrangements so there is an intra-group supply, to allow either the sale of the residential premises from the supplying group member to the acquiring group member who on-sells to third parties or use of a higher acquisition consideration in calculating the margin under the margin scheme. The transfer of title, in this way produces the benefit rather than the application made under subsection 48-5(1).

Your comments

102. We invite you to comment on this draft Goods and Services Tax Ruling. Please forward your comments to the contact officer(s) by the due date.

Due date:	**17 September 2004**
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Commissioner of Taxation
4 August 2004

Previous drafts:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 1999/1; GSTR 2000/21; GSTR 2003/3; GSTR 2004/D6

Subject references:

- anti avoidance
- GST groups
- GST input tax credits and creditable acquisitions
- GST margin scheme
- GST new residential premises
- GST property and construction
- GST sale of residential premises

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