GSTR 2008/D3 - Goods and services tax: partitioning of land

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Draft Goods and Services Tax Ruling

Goods and services tax: partitioning of land

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Preamble

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way the law applies. It is not a ruling or advice for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*. You can rely on this publication to provide you with protection from interest and penalties as follows. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

What this Ruling is about

1. This draft Ruling considers the goods and services tax (GST) consequences of the partitioning of **real property** among joint tenants[1] or tenants in common[2] (co-owners).

2. In particular, this draft Ruling explains:

- what a partition is;
- whether co-owners of land make a supply of that land under a partition by agreement and if it is in the course or furtherance of an enterprise;
- whether co-owners of land make a supply of land under a court ordered partition;
- if a partition results in a supply, whether the supply is made for consideration;
- if a partition results in the making of a taxable supply of land, whether the margin scheme can apply to the taxable supply;
- a partition of land by a general law partnership; and
- a partition of land under a joint venture.

[1] A joint tenant does not hold a right to any particular part of the land and has a right of survivorship in respect of the land. See *Wright v. Gibbons* (1949) 78 CLR 313 per Dixon J at 330.

[2] A tenant in common has an undivided share in and a right to occupy the whole of the property in common with others. See *Nullagine Investments Pty Ltd v. Western Australian Club Inc* (1993) 177 CLR 635 per Brennan J at 643-644.

3. This draft Ruling does not consider:

- if consolidations of title[3] result in land being held jointly or in severalty;[4]
- exchanges of land other than in the context of a partition;
- a transfer of an interest in land by a co-owner to other parties other than in the context of a partition;
- a transfer of an interest in land by trustees for partition appointed by a court to co-owners pursuant to a court ordered partition;
- the partition of property other than land or stratum units; or
- a partition of land by a tax law partnership.

4. Unless otherwise stated, all legislative references in this draft Ruling are to the A New Tax System (Goods and Services Tax) Act 1999 (the GST Act).

Date of effect

5. This draft Ruling represents the preliminary, though considered view of the Australian Taxation Office. When the final Ruling is officially released, it will explain the Commissioner's view of the law as it applies both before and after its date of issue.

6. The final Ruling will be a public ruling for the purposes of section 105-60 of Schedule 1 to 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 *Goods and Services Tax: the GST rulings system* explains the GST rulings system and the Commissioner's view of when you can rely on our interpretation of the law in GST public and private rulings.

7. 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 issue of the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

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[3] For example, see *Aoun Investments Pty Ltd & Anor v. Chief Commissioner of State Revenue (NSW)* [2006] NSWSC 1394; [2007] ALMD 6181; (2006) 65 ATR 301; 2007 ATC 4144 and '*Joint Proprietors' in the Torrens System* (2007) 81 ALJ 372.

[4] The *Macquarie Dictionary, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW* defines 'severalty' to mean the condition, as of land, of being held or owned by separate or individual right.

Background

8. In this draft Ruling, unless otherwise stated:

- a reference to a taxable supply means that all the requirements of section 9-5 are satisfied;
- a reference to a partnership is a reference to a general law partnership that is either registered or required to be registered for GST;
- a reference to a GST joint venture is a reference to a joint venture under Division 51;
- a reference to land includes stratum units; and
- a reference to an interest in land is a reference to the legal and beneficial interest that an owner or co-owner has in the land.

What is a Partition?

9. It is common for real property to be held by more than one entity as either joint tenants or tenants in common (co-owners) whether at law or in equity. Circumstances may arise between these entities resulting in the termination of the co-ownership by way of the partition of the real property between them. The circumstances may include a dispute between the co-owners, or the conclusion of a venture between two or more entities to develop, subdivide and share the products of the subdivision.

10. The term 'partition' is not used or defined in the GST Act. The concept, however, is relevant to the scope of this draft Ruling. It is defined for the purpose of this draft Ruling by reference to its ordinary and property law meanings.

11. The *Macquarie Dictionary* provides the following relevant definition:[5]

> … **8.** *Law:*
>
> (a) a division of property among joint owners or tenants in common, or a sale of such property followed by a division of the proceeds
>
> (b) a division of real property held in co-ownership. …

12. The term is also defined at paragraph 1501 of the *Australian Encyclopaedia of Forms and Precedents*, which states:

> Partition is the process by which property, either real or personal, belonging to co-owners as joint tenants or tenants in common, is physically divided among them, so that each co-owner is from then on entitled in severalty to a separate part of the physically divided property.

[5] The *Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

13. Some State and Territory laws define partition for the purposes of the application of stamp duty laws.[6] For example, subsection 30(1) of the *Duties Act 1997* (NSW) states:

> What is a partition? For the purposes of this section, a partition occurs when dutiable property comprised of land in New South Wales that is held by persons jointly (as joint tenants or tenants in common) is transferred or agreed to be transferred to one or more of those persons.

14. The term partition, in the context of the law of property, was considered by Young CJ in *Comptroller of Stamps (Vic) v. Christian & Anor*.[7] He said:

> In Vol. 21 of the first edition of *Halsbury's Laws of England* the following passage being para. 1512 appears at p.810:
>
> > The legal term 'Partition' (a) is applied to the division of lands, tenements and hereditaments belonging to co-owners (b) and the allotment among them of the parts, (c) so as to put an end to community of ownership between some or all of them… .'[8]

15. For the purposes of this draft Ruling, the term 'partition', therefore, refers to either:

- the division of land and the transfer of the divided parts between the co-owners; or
- if land is already divided and held by the co-owners, the transfer of the divided parts between the co-owners,

so that one or more co-owners become the owner in severalty of a specifically ascertained part(s) of the land.

Partition – how effected

16. A partition of land may be effected by either an agreement between the co-owners (partition by agreement) or as a result of a court order (court ordered partition).[9] In the case of a court ordered partition, trustees may be appointed to hold the property on trust pending resolution of the dispute between the co-owners in relation to the real property.

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[6] See subsection 30(1) of the *Duties Act 1997* (NSW); subsection 29(1) of the *Duties Act 1999* (ACT); subsection 31(1) of the *Duties Act 2001* (Qld); subsection 26(1) of the *Duties Act 2001* (Tas); subsection 39(1) of the *Duties Act 2008* (WA).

[7] *Comptroller of Stamps (Vic) v. Christian & Anor* [1991] 2 VR 129; 90 ATC 5046; (1990) 21 ATR 1036.

[8] *Comptroller of Stamps (Vic) v. Christian & Anor* [1991] 2 VR 129 at 133; 90 ATC 5046 at 5050; (1990) 21 ATR 1036 at 1041.

[9] Chudleigh, C and Lozzi, V (November 2006), 'Partition', *Australian Encyclopaedia of Forms and Precedents*.

Partition by agreement

17. Paragraph 1501 of the *Australian Encyclopaedia of Forms and Precedents* states that a:

> Partition may arise by agreement, where all co-owners agree to [the] division of the physical property into separate parts to be taken by each.

18. Under a partition by agreement, co-owned property may be divided and each co-owner contemporaneously transfers or conveys their respective interest or share in the part of the land being taken by the other. If land is already physically divided, the partition will involve the contemporaneous transfer or conveyance of the co-owner's interest in the land to be taken by the other co-owners.

Example 1 – Partition of land by tenants in common in equal shares

19. *Amy and Bert own Greyacre as tenants in common in equal shares. Amy and Bert agree to subdivide Greyacre to create Blackacre and Whiteacre (each lot of equal value). If Amy takes Whiteacre and Bert takes Blackacre, the partition agreement is effected by:*

- *Amy transferring her undivided interest in Blackacre to Bert, and contemporaneously,*
- *Bert transferring his undivided interest in Whiteacre to Amy.*

20. *The effect of the partition is that where once Amy and Bert each had a 50% undivided interest in Greyacre (and following the subdivision – in both Blackacre and Whiteacre), Amy now has a 100% interest (or sole ownership) in Whiteacre and Bert has a 100% interest (or sole ownership) in Blackacre.*

Example 2 – Partition of land by tenants in common in unequal shares

21. *Christine and David own Greenacre as tenants in common in unequal shares. Christine has three undivided one-fourth shares and David has one undivided one-fourth share. Christine and David agree to subdivide Greenacre into two new lots – Blueacre having a value of $100,000 and Yellowacre having a value of $300,000. If Christine takes Yellowacre and David takes Blueacre the partition agreement is effected by:*

- *Christine transferring her three undivided one-fourth shares in Blueacre to David, and contemporaneously,*
- *David transferring his one undivided one-fourth share in Yellowacre to Christine.*

22. *The effect of the partition is that where once Christine and David each had an unequal interest in Greenacre (and following the subdivision – in both Blueacre and Yellowacre), Christine now has a 100% interest (or sole ownership) in Yellowacre and David has a 100% interest (or sole ownership) in Blueacre.*

Court ordered partitions

23. Paragraph 1501 of the *Australian Encyclopaedia of Forms and Precedents* states that:

> Where agreement between co-owners has not proved possible, a partition may be sought as a remedy for the co-owners' unreconciled dissatisfaction. This may arise because one owner desires to convert that owner's interest into cash, or because of some other disagreement between co-owners about the management of the property. Application for a court order may then be made.

24. Following an application, under the partition laws of each State and Territory, a court may make an order for partition or sale.[10]

25. In making an order for partition, a court may either order the co-owners to transfer their respective interests to one another or appoint trustees to hold the property on statutory trust for partition or sale.[11] In the latter, the court may order that the property vest in the trustees. In this case, the legal and equitable (beneficial) interest in the property passes to the trustees in the capacity as trustees of the trust.[12]

26. If trustees are appointed, following the making of an order by the court, the trustees may be required (with the consent of any encumbrancer) to:

- subdivide the property and transfer the divided parts to the co-owners
- sell the property and distribute the net proceeds to the co-owners, or

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[10] For example, see section 66G – Statutory trusts for sale or partition of property held in co-ownership of the *Conveyancing Act 1919* (NSW). See also section 243 of the *Civil Law (Property) Act 2006* (ACT), subsection 40(1) of the *Law of Property Act 2000* (NT), subsection 38(1) of the *Property Law Act 1974* (Qld), subsection 69(1) of the *Law of Property Act 1936* (SA), sections 3 and 7 of the *Partition Act 1869* (Tas), Part IV of the *Property Law Act 1958* (Vic), and subsection 126(1) of the *Property Law Act 1969* (WA).

[11] This draft Ruling does not consider a court ordered partition involving the appointment of trustees for partition as this circumstance rarely occurs. It is more common for the court to appoint trustees for sale which this draft Ruling also does not consider.

[12] When the property vests in the trustees, in the capacity as trustees of the statutory trust, is relative to the type of land (that is, Torrens title or otherwise) and the statutory provisions of each State or Territory. It may be when the order is made, upon the making of entries in the relevant titles register, or when the order itself is registered.

- employ a combination of the above

proportionate to the respective interests held by each of the co-owners in the land prior to partition or sale.[13]

Owelty

27. After partition, the proportions of land received by each co-owner may not correspond with the entitlements or interests in the land of the co-owners prior to its division. Even if the portions received by the co-owners are equal in size they may not be precisely equal in value. In these cases, the co-owner(s) in receipt of the greater portion of land or with the greater value may pay compensation (usually a sum of money, called 'owelty' or 'equality' money) to the other co-owner(s) to take account of any differences in the value of the portions of the land they receive.[14]

28. Alternatively, under a partition, one or more co-owners may not take part of the land in which they held an interest prior to its division. In these cases, each co-owner receiving a part of the land may pay monetary consideration ('owelty' money) to the other co-owner(s) for giving up their interests in the land without receiving an interest in any other land in return.

Example 3 – Partition by agreement with one co-owner not taking a part of the land

29. *Angie, Joanne and Nicole own Purpleacre as tenants in common in equal shares. They agree to subdivide Purpleacre to create Redacre and Blueacre (each lot of equal value). Under the partition Angie is to take Redacre, Nicole is to take Blueacre and Joanne is to be paid money for giving up her interests in the two lots. In this case the partition agreement is effected by:*

- *Angie transferring her undivided interest in Blueacre to Nicole and paying money to Joanne which is equal to the value of Joanne's interest in Redacre; and contemporaneously*
- *Nicole transferring her undivided interest in Redacre to Angie and paying money to Joanne which is equal to the value of Joanne's interest in Blueacre; and contemporaneously, and*
- *Joanne transferring her undivided interest in Redacre to Angie and her undivided interest in Blueacre to Nicole.*

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[13] Where the co-owners are joint tenants, the court is not bound to partition the property into equal proportions, but may order either the co-owners or trustees to effect a division that reflects the co-owners' equitable shares. See Butt, *Land Law*, 5th ed, at paragraph 14102. See also *Croghan v. Grosvenor* (1991) 57 SASR 545; [1991] SASC 3066.

[14] For example, see the decision of Debelle J in *Croghan v. Grosvenor* (1991) 57 SASR 545 at 548; [1991] SASC 3066 at paragraph 9.

30. *The effect of the partition is that where once Angie, Joanne and Nicole each had a one third interest in Purpleacre (and following the subdivision – in both Redacre and Blueacre), Angie now has a 100% interest (or sole ownership) in Redacre, Nicole has a 100% interest (or sole ownership) in Blueacre, and Joanne does not have an interest in either. Instead, Joanne received money equal to her proportionate interest in both Redacre and Blueacre.*

Legislative context

31. *Real property* is defined in section 195-1 and includes:

(a) any interest in or right over land; or

(b) a personal right to call for or be granted any interest in or right over land; or

(c) a licence to occupy land or any other contractual right exercisable over or in relation to land.

32. Land includes dwellings with its adjacent buildings, inheritable rights, corporeal (tangible) and incorporeal, of any holding or description, and includes all estates or interests, charges, rights, titles, claims, demands, liens or encumbrances at law or in equity.[15]

33. Subsection 75-5(1) states:

> The *margin scheme applies in working out the amount of GST on a *taxable supply of *real property that you make by:
>
> (a) selling a freehold interest in land; or
>
> (b) selling a *stratum unit; or
>
> (c) granting or selling a *long-term lease;
>
> if you and the *recipient of the supply have agreed in writing that the margin scheme is to apply.[16]

34. Subsection 75-5(2) states:

> However, the *margin scheme does not apply if you acquired the entire freehold interest, *stratum unit or *long term lease through a supply that was *ineligible for the margin scheme.[17]

[15] See paragraphs 22(1)(c) and 22(1)(d) of the *Acts Interpretations Act 1901* for the meaning of 'land' and 'estate' respectively.
[16] An asterisked term denotes a term defined in the Dictionary at section 195-1.
[17] See also subsections 75-5(3) and 75-5(4) for a description of the types of supplies ineligible for the margin scheme.

Ruling with Explanations

What are the GST consequences of a partition?

Is there a supply under a partition by agreement?

35. Under a partition by agreement, the transfer or conveyance by each co-owner of their respective interest in the land to be taken by the other co-owners in severalty is a supply as defined in subsection 9-10(1).

36. The term 'supply' is broadly defined in subsection 9-10(1) as 'any form of supply whatsoever'. This wide definition of the term includes the transfer or conveyance of an interest in or right over land by a co-owner.[18]

37. To effect a partition under an agreement, all the co-owners agree to divide the land and to mutually transfer or convey their respective interests in the parts to be taken and enjoyed in severalty by the other. Each transfer or conveyance is a supply.

38. However, a co-owner does not make a supply of its own interest in the land that it is to take in severalty.

Is the subdivision of land a supply?

39. The Commissioner considers that the subdivision of land by co-owners does not constitute a supply for the purposes of GST. All that results is that the subdivided land is held under different titles by the same owners. While the effect of the subdivision is to create new rights and titles in substitution of the original rights and titles, there is no change in the ownership of the subdivided land. Accordingly, where land is jointly held, a subdivision, by itself, does not involve a transfer of any interests in the land between the co-owners.

Is there a supply under a court ordered partition?[19]

Supply by co-owners pursuant to a court ordered partition

40. If a court makes an order for partition under which the co-owners are directed to execute a transfer or conveyance of their interests in the parts of the land to be taken by the others, the Commissioner considers that each co-owner makes a supply of each interest transferred. Each co-owner is required to comply with the order by doing something.

[18] The Commissioner's view on the meaning of supply is set out in Goods and Services Tax Ruling GSTR 2006/9 Goods and services tax: supplies.
[19] This draft Ruling does not consider a court ordered partition involving the appointment of trustees for partition.

41. In Goods and Services Tax Ruling GSTR 2006/9 Goods and services tax: supplies, the Commissioner takes the view that to make a supply 'an entity must do something'. [20]

42. In C & C,[21] in the context of Family Court proceedings, the Federal Magistrates Court in that case ordered '…the Wife…do all acts and things necessary to seek a partition of the title to the real property…'.

43. Further, in *Schnytzer v. Wielunski*,[22] the Supreme Court of Victoria '…ordered that the said land the subject of the action be partitioned between the parties and that the parties join in a transfer of the lot numbered 2 … to the defendants absolutely and… lot numbered 1 … to the plaintiffs absolutely.' It was also '…ordered that the conveyancing and like costs of giving effect to the partition so ordered be borne by the plaintiffs … and the defendants… in equal shares.'

44. It is evident from the above cases that a co-owner is required to do something to effect the partition. The transfer or conveyance by the co-owner of its interest in the land is a supply. It is irrelevant that the co-owners were compelled by the order to make the supply. The phrase 'to make a supply' requires there to be an act of making the supply. It does not require that act to be voluntary.

Alternative view

45. An alternative view is that a co-owner does not make a supply when it transfers or conveys its interests in the land to give effect to a partition ordered by the court. Any transfer of a co-owner's interest in land to the other co-owners is not a voluntary act and therefore would not amount to a supply.

46. The Commissioner considers that this view does not align with the manner of court ordered partitions where conduct by the co-owners is required to transfer the land to give effect to the order and, for the reasons set out in paragraphs 40 to 44 of this draft Ruling, does not share this view.

47. If, however, a court makes a 'vesting order' in relation to the co-owners' interest in land because, for example, a co-owner neglects or refuses to convey their interest in the land in accordance with the order of the court, the Commissioner considers that the co-owners do not make a supply as the co-owners take no action to cause their interest to be vested in the other co-owner.

48. A 'vesting order' vests the property to which it relates in the parties named in the order without any conveyance, transfer or assignment by the parties though it has the same effect as if a party had executed a transfer or conveyance to the effect intended by the order.

[20] See paragraphs 71 to 91 of GSTR 2006/9.
[21] *C & C* [2001] FMCAfam 194.
[22] *Schnytzer v. Wielunski* [1978] VR 418 at 430.

Is a supply made by a co-owner under a partition by agreement or court order for co-owners to effect a partition in the course or furtherance of an enterprise?

49. It is the Commissioner's view that if land is applied or intended to be applied in an enterprise carried on by a co-owner, a supply of that co-owner's interest in the land under a partition by agreement or court order for co-owners to effect a partition is in connection with the enterprise and is a supply in the course or furtherance of that enterprise.

50. Further, where the partition of that land results in the termination of the enterprise which was carried on, the supply of the interest in the land by the co-owners would still be in connection with the enterprise and is a supply in the course or furtherance of the enterprise.

Enterprise[23]

51. The Commissioner recognises that in some cases practical difficulties may arise in determining whether the activities of the co-owners before, or as part of, a partition are an enterprise.

52. In Miscellaneous Taxation Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number, the Commissioner sets out a list of factors to provide assistance in determining whether activities (including an isolated transaction) are an enterprise in the form of a business or an adventure or concern in the nature of trade.[24] The question is necessarily one of fact and degree. It requires a careful weighing of the various factors and exercising judgment in the light of decided case law and commercial experience.

In the course or furtherance of an enterprise

53. The phrase, 'in the course or furtherance of an enterprise' is not defined in the GST Act. The phrase forms part of the requirements that must be satisfied in order for a taxable supply to be identified for the purpose of establishing a liability to GST.

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[23] For a full discussion on the meaning of enterprise see Miscellaneous Taxation Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number.

[24] See paragraphs 170 to 190, paragraphs 233 to 261 and paragraphs 262 to 302 of MT 2006/1.

54. The Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (the Explanatory Memorandum) provides some guidance as to the intended scope of the phrase and states at paragraph 3.10:

> In the course or furtherance' is not defined, but is broad enough to cover any supplies made in connection with your enterprise. An act done for the purpose or object of furthering an enterprise, or achieving its goals, is a furtherance of an enterprise although it may not always be in the course of that enterprise. In the course or furtherance does not extend to the supply of private commodities, such as when a car dealer sells his or her own private car. See *Case N43* (1991) 13 NZTC 3361.

55. Having regard to the context in which the phrase 'in the course or furtherance of' appears and the above statement from the Explanatory Memorandum, the phrase should be given a broad meaning so as to encompass supplies made in connection with the relevant enterprise.

56. The application, or intended application, of an asset in an enterprise establishes the necessary relationship between the supply of the asset and the relevant enterprise. Given the broad meaning of 'in the course or furtherance', the supply of an interest in land under a partition is capable of being made in the course or furtherance of an enterprise regardless of the extent to which it has a connection with the enterprise, so long as it has some connection.

57. The GST Act does not require that an asset must be applied primarily or principally in carrying on the enterprise for the supply of an asset to be in the course or furtherance of an enterprise. Accordingly, a connection between the supply of the interest in land under a partition and the enterprise carried on by the co-owners exists even if, at the time of the supply, the land is applied or intended to be applied in carrying on the enterprise to a minor or secondary extent.[25]

Example 4 – Supply in the course or furtherance of an enterprise

58. *ConstructCo and DevelopCo each carry on a separate enterprise of residential property development. Both are interested in developing the same piece of land. They enter into a joint venture to buy the land together in equal shares and to construct 8 strata titled residential units on the land. ConstructCo and DevelopCo agree to take 4 units each after the development is completed.*

59. *When the strata plan is registered at the Land Titles Office each of the 8 units is held jointly as tenants in common in equal shares.*

[25] This view does not affect the application of Goods and Services Tax Ruling GSTR 2003/6 Goods and services tax: transfers of enterprise assets as a result of property distributions under the *Family Law Act 1975* or in similar circumstances, to situations that fall within the scope of that Ruling.

60. *On completion of the 8 units, under the partition, ConstructCo transfers its interest in units 1 to 4 to DevelopCo. In return DevelopCo transfers its interest in units 5 to 8 to ConstructCo.*

61. *The joint venture entered into by ConstructCo and DevelopCo is not an entity for GST purposes (that is, it is a non-entity joint venture)*[26] *as it does not involve a partnership or the creation of a separate entity.*

62. *The transfer by ConstructCo of its interest in units 1 to 4 to DevelopCo is connected to the enterprise that ConstructCo carries on as the units were intended to be applied in ConstructCo's enterprise of property development. As part of that enterprise, ConstructCo will sell, dispose of or transfer units it has constructed. Similarly, the transfer by DevelopCo of its interest in units 5 to 8 is made in the course or furtherance of the enterprise that DevelopCo carries on.*

Supply not in the course or furtherance of an enterprise

63. If the land was not applied or intended to be applied in the enterprise carried on by the co-owners, the supply of the land is not in connection with the enterprise, and the supply would not be made in the course or furtherance of that enterprise. Such cases would be unusual, and will usually result from an application of the land for a purpose that is entirely separate from the activities of the enterprise carried on.

64. An example of situations where supplies of assets are made or applied in the course of activities that do not form part of the entity's enterprise are contained in Goods and Services Tax Ruling GSTR 2003/6 Goods and services tax: transfers of enterprise assets as a result of property distributions under the *Family Law Act 1975* or in similar circumstances. Although such supplies are not in the course or furtherance of an enterprise the co-owners making such supplies should consider whether an adjustment under Divisions 129 or 138 is required in respect of all acquisitions or importations that relate to the making of the supply if the land was used in, or was the focus of, the enterprise activities.

Example 5 – Supply not in the course or furtherance of an enterprise

65. *Rohan runs his own profitable business as a personal trainer. In July 2003, he and his sister, Roma, purchased land as tenants in common in equal shares. Both Rohan and Roma use the land to carry out a primary production activity as a hobby.*

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[26] Subsection 995-1(1) of the *Income Tax Assessment Act 1997* defines a non-entity joint venture to mean an arrangement that the Commissioner is satisfied is a contractual arrangement:
(a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and
(b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties.

66. *In July 2004, Roma wanted to build a house on the land in which to live. Rohan and Roma agreed to subdivide the land into 2 lots because Rohan wanted to continue the primary production activity. Rohan agreed to take Lot 1 and Roma agreed to take Lot 2.*

67. *Rohan and Roma arrange for the land to be surveyed. The land has a road running along its boundary and had some existing services such as electricity. Only minimal activity was required to subdivide the land.*

68. *Rohan and Roma each transferred their interest in part of the subdivided land to the other to give effect to the partition. The transfer by Rohan of his interest in Lot 2 to Roma is not made in the course or furtherance of the enterprise he carries on. Roma's transfer of her interest in Lot 1 to Rohan is also not in the course or furtherance of an enterprise.*

69. *The partition is the division of an asset which does not have a connection with the business carried on by Rohan as it is not applied or intended to be applied in his enterprise. His hobby activity, which is a separate and distinct activity from the business, is not an enterprise. Roma also does not carry on an enterprise on or in relation to the land.*

Is a supply under a partition made for consideration?

Partition by agreement and court order for co-owners to effect a partition

70. The Commissioner considers that, under a partition by agreement or where a court orders the co-owners to effect a partition, each co-owner makes a supply of land for consideration. The consideration received is non-monetary in that each co-owner gives up their interests in parts of the land in return for the same from other co-owners.

71. Consideration is defined in section 195-1 to mean 'any consideration within the meaning given by section 9-15, in connection with the supply.'

72. Subsection 9-15(1) provides that a payment, or any act or forbearance is consideration for a supply if it is 'in connection with', 'in response to or for the inducement of' a supply. Further, a payment, act or forbearance may be consideration for a supply even though it is not made voluntarily, and regardless of whether it is made by the recipient of the supply.[27]

[27] Subsection 9-15(2).

73. A payment, act or forbearance is consideration for a supply where there is a sufficient nexus between the payment, act or forbearance and the supply.[28] The test as to whether there is a sufficient nexus is an objective test.[29]

74. In *Commissioner of Taxation v. Reliance Carpet Co Pty Ltd*[30] the High Court noted that, under section 9-15, consideration includes, among other things, any payment 'in connection with' a supply of anything. The Commissioner considers that the High Court's judgment discloses a practical approach to determining whether there is a connection between consideration and a supply. In analysing the decision of the European Court of Justice in *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie*,[31] the High Court gave some indication that the connection between consideration and a supply need not be direct (see paragraph 30 of the judgment), though it did not expand on what the extent of the connection needs to be.

75. For land transactions 'consideration' may be regarded as anything that 'moves' the transfer. In *Navakumar v. Commissioner of State Revenue*[32] Deputy President Macnamara of the Victorian Civil and Administrative Tribunal said:[33]

> Consideration is a very wide concept. In Equity consideration generally denotes something of significant value, at common law something purely nominal such as $1, a peppercorn or a chocolate wrapper may constitute consideration. In revenue law the meaning of consideration is wider still, it is that which 'moves' the conveyance or transfer. See *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143, 152 per Dixon J.

76. Although a partition ordinarily does not involve a monetary payment, consideration is not limited to a payment of money. It includes a payment in a non-monetary or in an 'in kind' form.[34] This includes acts, forbearances, and goods or property.

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[28] See paragraph 68 of Goods and Services Tax Ruling GSTR 2001/6 Goods and services tax: non-monetary consideration; paragraph 33 of Goods and Services Tax Ruling GSTR 2002/3 Goods and services tax: prizes; paragraph 28 of GSTR 2003/6.

[29] See paragraph 72 of GSTR 2001/6; paragraph 33 of GSTR 2002/3; paragraph 28 of GSTR 2003/6.

[30] *Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; 2008 ATC 20-028.

[31] *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie* [2007] 3 CMLR 1003.

[32] *Navakumar v. Commissioner of State Revenue* [2007] VCAT 476; (2007) 66 ATR 186.

[33] See also comments made by Gleeson CJ and Callinan J in their dissenting judgment in the High Court decision *Chief Commissioner of State Revenue (NSW) v. Dick Smith Electronics Holdings Pty Ltd* (2005) 213 ALR at 235-236 at [22] to [24].

[34] See paragraph 12 of GSTR 2001/6.

77. The consideration for a co-owner transferring their interest in land to the other co-owners is the transfer or conveyance made by the other co-owners of their respective interests in another part of the land to the first co-owner. The transfer or conveyance by the other co-owners together with any owelty money paid or payable is consideration received by the first co-owner for the supply of their interest to the others.

78. This is supported by comments made by McCabe SM in *Johnson v. FC of T*[35] (*Johnson*).

79. In that case, in considering the consequences of the division of jointly-owned shares between the owners for capital gains tax purposes, McCabe SM said, at paragraphs 15 and 16:

> 15. … Dividing the parcel in two for the purposes of a transfer to each joint owner effectively requires those owners to relinquish ownership of the CGT assets in the shares in the other parcel in return for clear title to the shares in the parcel they are acquiring. It is as if the CGT assets contained in each share have to be unpacked and redistributed so that the taxpayer ends up holding half the number of shares in his or her own right- and those shares do not contain any CGT assets belonging to the other (former) joint owner.
>
> 16. This rearrangement and reallocation of the ownership of CGT assets constitutes a disposition of the CGT asset, and is therefore a CGT event: s 104-10. Subject to the legislation, tax is levied on the capital proceeds from a CGT event less the cost base of the asset. The capital proceeds are the sum of the money received in respect of the transaction (no money changed hands in this case) and the market value of any other property received (in this case, the market value of the interest acquired in the shares): s 116-20.

80. The Commissioner considers that, although the comments made by McCabe SM in *Johnson* were in a different context, nevertheless they support the proposition that a supply of land under a partition is for consideration.

81. The value of the consideration is the sum of the GST inclusive market value of all the other co-owners' interests in the part of the land acquired by a co-owner plus any owelty money received in respect of the partition.

82. The Commissioner accepts that the transfer of an interest in a part of the land by a co-owner is 'in connection with', 'in response to' or 'for the inducement' of the supply by each of the other co-owners of their respective interests in a part of the land.

[35] *Johnson v. FC of T* [2007] ATAA 1322; (2006) ATR 839; 2007 ATC 2161.

Can the margin scheme apply to a taxable supply of land under a partition?

83. Subsection 75-5(1) provides that an entity may apply the margin scheme to work out the amount of GST payable on a taxable supply of land it makes by selling a freehold interest in land, a stratum unit, or (granting) a long term lease.

Sale

84. The Commissioner accepts that the supply of land by co-owners under a partition by agreement or under a court order is a sale and, therefore, accords with the meaning of 'selling' for the purposes of subsection 75-5(1).[36] The margin scheme provisions can be applied to a transfer or conveyance of an interest in land under a partition.

85. The margin scheme only applies if there is a 'selling' of a freehold interest in land, a stratum unit, or (granting) a long term lease.

86. The term 'sale' in relation to land is not defined in the GST Act. The meaning of the term, however, has been considered in Goods and Services Tax Ruling GSTR 2004/8 Goods and services tax: when does an entity have a decreasing adjustment under Division 132?

87. Paragraph 20 of GSTR 2004/8 states:

> 20. The technical legal meaning usually given to the term 'sale' is the transfer by mutual consent of the ownership of a thing from one person to another person for a money price.[37] However, in some contexts, as a matter of ordinary non-technical English usage, 'sale' is capable of extending to the transfer of property for any valuable consideration ….[38]

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[36] See paragraphs 41 to 43 of Goods and Services Tax Ruling GSTR 2006/8 Goods and services tax: the margin scheme for supplies of land acquired on or after 1 July 2000.

[37] See *Halsbury's Law of England*, 1983, vol. 41, 4th edn, Butterworths, London, paragraph 601.

[38] *The Collins Concise Dictionary* 1990, Harper Collins, New York, defines 'sell' as 'to dispose of or transfer ... to a purchaser in exchange for money **or other consideration**' [emphasis added]. In *The Australian Oxford Dictionary* 1999, Oxford University Press, Melbourne, the first sense of 'sale' given is 'the exchange of a commodity for money **etc**.' Etcetera has been emphasised in this definition to distinguish from some other dictionaries, which limit the definition of 'sales' to transfers for a money price.

88. The Commissioner considers that Division 75 is one such context in which it is appropriate to adopt the wider, non-technical, interpretation of the term 'sale'.[39] Having regard to the purpose of Division 75 and the need for a workable application of Division 75 across all entities the Commissioner considers it appropriate to take a purposive approach to the application of Division 75 to a supply of land under a partition.

89. In the Commissioner's view, the intention for limiting the margin scheme to taxable supplies by way of sale of a freehold interest in land or stratum units was to exclude taxable supplies consisting of partial or temporary disposals.[40] The margin scheme should only be available when the freehold interest is wholly and permanently disposed of. Whether that disposal is for monetary consideration, as opposed to some other kind of valuable consideration, is immaterial.

90. Therefore, it is considered that for the purposes of Division 75, 'sale' encompasses transactions where the consideration is monetary or non-monetary.

91. Further, the Commissioner considers that the analysis undertaken by the courts in relation to the distinction between a sale and a partition for the purposes of the relevant State and Territory Acts dealing with partition and of the relevant stamp duties legislation is not determinative of whether or not there is a 'selling of a freehold interest' for the purposes of the GST Act.[41]

92. The wider meaning of the term 'consideration' in combination with the approach to the interpretation of the GST Act which gives effect to the object and purpose of the legislation means that it is open to the Commissioner to take a broader view of the meaning of 'selling'. For GST purposes, in particular for the purposes of Division 75, under a partition, each co-owner is 'selling' their freehold interest in land to be retained by the other co-owners.

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[39] See paragraph 125 of Goods and Services Tax Ruling GSTR 2001/1 Goods and services tax: supplies that are GST-free for tertiary education courses, for another context in which the term sale has been given a wider meaning for GST purposes. See also paragraphs 20 to 25 of GSTR 2004/8.

[40] A grant of a long-term lease of real property is not a supply by way of sale but is a supply to which the margin scheme may apply. See paragraph 75-5(1)(c).

[41] See the 'Alternative view' at paragraphs 93 to 101 of this draft Ruling.

Alternative view

93. Statute,[42] common law and text writers favour a proposition that a partition is not a sale. One of the elements of a sale is not present in a partition – being that a price in money is not paid or promised. In Sale of Goods by Benjamin[43] it is stated:

> To constitute a sale it is necessary that the consideration for the transfer of the property in the goods should be in money. This may be either paid or promised (i.e. the sale may be for cash or on credit); but if the consideration is something other than money the contract is not, strictly speaking, one of sale in English law.

94. This is confirmed in *John Foster & Sons, Limited v. The Commissioners of Inland Revenue*[44] at pages 522 to 523, in which Cave J (dissenting) stated:

> … To constitute a sale it is essential that there should be a seller, a purchaser, a thing sold, and a price given for the same; and the interests of the purchaser and seller are necessarily distinct and antagonistic. If any of these characters are wanting, the transaction may be a mortgage, or a gift, or an exchange, or a **partition**, or a transaction of some other kind, but it cannot be a sale.
>
> …
>
> … It is not enough to say that there are some features resembling those of a sale in the transaction. …

95. Further, in *Henniker v. Henniker*[45] it was held that an exchange upon which money was paid for equality of partition was not a sale of property.

96. State and Territory laws also distinguish between a sale and a partition for the purposes of the application of stamp duty laws.[46]

97. The distinction has also been discussed in cases involving suits for partition or sale. For example, section 4 of the *Partition Act 1900* (NSW) (repealed) was discussed in *Bray v. Bray*[47] where Higgins J stated … 'I regard a sale as an alternative to a partition and not to the status quo'.

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[42] An example of the distinction between sale and partition is found in sections 69 and 70 of the *Law of Property Act 1936* (SA).
[43] Benjamin, JP, *Sale of Goods*, 4th Ed, Sweet & Maxwell, London, 1992,, at 1-034.
[44] *John Foster & Sons, Limited v. The Commissioners of Inland Revenue* [1894] 1 QB 516.
[45] *Henniker v. Henniker* (1852) 1 Ellis and Blackburn 54; 118 ER 357.
[46] For example, see subparagraph 8(1)(b)(i) and section 30 of the *Duties Act 1997* (NSW).
[47] *Bray v. Bray* (1926) 38 CLR 542; [1926] HCA 40.

98. In *Lucky Developments v. Hsu*[48] Windeyer J discussed the provisions of section 66G of the *Conveyancing Act 1919* (NSW) and stated:

> …In this case of course, it is the plaintiff whom the Court must be satisfied would be in a more beneficial position on partition than on sale. Even so, the matter is still in the discretion of the Court and the Court is not bound to make an order for partition in such circumstances, the position being that it cannot do so unless those circumstances exists. (Section 66G(4).) Sale and partition remain as true alternatives; *Re Cordingley* (1948) 48 SR (NSW) 248.

99. In *Christie v. The Commissioners of Inland Revenue*[49] (*Christie*) the Court of Exchequer considered at 49 the provisions of the Stamp Act and a conveyance by a retiring partner to a co-partner. The appellant submitted:

> The contract of partnership involves an implied stipulation, that the property belonging to the partners shall be sold and divided upon the dissolution. Each partner has a right to have the property realised, and to be paid his share…and when a retiring partner, on receiving that share, executes a deed assigning his interest to his co-partner, there is nothing sold by him in the ordinary acceptation of the word: Belcher v. Sikes [FN4]; 2 Lindley on Partnership, 713. The case is similar to that of a partition: Henniker v. Henniker [FN 5]; …

100. However, the facts of *Christie* were that by an indenture of later date (that is, after the partnership was dissolved), reciting the previous deed, the retiring partner 'in pursuance of the agreement and in consideration of the premises', conveyed to the remaining partner, all his estate and interest in the partnership property and assets. It was held that the indenture was liable to stamp duty as a 'conveyance upon the sale of property'.

101. Having regard to the object and purpose of Division 75, the Commissioner considers it appropriate to take a broader view of the meaning of 'selling', and for the reasons outlined in paragraphs 84 to 92 of this draft Ruling, the Commissioner does not adopt this alternative view.

Taxable supply of land by co-owners

102. The Commissioner takes the view that the margin scheme can be applied to a taxable supply of land by a co-owner under:

(i) a partition by agreement, or

(ii) a court ordered partition without the appointment of a trustee for partition

if the requirements of Division 75 are satisfied.

103. A supply by a co-owner of their interests in parts of land to the other co-owner(s) is a supply of a freehold interest in land.

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[48] *Lucky Developments v. Hsu* [1999] NSWSC 412.
[49] *Christie v. The Commissioners of Inland Revenue* (1866-67) LR 2 Ex. 46.

How is the margin calculated under the margin scheme?

104. If a supply is made under the margin scheme, the margin for the supply is calculated under either section 75-10 or section 75-11, taking into account section 75-13.

Taxable supplies of land made under a partition before 17 March 2005 where the land was acquired on or after 1 July 2000

105. The margin for a taxable supply of land made under a partition before 17 March 2005, where the land was acquired after 1 July 2000, is calculated under subsection 75-10(2).[50]

106. Under subsection 75-10(2), the margin for the supply is the amount by which the consideration for the supply exceeds the consideration for the acquisition.[51]

107. The consideration for the supply of a co-owner's interest in the land[52] to another co-owner is the GST inclusive market value of that other co-owner's interest in the part of the land acquired by the first co-owner plus any owelty money received in respect of the interest being supplied.

Example 6 – Consideration for the supply

108. *George and Lizzie each carry on a separate enterprise of land development and each is registered for GST. They enter into a joint venture agreement to acquire a large block of land to develop into 30 commercial lots, and for each to take 15 lots.*

109. *Upon subdivision they agree that George is to take lots 1 to 15 and Lizzie is to take lots 16 to 30.*

110. *The consideration for the supply by George of his interests in lots 16 to 30 to Lizzie is the GST inclusive market value of Lizzie's interests in lots 1 to 15 which she supplies to George. Similarly, the consideration for the supply by Lizzie of her interests in lots 1 to 15 to George is the GST inclusive market value of George's interests in lots 16 to 30 which he supplies to Lizzie.*

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[50] In limited circumstances, subsection 75-10(3) can also apply where real property was acquired on or after 1 July 2000.

[51] If the consideration for the acquisition is equal to or greater than the consideration for the supply, then the margin for the supply is nil.

[52] The consideration for the acquisition is the original purchase price after taking into account settlement adjustments, and does not include costs associated with the purchase of the property, such as legal expenses and stamp duty. It also does not include costs incurred in developing the real property. See paragraphs 48 to 49 of GSTR 2006/8.

111. The consideration for the acquisition is the original purchase price of the land apportioned on any fair and reasonable basis, to ascertain the part of the acquisition consideration that relates to the interest that each co-owner supplies.

112. In the case of subdivided land or stratum units, each co-owner may apportion the consideration for the acquisition of the land to each of the subdivided lots or units.[53] Each co-owner may further allocate this portion to ascertain the part of the acquisition consideration that relates to the interest in the land that each co-owner supplies. Co-owners may use any fair and reasonable basis to make this apportionment.[54]

Example 7 – Co-owners supply land under a partition before 17 March 2005 that was acquired on or after 1 July 2000

113. *RockCo and HardPlaceCo each separately carry on an enterprise of land development and are registered for GST. On 10 August 2001, they purchased a block of land as tenants in common in equal shares and agreed to develop the land into two townhouses. RockCo agreed to take Townhouse 1 and HardPlaceCo agreed to take Townhouse 2. The land was acquired for $220,000.*

114. *In October 2001, RockCo and HardPlaceCo subdivided the land into two lots of equal value and area and commenced construction of the townhouses. Construction was completed in December 2003.*

115. *In January 2003, to give effect to their agreement for partition, RockCo transferred its interest in Townhouse 2 to HardPlaceCo, and contemporaneously HardPlaceCo transferred its interest in Townhouse 1 to RockCo.*

116. *RockCo and HardPlaceCo each used the margin scheme to calculate the GST payable on the supply. At that time, the GST inclusive market value of each townhouse was $330,000.*

117. *The GST inclusive market value of the consideration for the supply of RockCo's half interest in Townhouse 2 is $165,000, being the GST inclusive market value of the supply of HardPlaceCo's half interest in Townhouse 1 that RockCo takes (that is, $330,000 x 50%).*

[53] See section 75-15.

[54] To ascertain the proportion of the purchase price that relates to the subdivided allotment or stratum unit, see paragraphs 58 to 68 of GSTR 2006/8 for fair and reasonable methods of apportionment. Examples of two bases of apportionment are the area method, whereby the consideration for the real property acquired is apportioned on the basis of the proportion of the total saleable area of the development represented by the particular lot, and the lots or sites method, whereby the apportionment is based on the number of lots or sites.

118. *Under subsection 75-10(2), RockCo's consideration for the acquisition of the half interest in Townhouse 2 which it supplied to HardPlaceCo is $55,000. This is the proportion of the consideration for the land acquired for Townhouse 2 (using the lots method),*[55] *and then apportioned on the basis of RockCo's half interest in that land (that is, (½ x $220,000) x 50%).*

119. *The margin for the supply by RockCo is $110,000, being the difference between the consideration for the supply ($165,000) and the consideration for the acquisition ($55,000).*

120. *The GST payable by RockCo is $10,000, being 1/11th of the margin of $110,000. HardPlaceCo would also be liable to pay this amount for the supply of its interest in Townhouse 1 to RockCo.*

Taxable supplies of land made under a partition before 17 March 2005 where the land was acquired before 1 July 2000

121. If the land was acquired before 1 July 2000 and the co-owners have a valuation of the land that is in accordance with one of the Commissioner's written determinations,[56] the margin for the supply is calculated under subsection 75-10(3). The margin for the supply is the amount by which the consideration for the supply of each co-owner's interest in the land[57] exceeds that proportion of the valuation that relates to each co-owner's interest in the land at the valuation date prescribed in that subsection.

122. If the interest in the land that is supplied by the co-owners was not in existence at the valuation date but arose, for example, from a subdivision of land that was in existence at that date, the valuation must be made as follows:

- a valuation of the land in existence at the valuation date is undertaken;
- then apportioned on any fair and reasonable basis, to ascertain the part of the valuation that relates to the interest of each co-owner; and
- then apportioned on any fair and reasonable basis, to ascertain the part of the valuation that relates to the interest that each co-owner supplies.

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[55] See paragraph 59 of GSTR 2006/8 for a discussion on this method of apportionment.

[56] A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination (No. 1) 2000 MSV 2000/1; A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination (No. 2) 2000 MSV 2000/2; A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination MSV 2005/1; A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination MSV 2005/2; A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination MSV 2005/3.

[57] See paragraph 107 of this draft Ruling.

Example 8 – Co-owners supply land under a partition before 17 March 2005 that was acquired before 1 July 2000

123. *On 10 February 2000, CrystalCo and ClearCo purchased a 1000 square metre block of land as tenants in common in unequal shares for development into two townhouses. CrystalCo has one undivided one-third share in the land and ClearCo has two undivided one-third shares in the land.*

124. *On 30 October 2000, CrystalCo and ClearCo subdivided the land into two lots of 400 (Lot 1) and 600 (Lot 2) square metres respectively, and commenced construction of the townhouses. Construction was completed in March 2001.*

125. *In April 2001, to give effect to their agreement for partition, CrystalCo transferred its one-third interest in Townhouse 2 on Lot 2 to ClearCo, and contemporaneously ClearCo transferred its two-thirds interest in Townhouse 1 on Lot 1 to CrystalCo.*

126. *CrystalCo and ClearCo each used the margin scheme to calculate the GST payable on the supply. At that time, the GST inclusive market value of Townhouse 1 was $210,000 and the GST inclusive market value of Townhouse 2 was $312,000.*

127. *CrystalCo and ClearCo obtained a valuation of the land as at 1 July 2000 for the purposes of subsection 75-10(3). The land was valued at $225,000.*

128. *The consideration for the supply made by ClearCo of its interest in Lot 1 is the interest of CrystalCo in Lot 2 that ClearCo takes. The GST inclusive market value of CrystalCo's interest in Lot 2 is $104,000 ($312,000 x 1/3).*

129. *The proportion of the valuation of the land as at 1 July 2000 as it relates to Lot 1 (using the area method[58]) is $90,000 (400/1000 x $225,000). The proportion that relates to ClearCo's interest in Lot 1 is $60,000 ($90,000 x 2/3).*

130. *The margin for the supply by ClearCo is $44,000, being the difference between the consideration for the supply ($104,000) and the proportion of the valuation of the interest in the land supplied by ClearCo to CrystalCo ($60,000).*

131. *The GST payable on the supply by ClearCo is $4,000, being 1/11th of the margin of $44,000. CrystalCo is also liable to pay GST on the supply of its interest in Lot 2 to ClearCo using the same basis of calculation above.*

[58] See paragraph 59 of GSTR 2006/8 for a discussion on this method of apportionment.

Taxable supplies of land made under a partition on or after 17 March 2005

132. If a taxable supply of land is made by co-owners under a partition on or after 17 March 2005 the calculation of the margin is the same as explained above unless section 75-11 applies.

133. In the context of this draft Ruling, if the land was acquired from an associate[59] of the co-owners, then the margin for the supply is calculated under subsection 75-11(7), unless any of the other subsections in section 75-11 apply. This is because, for supplies made on or after 17 March 2005, section 75-11 takes precedence over subsections 75-10(2) and (3).

134. Under subsection 75-11(7) the margin for the supply is the amount by which the consideration for the supply exceeds:

- an approved valuation of the land as at 1 July 2000 – if the acquisition was made from the associate before 1 July 2000; or
- the GST inclusive market value of the land at the time of the acquisition – if the acquisition was made from the associate on or after 1 July 2000.[60]

135. The valuation of the land is then apportioned on a fair and reasonable basis, to ascertain the part of the valuation that relates to the interest that each co-owner supplies.

136. Further, if the co-owners are associates, for the purposes of working out the margin for supplies made under a partition on or after 17 March 2005, treat the consideration for the supply as if it were the same as the GST inclusive market value of the land at the time of the supply.[61]

137. All of the above discussion and examples apply equally where a court orders the co-owners to effect a partition.

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[59] See section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936) for the definition of the term 'associate' for the purposes of section 195-1.

[60] The Government has announced proposed amendments in relation to subsection 75-11(7) and the application of the margin scheme to the supply of real property acquired from an associate. The final Ruling will take these proposed changes into account if it the relevant legislation is enacted before the date of issue of the final Ruling.

[61] Section 75-13.

Partitions and Partnerships[62]

General law partnerships

Does a general law partnership make a supply when it effects a partition of partnership property?

138. In making an in specie distribution of land, or a supply of an interest in land by way of a partition, the partnership makes a supply to the partners.[63] This supply is in the course or furtherance of the partnership's enterprise, and is made for consideration.

Land as partnership property

139. Land becomes partnership property when the partners make an in kind capital contribution of the property to the partnership, or the land is acquired by the partners in their capacity as partners in the partnership.[64]

What is the interest of the partners in the land of the partnership?

140. A partnership does not have a legal personality separate from its members. This means that a partnership cannot 'hold' the legal interest in land. The legal interest in land is either held by the partners or held by some partners on trust for all the partners including themselves.[65]

141. A partner has a beneficial interest in each and every asset of the partnership.[66] A partner does not have a right to any particular property of the partnership but upon dissolution of the partnership has a right to call for the sale of partnership property and for the distribution of any surplus to the partners.

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[62] This draft Ruling does not consider the GST treatment of a partition of land by a tax law partnership.

[63] The Commissioner's views on the application of the GST laws to general law partnerships are set out in Goods and Services Tax Ruling GSTR 2003/13 Goods and services tax: general law partnerships. See also the draft Addendum Goods and Services Tax Ruling GSTR 2003/13DA Goods and services tax: general law partnerships.

[64] In determining whether land has become partnership property it is necessary to look at the intentions of the partners. This involves an examination of the partnership agreement and any relevant conduct of the partners.

[65] Land may be vested at law in one partner only and also be partnership property: *Re Rayleigh Weir Stadium* [1954] 2 All ER 283; [1954] 1 WLR 786 (*Rayleigh*). In such a case, other partners have an equitable right to their own share and thus a right to a share of the proceeds of sale of the land: *Rayleigh* [1954] 2 All ER 283 at 286; [1954] 1 WLR 786 at 791.

[66] See *Canny Gabriel Castle Advertising Pty Ltd and anor v. Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327; (1974) 3 ALR 409 at 412.

Distribution of land by the partnership to a partner[67]

142. By agreement between all the partners, a partnership may convert partnership property into the separate property of one or more partners[68] by delivering the property to the acquiring partner or partners, possession being the act which completes the partition.[69] This conversion by way of an *in specie* distribution may occur either while the partnership is continuing or upon a general dissolution of the partnership.

143. In *Macleod v. IRC*[70] it was held that, where two partners dissolved their partnership upon the footing of an equal division of the partnership property, the transaction was a partition or division. Accordingly, distribution of partnership land to the partners may be a partition.

144. To effect the partition each partner would transfer their interest in the land to the other partners for absolute ownership of the property to be received by them.

145. It is considered that the transfer of a partner's beneficial (and legal) interest in land by each partner to the other partners would be in the capacity as a partner of the partnership. The distribution of the partnership property would therefore be made by the partnership to the acquiring partner in their own right.[71]

146. As noted above, partnership property may be converted into the separate property of a partner by the partnership delivering the property to the acquiring partner. For the acquiring partner to enjoy absolute ownership of the land therefore the partnership must also distribute the remaining beneficial (and legal) interest in the land held by the partner as a partner in the partnership to the partner in their own right. The partnership therefore makes an in specie distribution of the whole of the land to the acquiring partner.

Is an in specie distribution of land a supply?

147. The Commissioner considers that an in specie distribution of land by a partnership to a partner is a supply made by the partnership. The supply is made in the course or furtherance of the partnership's enterprise. It makes no difference whether the in specie distribution is made while the partnership is continuing or under a general dissolution.

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[67] Pursuant to paragraph 318(4)(a) of the ITAA 1936 a partner is an associate of a partnership. Note that section 195-1 provides that the term 'associates' has its meaning given by section 318 of the ITAA 1936.
[68] *Bolton v. Puller* (1796) 1 Bos & P 539; (1796) 126 ER 1053.
[69] *Re Christopher; Ex parte Harris* (1816) 1 Madd 583; 56 ER 214.
[70] *Macleod v. IRC* (1885) 12 R (Ct of Sess) 1045.
[71] Pursuant to paragraph 184-5(1)(a), a supply or acquisition made by or on behalf of a partner in their capacity as a partner of the partnership is taken to be made by the partnership. Under subsection 184-1(1), a partnership is able to make supplies and acquisitions in its own right as it is a separate entity from its partners.

148. The above view aligns with the Commissioner's views set out in Goods and Services Tax Ruling GSTR 2003/13 Goods and services tax: general law partnerships. GSTR 2003/13 provides that an in specie distribution by the partnership to a partner is a supply and, for GST purposes, something done in the course of the termination of the enterprise that the partnership carries on.[72]

Is the in specie distribution made for consideration?

149. The Commissioner takes the view that an in specie distribution of land to the partners is made by a partnership for consideration.

What is the consideration for the in specie distribution?

150. In the GST Act, the term consideration has a wide meaning and includes an act or forbearance. The capital contributed by a partner to the partnership entitles the partner to an interest in the partnership, and gives rise to an entitlement to a distribution of any surplus remaining on dissolution of the partnership (after payment of partnership debts and other liabilities and after return of capital to the partners). The right to an in specie distribution is a consequence of an entity being a partner. The reduction in the value of the partner's interest in the partnership, reflecting the value of the property distributed, is the consideration for an in specie distribution.[73] This reduction in value may be represented by:

(a) an amount debited to the capital account of the partner

(b) an amount debited to the current account of the partner, or

(c) a combination of amounts debited to both the partner's capital account and current account.

151. Where the value of the in specie distribution is greater than the total credit standing to the partner, as reflected by the combined balance of the partner's capital and current account, the consideration for the in specie distribution is:

- the combination of amounts debited to both the partner's capital account and current account, plus
- the entry into an obligation, or the promise to pay the partnership an amount in respect of the partnership property.[74]

[72] See paragraph 135 of GSTR 2003/13. See also the draft Addendum GSTR 2003/13DA.
[73] However, if consideration is less than the GST inclusive market value of the land, the supply may be for inadequate consideration and subsection 72-70(1) may apply.
[74] As reflected in the partner's loan account or similar.

152. The Commissioner's views in paragraphs 150 to 151 of this draft Ruling are supported by the High Court decision in *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)*[75] (*Archibald Howie*).

153. In *Archibald Howie*, the Company transferred shares in another company to two shareholders who held shares in Archibald Howie Pty Ltd. The purpose of the transfers was to carry out a resolution for the reduction of the share capital of the appellant company. The reduction was carried out by a distribution of assets *in specie.* In relation to the facts Dixon J stated:

> In the context I think that the word 'consideration' should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts. The difference is perhaps not very material because the consideration must be in money or money's worth. But in the law of simple contracts it is involved with offer and acceptance: indeed properly understood it is perhaps merely a consequence or aspect of offer and acceptance. Under s. 66 the consideration is rather the money or value passing which moves the conveyance or transfer.
>
> …
>
> The truth is, however, that the return of … the amount paid up is the discharge pro tanto of a claim of the shareholder upon the assets of the company.
>
> …
>
> The reduction in both the amount and value of the share affords an adequate consideration in money and in money's worth.

Can the margin scheme apply to an in specie distribution of land?

154. The Commissioner takes the view that the margin scheme can be applied to a taxable supply (that is, an in specie distribution) of land by the partnership to the partners.[76]

155. Further, in the context of this draft Ruling, in working out the margin for an in specie distribution of land made by the partnership on or after 17 March 2005 to a partner at the time of the supply, treat the consideration for the supply as if it were the same as the GST inclusive market value of the land at the time of the supply.[77]

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[75] *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143; (1948) 22 ALJ 331; (1948) 49 SR (NSW) 112; (1948) 66 WN (NSW) 51; [1948] 2 ALR 489; [1948] HCA 28.

[76] For the Commissioner's view on the application of the margin scheme to general law partnerships see Draft Goods and Services Tax Ruling GSTR 2008/D2 Goods and services tax: general law partnerships and the margin scheme.

[77] Section 75-13.

Alternative view

No partition of partnership land

156. An alternative view is that partnership land cannot be partitioned, rather it can only be sold on dissolution of the partnership.

157. In *Tenure Pty Ltd v. Costala Pty Ltd and Anor*,[78] McDonald J stated:

> In the 9th ed of the Law of Partnership by Lord Lindley, published in 1924, the learned editors at p28 identifying a number of principle (sic) differences between co-ownership and partnership. In part they stated:
>
> > 6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of the Partition Acts) to have it sold against their consent. A partner has no right to partition in specie, but is entitled on a dissolution, to have the partnership property, whether land or not, sold, and the proceeds divided.
>
> Having regard to these authoritative statements, it is my opinion that in the event of it being determined that there exists in this case a partnership between the parties pursuant to an agreement entered into between them and the land, the subject of these proceedings, is part of the partnership property, then while that partnership continues to exist the plaintiff has no right to seek partition or sale of the land under s222 of the *Property Law Act*. However, on dissolution of the partnership the plaintiff would be entitled to have the land sold, together with all other property of the partnership, and after discharge of all partnership debts and liabilities, to have the net proceeds divided equally amongst itself and the defendants.

158. In partnership situations, it is unlikely that on the dissolution of a partnership, a court would make an order for partition as this would be inconsistent with a partner's interest in the partnership. This interest consists of a right to a proportion of the surplus after the realisation of the assets and payment of the debts and liabilities of the partnership. A partner has a right to call for a sale of partnership assets and for the profits from such sale to be divided in accordance with the interest that each partner has in the partnership.[79]

159. Although it is more likely that a court would order a sale rather than a partition in a partnership situation, this does not preclude the partners agreeing to a partition of partnership land between themselves.[80]

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[78] *Tenure Pty Ltd v. Costala Pty Ltd and Anor* [1997] VConvR 54-565.

[79] See *Federal Commissioner of Taxation v. Everett* (1980) 28 ALR 179 at 182, per Barwick CJ, Stephen, Mason & Wilson JJ.

[80] Although note the comments of Brennan J in the High Court decision *Nullagine Investments Pty Ltd v. Western Australian Club Incorporated* (1993) 116 ALR 26 at 34, where his Honour stated at paragraph 12:
'…Thus joint venture or partnership agreements which govern the development and sale of land or otherwise provide for its disposition when the joint venture or partnership is wound up may validly exclude, expressly or impliedly, the right of a co-owner to apply for an order for partition or sale; As Halsbury's Laws of England (1st edition), vol 1.'

Partitions and Joint Ventures

Supply of land held jointly by the participants (including joint venture operator in capacity as a participant)

160. Under a partition the transfer by each participant in a joint venture[81] of their interests in the land is a taxable supply provided all the requirements of section 9-5 are met. It makes no difference whether the joint venture is a GST joint venture or not.

161. The transfer of the interest of each participant for absolute ownership in particular land to be taken by the other participants is consideration for the supply.[82]

162. The value of the consideration is the sum of the GST inclusive market value of all the other participants' interests in the part of the land acquired by a participant in return for the supply made by that participant plus any owelty money received in respect of the partition.

163. An arrangement between two or more parties entered into for the construction of residential or commercial premises may be a joint venture. The participant's share of the product or output may be a share of the premises, for example, or a specified number of stratum units in a strata title development.

164. Where the legal title to the units is held jointly with one or more of the participants, it will be necessary to effect a partition for the legal title to each unit to be transferred to the participant entitled to receive that unit under the terms of the joint venture.

165. For each participant in a joint venture to obtain their share of the land, it is necessary for each participant to mutually convey their interest in the land to the other.

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[81] The Commissioner's views on the application of the GST laws to joint ventures are set out in Goods and Services Tax Ruling GSTR 2004/2 Goods and services tax: What is a joint venture for GST purposes?; Goods and Services Tax Determination GSTD 2004/2 Goods and services tax: Are all supplies made by the entity nominated as the joint venture operator to entities that are participants in the GST joint venture to be treated as if they are not taxable supplies?; Goods and Services Tax Ruling 2004/3 Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/2: Avoidance of GST on the sale of new residential premises.

[82] See paragraphs 70 to 82 of this draft Ruling.

Does subsection 51-30(2) apply to a supply of land under a partition by a joint venture participant that is also a joint venture operator?

166. Subsection 51-30(2) does not apply to the supply of an interest in land under a partition by a joint venture participant, in its capacity as a joint venture operator, to the other participant(s) as the participant acquiring the land does not do so for consumption, use or supply in the course of activities for which the joint venture was entered into. The supply is a taxable supply.

167. In some circumstances, a joint venture participant in a GST joint venture may also be nominated as a joint venture operator. In these circumstances it is appropriate to consider whether subsection 51-30(2) applies.

168. Subsection 51-30(2) provides that a supply that the joint venture operator makes under a GST joint venture arrangement is treated as if it were not a taxable supply if:

(a) it is made to another entity that is a participant in the joint venture; and

(b) the participant acquired the thing supplied for consumption, use or supply in the course of the activities for which the joint venture was entered into.[83]

169. It is considered that, in referring to the '...activities for which the joint venture was entered into', subsection 51-30(2) is referring to activities which are part of the specified purpose for which the joint venture was approved.

170. The acquisition of residential or commercial premises, by a participant under a partition, for the purpose of the participant subsequently selling, retaining, or renting is not an acquisition 'for consumption, use or supply in the course of activities for which the joint venture was entered into'.

171. The participant acquires the premises for its own purpose which is separate from and not part of the activities for which the joint venture was entered into.

Can a participant in a joint venture apply the margin scheme to a taxable supply of land?

172. The Commissioner takes the view that the margin scheme can be applied to a taxable supply of land by a participant in a joint venture provided the requirements of Division 75 are met.

[83] See also GSTD 2004/2 for a discussion of the operation of subsection 51-30(2) in the context of supplies made by the entity nominated as the joint venture operator to entities that are participants in the GST joint venture.

Your comments

173. We invite you to comment on this draft Goods and Services Tax Ruling. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

174. In particular, the Commissioner invites comment on what the date of effect of the final Ruling should be (including whether an application before the date of issue may adversely affect any taxpayer and in what circumstances) and what, if any, transitional arrangements are appropriate in implementing the final Ruling.

Due date:	**8 August 2008**
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Commissioner of Taxation
25 June 2008

Previous drafts:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 1999/1; GSTR 2001/1; GSTR 2001/6; GSTR 2002/3; GSTR 2003/6; GSTR 2003/13; GSTR 2004/2; GSTR 2004/3; GSTR 2003/13DA, GSTR 2004/8; GSTR 2006/8; GSTR 2006/9; GSTD 2004/2; MT 2006/1; GSTR 2008/D2

Subject references:

- Acquisition of real estate
- Carrying on an enterprise
- GST consideration
- GST enterprise
- GST joint ventures
- GST lease and real property
- GST margin scheme
- GST non-monetary consideration
- GST property and construction
- GST sale of real property
- GST supply
- Joint ventures
- Partnerships
- Partnership restructuring
- Partnership interests
- Distribution in-specie
- Subdivision of Real Property
- Real property
- Taxable supply

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