GSTR 2005/D5 - Goods and services tax: improvements on the land for the purposes of Subdivision 38-N and Division 75 of the A New Tax System (Goods and Services Tax) Act 1999

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Draft Goods and Services Tax Ruling

Goods and services tax: improvements on the land for the purposes of Subdivision 38-N and Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999*

Contents **Para**

What this Ruling is about **1**

Date of effect **4**

Ruling with Explanation **10**

Your comments **35**

Detailed contents list **36**

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 discusses the meaning of the phrase 'improvements on the land' in the context of the phrases 'improvements on the land' or 'no improvements on the land' or equivalent phrases in Subdivision 38-N and Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

2. These phrases appear in Subdivision 38-N and Division 75:

- 'land on which there are no improvements' in subsection 38-445(1) and section 38-450;
- 'no improvements on the land' in paragraph 38-445(1A)(c);
- 'no improvements on the land or premises' in item 4 of the table contained in subsection 75-10(3) and subsection 75-10(3A); and
- 'improvements on the land or premises' in item 3 of the table contained in subsection 75-10(3) and in paragraph 75-10(3A)(b).

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

Date of effect

4. This draft Ruling represents the preliminary, though considered view of the Commissioner of Taxation. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is officially released, it will explain the Commissioner's 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 the Commissioner's view of when you can rely on the Commissioner's 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.

7. If the final public ruling conflicts with an earlier public ruling (for example the Property and Construction Industry Issues Log item dealing with improvements to real property) this public ruling prevails. If you have relied on an earlier public ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling.

8. 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.

9. If you have relied on an earlier ruling dealing with improvements to real property and the final public ruling contains an interpretation which would result in a more favourable valuation under subsection 75-10(3), you may revise your valuation to reflect this interpretation.

Ruling with Explanation

Supplies under section 38-445 or 38-450

10. Whether there are improvements on the land is relevant in establishing whether a supply made by the Commonwealth, a State or Territory is GST-free under sections 38-445 and 38-450 of the GST Act.

11. Under subsection 38-445(1), if the Commonwealth, a State or a Territory makes a supply of land on which there are no improvements and the supply is of a freehold interest or long-term lease, it is GST-free unless the land has been previously supplied as a GST-free supply under section 38-445.

12. Under subsection 38-450(1), a supply by the Commonwealth, a State or Territory of land on which there are no improvements is GST-free if the supply is by way of a lease other than a long-term lease and the lease is subject to conditions that when satisfied entitle the recipient to the grant of a freehold interest in or long-term lease of the land.

13. When the Commonwealth, a State or Territory subsequently supplies the freehold interest or long-term lease, it is GST-free under subsection 38-445(1A), unless the land has previously been supplied as a GST-free supply under section 38-445.

Surrender of a lease under subsection 38-450(2)

14. Under subsection 38-450(2) the *surrender* of a lease to the Commonwealth, a State or Territory is GST-free if:

- the supply of the lease was GST-free under subsection 38-450(1), or would have been GST-free under that subsection if it had not been made before 1 July 2000; and
- solely or partly in return for the surrender of the lease, the Commonwealth, State or Territory makes a supply of the land to the lessee that is GST-free under section 38-445.

Paragraph 75-10(3)(b)

15. Whether there are improvements on the land is also relevant if a taxable supply of real property is made under the margin scheme and the margin for the supply is calculated under subsection 75-10(3).

16. If subsection 75-10(3) applies, the margin for the supply is the difference between the consideration for the supply and an approved valuation of the real property at the relevant date specified in the table in paragraph 75-10(3)(b). Whether there are improvements on the land determines which item in the table applies to the supply. The item in the table then establishes the valuation date.

17. For example, item 4 of the table applies where the supplier is the Commonwealth, a State or Territory and has held the interest, unit or lease since before 1 July 2000, and there were no improvements on the land or premises in question as at 1 July 2000. Under item 4, the valuation must reflect the value of the real property on the day on which the taxable supply takes place. In addition, if item 4 of the table applies, then the valuation excludes any improvements on the land or premises at the valuation date.[1]

[1] Subsection 75-10(3A).

The meaning of 'improvements on the land'

18. There have been numerous cases, several at the High Court of Australia, addressing the meaning of 'improvements thereon or appertaining to' or similar expressions in the context of land tax and rating statutes.[2] Each has taken a broad view of the meaning of the expression, that is, not limiting it to visible structural improvements but taking it to embrace clearing, draining and any other operation on the land that has the effect of enhancing its value.

19. Applying this principle when interpreting the words 'improvements on the land' means that the term 'improvements' refers to any improvements through human intervention 'on' the land which have the effect of enhancing its value.

20. The following examples are 'improvements on the land' for the purposes of the Subdivision 38-N and Division 75 if they enhance the value of the land:

- houses, town-houses, stratum units, separate garages, sheds and other out-buildings;
- commercial and industrial premises;
- farm houses, farm outbuildings, internal fencing, stockyards, wells and bores, excavated tanks, dams, surface drains, culverts, bridges, sown pasture, formed internal roads, and irrigation layouts;
- formed driveways, swimming pools, tennis courts, and walls;
- any other similar buildings or structures;
- fencing – internal or boundary fencing;
- clearing of timber, scrub or other vegetation;
- excavation, grading or levelling of land;
- drainage of land;
- building up of soil fertility;
- removal of animal pests, rabbit burrows etc.;
- removal of rocks, stones or soil; and
- filling of land.

[2] The most commonly cited case seems to be *Morrison and others v. Federal Commissioner of Land Tax* (1914) 17 CLR 498. For a more detailed discussion, see *McGeogh v. Federal Commissioner of Land Tax* (1929) 43 CLR 277. Also, *Fisher v. Deputy Federal Commissioner for NSW Land Tax* (1915) 20 CLR 242; and *Keogh v. Deputy Federal Commissioner of Land Tax for NSW* (1915) 20 CLR 258. See also, *Ex parte George Thomas* (1881) 2 LR NSW 39, a case concerning compensation for improvements 'upon' the land, an expression that Manning J at 44 took to mean no more than that 'the improvement should not be out of the land', such that ringbarking was an improvement, Martin CJ and Windeyer J reaching the same conclusion.

21. The fact that a particular human intervention results in a decrease in the value of land does not necessarily mean that there are no other improvements on the land.[3] In limited circumstances, a building may be a detriment. For example, a building that is uninhabitable because it is derelict, is not capable of being repaired and does not enhance the value of the land is a detriment rather than an improvement. However, usually there will be other improvements on the land, in particular, clearing. In those circumstances, there are improvements on the land notwithstanding the presence of the derelict building.

22. In some circumstances, human intervention on land results in neither an improvement nor a detriment, as it neither enhances nor decreases the value of land. Examples of this are as follows:

- fire breaks, where their purpose is solely to allow access to fire equipment and reduce the spread of a fire and which do not enhance the value of the particular land; and
- a fence that is in such disrepair that it does not enhance the value of the land, but is capable of being easily removed.

Alternative view

23. There is an alternative view that the expression 'improvements on the land' is limited to visible structural improvements such as buildings and does not extend to things such as clearing and draining.

24. This view does not accept that the principles in the cases referred to at paragraph 18 apply when considering whether there are 'improvements on the land', as these cases considered a broader expression, being 'improvements thereon or appertaining to' the land. The expression is broader, on this view, because the words 'appertaining to the land' extend the phrase to improvements that are not necessarily *on* the land.

25. However, in *Brisbane City Council v. Valuer-General (Queensland)* [1978] HCA 40, Gibbs J, with whom the four other members of the Court agreed, when considering the meaning of the phrase 'thereon or appertaining thereto', noted at 47 that:

> [t]his means that the improvements, if not on the land, must be 'such as are in the strict legal sense 'appurtenant' to the property and incident to its ownership' (*McDonald v. Deputy Federal Commissioner of Land Tax (NSW)* (1915) 20 CLR 231, at pp 234-235).

[3] *Brisbane City Council v. Valuer-General (Queensland)* (1978) 140 CLR 41 at 51 discusses a circumstance where human intervention is not an improvement.

26. From the above it can be seen that the words 'appertaining to' only extend the meaning of the phrase to a limited extent. Given this, it seems that the conclusions in the rating and land tax cases are more likely based on the expression 'improvements thereon' rather than the improvements 'appertaining to' the land.

27. As the phrase 'improvements thereon' is analogous to 'improvements on the land', it is the Commissioner's view that the principles in the rating and land tax cases apply when ascertaining the meaning of 'improvements on the land'.

28. The alternative view also argues that the construction adopted in the rating and land tax cases may have been influenced by the perceived policy of that legislation, and consequently the decisions do not have application in the GST context.

29. In *McGeogh v. Federal Commissioner of Land Tax* (1929) 43 CLR 277, per Knox CJ and Dixon J at 290, the policy intent of the relevant legislation was articulated in the decision, in which the purpose of land tax was described as a policy of taxing the 'unearned increment'. That is, without regard to improvements effected by the owner or the owner's predecessors, but having regard to extrinsic circumstances, such as public roads or railways, increased settlement in the neighbourhood and other benefits not brought about by the operations on the land of successive operators. However, this reference to the apparent policy of land tax was not the primary basis for the decision.

30. For the above reasons, on balance, the Commissioner considers the better view to be that improvements on the land, in the GST context, are not limited to visible structural improvements. This view is consistent with the Explanatory Memorandum which refers to the provisions requiring that the land is 'unimproved' or land that 'has not been improved'.[4]

Improvements that are not on the land

31. The value of land may be enhanced by amenities, such as public roads or railways, or increased settlement in the neighbourhood. While these factors may enhance the value of the land they are not improvements on the land for the purposes of Subdivision 38-N and Division 75.

When do you ascertain whether there are improvements on the land

32. The following table describes the relevant day for ascertaining whether there are improvements on land.

[4] Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, paragraph 5.132.

Section	***Relevant day for ascertaining whether there are improvements on the land***
Subsection 38-445(1)	When the supply is made.
Subsection 38-445(1A)	When the land was previously supplied by the Commonwealth, a State or a Territory by way of a lease that was GST-free under section 38-450.
Subsection 38-450(1)	When the supply is made.
Item 2A of the table in paragraph 75-10(3)(b)	When the land was previously supplied by the Commonwealth, a State or a Territory by way of a lease that was GST-free under section 38-450.
Item 3 of the table in paragraph 75-10(3)(b).	1 July 2000.
Item 4 of the table in paragraph 75-10(3)(b).	1 July 2000.
Subsection 75-10(3A)	The day on which the taxable supply takes place.

33. In some circumstances, improvements may have been on the land but no longer exist as improvements on the relevant day specified in the table above. For example, bushland owned by the Commonwealth, a State or a Territory may have originally been fenced, but due to deterioration no valuable fencing remains at 1 July 2000.

34. While when it was first erected the fencing was an improvement to the land, as no valuable fencing remains as at 1 July 2000, in this case, for the purposes of item 4 in the table there would have been no improvements on the land at the relevant date.

Your comments

35. 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: **11 November 2005**

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Detailed contents list

36. Below is a detailed contents list for this draft Goods and Services Tax Ruling:

	Paragraph
What this Ruling is about	**1**
Date of effect	**4**
Ruling with Explanation	**10**
Supplies under section 38-445 or section 38-450	10
Surrender of a lease under subsection 38-450(2)	14
Paragraph 75-10(3)(b)	15
The meaning of 'improvements on the land'	18
Alternative view	23
Improvements that are not on the land	31
When do you ascertain whether there are improvements on the land	32
Your comments	**35**
Detailed contents list	**36**

Commissioner of Taxation
4 October 2005

Previous drafts:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 1999/1; GSTR 2005/D3; GSTR 2005/D4

Subject references:

- Commonwealth, a State or Territory
- freehold interest
- improvements
- long-term lease
- margin
- margin scheme
- real property

Legislative references:

- ANTS(GST)A 1999 Subdiv 38-N
- ANTS(GST)A 1999 38-445
- ANTS(GST)A 1999 38-445(1)
- ANTS(GST)A 1999 38-445(1A)
- ANTS(GST)A 1999 38-445(1A)(c)
- ANTS(GST)A 1999 38-450
- ANTS(GST)A 1999 38-450(1)
- ANTS(GST)A 1999 38-450(2)
- ANTS(GST)A 1999 Div 75
- ANTS(GST)A 1999 75-10(3)
- ANTS(GST)A 1999 75-10(3)(b)
- ANTS(GST)A 1999 75-10(3A)
- ANTS(GST)A 1999 75-10(3A)(b)
- TAA 1953 37

Case references:

- Brisbane City Council v. Valuer-General (Queensland) [1978] HCA 40; (1978) 140 CLR 41
- Ex parte George Thomas (1881) 2 LR NSW 39
- Fisher v. Deputy Federal Commissioner for NSW Land Tax (1915) 20 CLR 242
- Keogh v. Deputy Federal Commissioner of Land Tax for NSW (1915) 20 CLR 258
- McDonald v. Deputy Federal Commissioner of Land Tax (NSW) (1915) 20 CLR 231
- McGeogh v. Federal Commissioner of Land Tax (1929) 43 CLR 277
- Morrison and others v. Federal Commissioner of Land Tax (1914) 17 CLR 498

Other references:

- Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998

ATO references

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