GSTD 2012/3 - Goods and services tax: does an adjustment for a change in extent of creditable purpose necessarily arise for services acquired in relation to a proposed merger and acquisition transaction that does not eventuate, or that does not proceed in the manner contemplated at the time the services were acquired?

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There is a Compendium for this document: **GSTD 2012/3EC** .

From 1 July 2015, the term 'Australia' is replaced in nearly all instances within the GST, Luxury Car Tax, and Wine Equalisation Tax legislation with the term 'indirect tax zone' by the *Treasury Legislation Amendment (Repeal Day) Act 2015*. The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts. This change was made for consistency of terminology across the tax legislation, with no change in policy or legal effect. For readability and other reasons, where the term 'Australia' is used in this document, it is referring to the 'indirect tax zone' as defined in subsection 195-1 of the GST Act.

Goods and Services Tax Determination

Goods and services tax: does an adjustment for a change in extent of creditable purpose necessarily arise for services acquired in relation to a proposed merger and acquisition transaction that does not eventuate, or that does not proceed in the manner contemplated at the time the services were acquired?

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Ruling

1. No.

2. There can only be an adjustment under section 129-40[1] where there is a change in the extent of creditable purpose of an acquisition. If a service is acquired and applied in carrying on your enterprise, and is not of a private or domestic nature, an adjustment can only arise under section 129-40 if there is a difference between the extent that the service relates to input taxed supplies at the time it is acquired, and the extent that it relates to input taxed supplies when it is actually applied in carrying on your enterprise (whether those supplies occur at the time of application or are merely proposed at that time).

[1] All references are to the *A New Tax System (Goods and Services Tax) Act 1999*.

3. An adjustment under Division 129 cannot be determined for all services acquired in mergers and acquisitions (M&A) transactions simply by reference to the outcome of the transaction. Rather, whether there is a change in the extent of creditable purpose between time of acquisition and time of application necessarily needs to be worked out in the context of the particular transaction, having regard to how the particular services have been used.

4. Services acquired in the context of proposed M&A transactions typically include due diligence and other advisory services. In many cases, those services are applied in evaluating or preparing for a proposed transaction. If there has been no change in the extent to which those services relate to an input taxed supply between the time they are acquired, and the time they are used in evaluating or preparing for a transaction, the intended use of the services and their actual use are the same. Accordingly, there is no change in the extent of creditable purpose of the services.

5. On the other hand, there may be a change in creditable purpose if the services are applied or reapplied at a time when there has been a change in the intended transaction.

6. The termination of a proposed transaction would not ordinarily give rise in itself to a Division 129 adjustment because services are not applied or reapplied for a different purpose once the transaction is terminated.

Examples[2]

Example one – Application of advice where the proposed transaction changes

7. *Bid Co wants to expand its operations (which involve making taxable supplies) and is considering acquiring the business of Target Co. Both are Australian companies. Bid Co acquires corporate advisory services from Number Cruncher Co. They are engaged to assess the industry and other competitors, assess the potential synergies between the two businesses, and advise on transaction structuring (shares or assets) and a pricing range for the potential transaction. Therefore the acquisition of corporate advisory services relates more or less equally to input taxed (shares) and non-input taxed (assets) options. Bid Co is entitled to and claims input tax credits based on 50% creditable purpose.*

8. *Number Cruncher provides a report on the above matters and recommends that Bid Co should proceed with an acquisition. Bid Co decides to proceed, and after considering the information and advice in Number Cruncher's report about the respective merits of proceeding by way of either a share purchase or an asset purchase, initially favours a share acquisition. Bid Co acquires the services of lawyers in conducting due diligence and drafting a share sale agreement.*

9. *The intended purchase of the shares of Target Co would be an input taxed financial supply.*[3] *Accordingly, Bid Co is not entitled to and claims no input tax credits for the legal services related to drafting the share sale agreement, because this is solely related to a supply that would be input taxed and is not made for a creditable purpose to any extent.*

[2] Each of the examples assumes that the relevant entity has exceeded the financial acquisitions threshold (Division 189). The examples do not deal with any potential reduced input tax credits under Division 70 of the GST Act.
[3] See explanation at paragraphs 29 and 33 of this Determination.

10. *Among other things, the due diligence advice states that Target Co has had very poor compliance with trade practices and health and safety regulations, and concludes that there would be a material exposure in purchasing Target Co by way of share acquisition. However, Bid Co considers that Target Co's business is very valuable and decides to acquire the assets of Target Co instead. The due diligence service by the lawyers related specifically to the former proposed share acquisition. Therefore Bid Co was not entitled to an input tax credit for its acquisition of the due diligence services. However, some aspects of the due diligence report, such as in relation to intellectual property (including patents) held by Target Co were later used specifically to determine the price of the assets when negotiating the terms on which Bid Co would acquire the assets of Target Co. Bid Co needs to consider whether an adjustment arises under Division 129 for each of the acquisitions.*

Corporate advisory services

11. *The corporate advisory services were acquired when there was an intention to acquire the business but the form of the transaction was yet to be determined. Those services were applied by Bid Co for their intended purpose of evaluating the merits of a takeover of Target Co, either by way of share purchase or asset purchase. There has been no further use or application of the corporate advisory services by Bid Co; either in relation to the initial proposed share purchase or the later proposed asset purchase. This application of the corporate advisory services in Bid Co's enterprise concluded when the decision was made to proceed with a takeover of Target Co, and the actual application of the corporate advisory services in Bid Co's enterprise reflected their intended application. Therefore no adjustment for a change in extent of creditable purpose arises under Division 129.*

Legal services

12. *The acquisition of the legal services in drafting of a share sale agreement relates to the initial, intended acquisition of Target Co's shares and therefore was not for a creditable purpose. Although the share agreement was never executed, the services acquired in having the agreement drafted were allocated or dedicated to, and thus applied, in Bid Co's enterprise for the purpose of acquiring Target Co's shares, as was then proposed. This application of the services ceased at the time when it was decided that the takeover would proceed by way of an asset purchase, rather than a share acquisition. The services, which were specific to a share purchase, are not subsequently applied for any other purpose, and an adjustment for a change in extent of creditable purpose does not arise under Division 129.*

Due diligence services

13. *The due diligence services were acquired and used by Bid Co Pty Ltd for the purpose of assessing and evaluating the merits of the then proposed acquisition of Target Co's shares. The decision to acquire Target Co's assets instead of proceeding with the proposed share acquisition does not in itself represent a change in use of the due diligence services, for which a Division 129 adjustment may arise.*

14. *However, subsequent to Bid Co deciding to purchase Target Co's shares, specific aspects of the report, such as those relating to intellectual property, were used to determine the price of the assets when negotiating with Target Co. To the extent of the application of the report for this purpose, there is a change in extent of creditable purpose of the due diligence services acquired by Bid Co that gives rise to an adjustment under Division 129*[4]

Example two – Application of advice where transaction does not eventuate: no Division 129 adjustment

15. *As part of its national expansion strategy, Flash Co acquires the services of an investment bank with industry expertise for the purpose of identifying a suitable target entity, preferred option for effecting the acquisition and indicative price range. At this stage, Flash co has no particular preference for how to proceed (e.g. whether by way of a share or asset purchase). The investment bank undertakes research into suitable targets and having formed a view about a particular target entity, recommends that Flash Co make a takeover bid for the shares of Lightning Co.*

16. *These services of the investment bank relate more or less equally to input taxed and non-input taxed options. The services acquired from the investment bank are applied in Flash Co's enterprise to evaluate the merits of identifying a suitable target for takeover, either by way of a share acquisition or asset purchase. Flash Co is entitled to and claims input tax credits based on its reasonable estimate that the extent to which the services are acquired for a creditable purpose is 50%.*

17. *Flash Co accepts the recommendation, and retains the investment bank to assist with the transaction, and to advise on the best takeover strategy and the appropriate bid price for the shares. Both Flash Co and Lightning Co make only taxable supplies (excluding any M&A transactions).*

18. *There is no further use or application of the initial services acquired from the investment bank in Flash Co's enterprise and a Division 129 adjustment does not arise for these acquisitions.*

19. *The investment bank services acquired after the recommendation is accepted relate to Flash Co's proposed acquisition of Lightning Co's shares, which would be an input taxed financial supply.*[5] *The acquisition of these services is not for a creditable purpose.*[6]

20. *The board of Lightning Co rejects the 'friendly' takeover proposal made by Flash Co. Flash Co decides not to pursue the transaction any further. The investment bank's services were applied for their intended purpose of evaluating a proposed acquisition of shares in Lightning Co. The decision not to continue with the share purchase does not give rise to change in the application of these services. Accordingly, an adjustment for a change in extent of creditable purpose of the services acquired does not arise under Division 129.*

[4] Provided that the other requirements for an adjustment under Division 129 are satisfied.
[5] See explanation at paragraphs 29 and 33 of this Determination.
[6] Subject to the potential application of Division 70 of the GST Act.

Example three – Application of advice where the advice is subsequently applied for a purpose that is different from what was intended: adjustment required under Division 129

21. *Big Digger Inc is a mining company which plans to expand. It has been assessing Barren Ground Co, which operates several mines in another State, and has made a private offer to purchase the assets of Sub Co, a wholly owned subsidiary of Barren Ground Co.*

22. *As well as making its own internal assessment, Big Digger engages a firm of consulting geologists to provide a report on the mineral reserves controlled by Sub Co. When received, the geologist's report is used to assess the merits of the proposed asset purchase and a decision is made to proceed with the planned asset purchase.*

23. *The acquisition of the geologist's report is made in the course of Big Digger's enterprise and is not related to any intended input taxed supply. The acquisition is made for a creditable purpose and Big Digger Inc claims 100% input tax credits.*

24. *The offer to buy the assets of Sub Co is rejected by Barren Ground Co which indicates that it would prefer an offer to buy 100% of the shares of Sub Co. Big Digger conducts further due diligence and decides to acquire the shares of Sub Co.*

25. *The consulting geologist's report which informs Big Digger Inc's decision to proceed with the offer to purchase Sub Co's assets includes a valuation of Sub Co's key asset, being the expected future production of the mine. This was previously used to inform the valuation of Sub Co's assets and this was the intended use at the time the valuation report was acquired.*

26. *When the decision is made to make a bid for Sub Co's shares, the valuation contained in the geologist's report is used to determine the price for this bid. In this case, the consulting geologist's service is incorporated into, and reflected by, the final report provided. There is no need for further advice to be provided, or for any revision of the advice set out in the report, by the consulting geologist.*

27. *This is a circumstance where a service is applied as intended to evaluate a proposed transaction structure (a proposed asset purchase) but is then subsequently applied for a different purpose (in relation to a proposed share acquisition), and an adjustment arises under Division 129.*[7]

Date of effect

28. This Determination applies both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
7 March 2012

[7] Provided that the other requirements for an adjustment under Division 129 are satisfied.

Appendix 1 – Explanation

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

Background to M&A

29. References to M&A transactions include takeovers and mergers of companies, and the sale and purchase of business assets (including goodwill). M&A activities include the steps that lead up to an M&A transaction, including where the intended M&A transaction does not proceed. M&A may consist of several different supplies for GST purposes. For example, in addition to the sale of shares or business assets, there may be supplies associated with corporate restructuring, capital raising, divestments or share buy-backs.[8] Acquisitions of financial supplies, including acquisitions of shares, are treated as financial supplies. These supplies are referred to as 'acquisition-supplies'.[9]

Creditable purpose

30. Broadly speaking, the GST is intended to tax expenditure on private consumption in Australia. To ensure that the GST is borne by consumers, generally business are entitled to input tax credits for the GST on what they acquire.[10] Section 11-20 provides that an entity is entitled to input tax credits for creditable acquisitions that it makes. To make a creditable acquisition, the entity must, among other things, acquire the thing solely or partly for a creditable purpose.[11]

31. An exception to the entitlement of a business to input tax credits is where the business makes input taxed supplies. No GST is charged on the input taxed supply, and paragraph 11-15(2)(a) provides that you do not acquire a thing for a creditable purpose to the extent that the acquisition relates to making supplies that would be input taxed.

32. The test for creditable purpose is based on intention when the entity makes the relevant acquisition. However, Division 129 is designed to provide for an adjustment in some cases where the actual use of an acquisition differs from the intended use.

33. The Commissioner's view of the test of creditable purpose in section 11-15 is that a sufficient connection is established to an intended input taxed supply if, on an objective assessment of the surrounding facts and circumstances, the acquisition is used, or intended to be used, solely or to some extent for the making of input taxed supplies.[12] In the context of M&A this includes making input taxed acquisition-supplies, such as the purchase of shares. The issue considered in this Determination is in what circumstances an adjustment arises under Division 129 where acquisitions are made in contemplation of intended M&A that either does not proceed, or proceeds in a form different from that intended.

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[8] Further background information on the GST treatment of mergers and acquisitions can be found in the *GST guide – claiming input tax credits on acquisitions made in connection with a merger and acquisition activity* at www.ato.gov.au.

[9] This is further explained in GSTR 2002/2 at paragraph 22.

[10] Explanatory Memorandum to A New Tax System (Goods and Services Tax) Bill 1998

[11] Paragraph 11-5(a).

[12] GSTR 2008/1: Goods and services tax: when do you acquire anything or import goods solely or partly for a creditable purpose? See paragraphs 149 to 161 for passages particularly relevant to M&A transactions.

34. The construction of Division 129 is informed by its context in the GST legislation. Part of that context is the intended practical operation of the GST evident from the scheme of the legislation. If the Division were construed as requiring a detailed reconciliation between the intended use of services, and the ultimate results flowing directly and indirectly from their use traced over a period of years, the compliance burden imposed by the Division might be considerable.[13]

35. Under Division 129 an adjustment may arise if the actual application of a 'thing' (that is an acquisition) is different from the intended application. Adjustments under Division 129:

- arise only for acquisitions above a certain value;
- arise for 'adjustment periods'; and
- are calculated by use of a 'method statement'.

36. The method statement in subsection 129-40(1) requires a comparison between the **actual application of the thing** and the **intended or former application of the thing**. If these differ, there is an adjustment.

37. Under section 129-55 the term 'apply', in relation to a thing acquired or imported, includes to:

(a) supply the thing; and

(b) consume, dispose of or destroy the thing; and

(c) allow another entity to consume, dispose of or destroy the thing.

38. The meaning of 'apply' is central to determining actual application.[14] A thing will have been applied in an entity's enterprise if an objective assessment of the facts and circumstances demonstrates that the thing has been allocated or dedicated to a particular use (or uses) in the enterprise.[15]

39. After an acquisition or importation is made, the extent to which it is actually applied or used for a creditable purpose may be different from the intended use, in which case an adjustment may arise. If an acquisition is applied when it is acquired, the actual application should reflect the intended use and no adjustment will arise.

40. This Determination is concerned with change in use and does not consider other aspects of Division 129. For a fuller explanation of the Commissioner's view of the application of Division 129 refer to GSTR 2000/24 and GSTR 2009/4. For the purposes of this determination, we assume that the other requirements for making adjustments are met and the only issue is whether there has been a change in extent of creditable purpose of relevant acquisitions.

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[13] There is a distinction between services that are applied for their intended purpose, and those that are effectively incorporated into a physical asset such as a building. In the context of services incorporated into a physical asset, see GSTR 2009/4: Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose.

[14] When we use the term 'apply' or 'application' this includes a reference to the actual application of the thing in Step 1 of the method statement in subsection 129-40(1). The Commissioner's views on the meaning of 'apply' are explained in more detail in paragraphs 30 to 35 of GSTR 2009/4.

[15] See also paragraph 35 of GSTR 2009/4.

Application of Division 129 to services in M&A context

41. In the context of M&A transactions, many acquisitions will be applied leading up to a critical event such as:

- making a decision on the transaction,
- making a bid, or
- concluding the transaction and making a supply.

42. Common acquisitions during M&A transactions are services, such as the provision of advice and due diligence. A service is a 'thing' that can be subject to the application of a section 129-40 adjustment. For example, in the case of real property transactions, the Commissioner's view is that services are capable of being incorporated into a broader thing (for example, a physical asset) which may be applied for different purposes over time.[16]

43. In the M&A context, however, services are not incorporated into another asset. If the proposed structure of an M&A transaction changes, it cannot be said that all services acquired prior to the change in structure are necessarily applied for the purpose of the new transaction structure. Rather, it is necessary to consider how each of the relevant services is in fact applied to determine whether there is a change in creditable purpose.

44. Services are applied for their intended purpose to the extent that they are used as part of the process of evaluating the transaction proposed at the time of their acquisition or preparing to carry out that transaction. In many cases the use of the services in evaluating or preparing for the transaction will occur soon after the services are acquired and they will not be further applied at a later point in time if the structure of the proposed transaction changes. In such cases, there will not be a change in creditable purpose in respect of those services.

45. However, there may be cases where advice received and applied in evaluating a proposed transaction or preparing to carry out the transaction is subsequently used for another purpose after there is a change in the transaction that was intended. In these cases there may be a change in extent of creditable purpose of the relevant acquisition for which a Division 129 adjustment arises. For example, a valuation of a target entity could be acquired and applied for the purpose of assessing the merit of a proposed share acquisition, but later, after a decision is made to abandon the proposed share transaction, the valuation may be applied to determine the bid price for a proposed asset purchase.

46. These views in paragraphs 42 to 45 apply equally to services that are acquired when the entity is making a preliminary evaluation of the proposed M&A transaction, and has yet to decide on its preferred structure for the transaction.

47. There are a range of services that are specific to the intended transaction structure, and will not be used if there is a change in what is proposed. For example, legal services acquired in drafting an asset sale agreement would be unlikely to be applied in the entity's enterprise subsequent to the entity deciding to proceed with a share sale rather than an asset sale. Accordingly, Division 129 would not apply in respect of the services of drafting the asset sale agreement when the form of the transaction changes.

[16] See GSTR 2009/4 at paragraph 63.

Application of Division 129 where the intended M&A transaction doesn't proceed

48. Paragraph 129-50(2)(a) states that you do not apply a thing for a creditable purpose to the extent that the application relates to making supplies that **are** input taxed. Under paragraph 11-15(2)(a), you do not acquire a thing for a creditable purpose to the extent that the acquisition relates to making supplies that **would be** input taxed (emphasis added). However, subsection 129-50(3) refers to supplies being treated for paragraph 129-50(2)(a) purposes as supplies that 'would be' input taxed.

49. The Division 129 test uses the term 'are' and Division 11 the term 'would be', but in other respects the provisions are essentially the same. Despite the difference in terminology, the Commissioner takes the view that the connection to input taxed supplies for the purpose of Division 129 is determined in the same way as for Division 11.[17] The difference between the two is that for Division 11 the connection is judged at the time of acquisition and for Division 129 at the time of application. For the purposes of Division 129, there is a sufficient connection to input taxed supplies to deny creditable purpose to the extent that, on an objective assessment of the surrounding facts and circumstances, the acquisition is allocated or dedicated to the making of actual or intended input taxed supplies as part of an entity's enterprise.

50. In some cases an M&A transaction will not be completed at all. This may be due to a decision by the entity (for example, to abandon the transaction) or to circumstances outside the entity's control (for example, a bid is unsuccessful). The fact that an actual supply doesn't eventuate does not, in itself, give rise to a change in the extent of creditable purpose of related acquisitions.[18] Where an acquisition is used in preparing for an intended supply or in the process of making a decision whether to proceed with the supply, that acquisition is applied in contemplation of the supply under consideration. If the intended supply is an input taxed supply, the application of the acquisition is not for a creditable purpose. The fact that the transaction does not eventuate will not affect this conclusion.[19]

51. For example, an entity intends to make an input taxed supply by way of acquiring shares and obtains due diligence advice prior to making a final commitment. The advice is used in evaluating and assessing the proposed share acquisition, culminating in a decision not to proceed with the transaction. Notwithstanding that the transaction is abandoned, the acquisition of the advice is still applied for the purpose of evaluating the proposed share acquisition and therefore retains its relationship to supplies that are input taxed for the purposes of determining the actual application and the extent of creditable purpose of the advice.

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[17] The Commissioner's view of determining a connection between an acquisition and the making of input taxed supplies is found in GSTR 2008/1, especially from paragraph 101-119.

[18] This is illustrated by Example 40 in GSTR 2002/2 at paragraph 270-271, where no Division 129 adjustment arises when an intended share acquisition doesn't occur due to the actions of the other entity's board.

[19] An alternative view is explained in Appendix 2.

Appendix 2 – Alternative views

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

52. In the Commissioner's view, the creditable purpose test in paragraph 11-15(2)(a) depends on whether the acquisitions are related to supplies which, if made, would be input taxed. If intended input taxed supplies do not eventuate, acquisitions related to those intended supplies will nevertheless not be for a creditable purpose.[20] No decreasing adjustment arises under Division 129 unless the acquisitions have been actually applied for a different and creditable purpose.

53. An alternative view argues that an entity should not be denied input tax credits on acquisitions relating to intended input taxed supplies that do not in fact eventuate. On this view Division 129 should operate to ensure that an enterprise that otherwise makes only taxable supplies does not incur irrecoverable GST on its inputs. This view is concerned with judging creditable purpose by reference to supplies that are actually made, rather than by the use to which an acquisition is put. On this view:

(a) where an intended input taxed supply is not in fact made, there has been no application of the thing for a non-creditable purpose, and Division 129 may operate to produce a decreasing adjustment; and

(b) where the acquisition is used in contemplation of a taxable supply or a GST-free supply, but an input taxed supply is ultimately made, Division 129 may operate to produce an increasing adjustment.

54. This view is said to be supported by the difference in wording of the 'creditable purpose' test in paragraph 129-50(2)(a) (which uses the term 'are input taxed') compared to the test in paragraph 11-15(2)(a) (which uses the term 'would be input taxed' and incorporates a nexus to intended supplies). The difference in terminology is treated as significant and an ordinary reading of the words of paragraph 129-50(2)(a) is said to lead to a conclusion that it must refer to supplies that are in fact made. This view argues that whilst Division 11 is concerned with the hypothetical, Division 129 is concerned with what has actually happened, and that if the tests in the two divisions were meant to be the same, the same words would have been used.

55. We think that the better view is that the tests in Division 11 and Division 129 are not intended to be inherently different, but merely that one is judged at the time of acquisition, and the other at the time of application. Although the definition of creditable purpose in Division 129 refers to supplies that **are** input taxed, in our view this merely reflects the fact that application of a thing will typically be contemporaneous with supplies made using the thing. Further, as noted as paragraph 48, subsection 129-50(3) refers to supplies being treated for paragraph 129-50(2)(a) purposes as supplies that 'would be' input taxed.

56. In the Commissioner's view paragraph 129-50(2)(a) will be invoked where the application of the thing relates to the making of an intended input taxed supply regardless of whether such a supply has occurred in the relevant adjustment period. This view is illustrated by paragraphs 47A and 47C of GSTR 2009/4 where, in the context of input taxed supplies of residential premises, creditable purpose is denied where the things in question are applied in relation to future intended input taxed supplies that have not occurred as at the end of the relevant adjustment period.[21]

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[20] See also GSTR 2008/1, paragraphs 107, 149-151, 158 and 170.
[21] This view is also consistent with Example 40 at paragraphs 270 and 271 of GSTR 2002/2.

57. We do not think that the choice of the term 'are' is particularly significant in this context.[22] For example, the term 'would be' is used in subsection 129-50(3) to qualify the operation of paragraph 129-50(2)(a). Similarly, paragraph 11-15(5)(b), in modifying the operation of paragraph 11-15(2)(a), refers to supplies that 'are not input taxed'. In our view the choice of connecting word between 'making' and 'input taxed' merely reflects a connection with past, present or future supplies as the context requires. It could equally be argued that if 129-50(2)(a) was intended to refer to actual supplies that have in fact been made (past tense) then the term 'were input taxed' might be more appropriate. In the context, we think that the use of the word 'making' is a neutral term that does not convey past, present or future tense.

58. Although not decisive because made in the context of Division 11, we note the following comments of Hill J in *HP Mercantile Pty Limited v. Federal Commissioner of Taxation* [2005] FCAFC 126 which are consistent with the approach adopted in this Determination:

> [W]hile it is true that the GST Act does not mandate a system of tracing acquisitions to actual supplies, it does not follow that an entity which has embarked upon an enterprise which consists of the making of input taxed supplies, but in fact makes no supplies, will be entitled to obtain input tax credits. Whether it is will depend upon whether the acquisitions are related to supplies which, if made, would be input taxed.
>
> Since a person will be taken to be carrying on an enterprise if the taxpayer does anything in the course of the commencement of an enterprise, there will always be the possibility that the enterprise might fail before there has been any supply made. It is difficult to see why the legislative policy would be to give a taxpayer a full input tax credit in such a case, while not giving it a credit if the enterprise in fact did not fail but thereafter operated to make a supply.[23]

[22] See by way of comparison, in the context of Division 11, *HP Mercantile Pty Limited v. Federal Commissioner of Taxation* [2005] FCAFC 126; 2005 ATC 4571; (2005) 60 ATR 106, per Hill J at [40] to [43].
[23] At [46] and [48].

References

Previous draft:

GSTD 2011/D3

Related Rulings/Determinations:

TR 2006/10; GSTR 2000/24; GSTR 2002/2; GSTR 2008/1; GSTR 2009/4

Subject references:

- adjustments
- creditable acquisition
- creditable purpose
- GST financial supplies
- GST input tax credits & creditable acquisitions
- GST supplies & acquisitions
- input taxed supplies
- takeovers & mergers

Legislative references:

- A New Tax System (Goods and Services Tax) Act 1999
- ANTS(GST)A 1999 Div 11
- ANTS(GST)A 1999 11-5(a)
- ANTS(GST)A 1999 11-15
- ANTS(GST)A 1999 11-15(2)(a)
- ANTS(GST)A 1999 11-15(5)(b)
- ANTS(GST)A 1999 11-20
- ANTS(GST)A 1999 Div 70
- ANTS(GST)A 1999 Div 129
- ANTS(GST)A 1999 129-40
- ANTS(GST)A 1999 129-40(1)
- ANTS(GST)A 1999 129-50(2)(a)
- ANTS(GST)A 1999 129-50(3)
- ANTS(GST)A 1999 129-55
- ANTS(GST)A 1999 Div 189

Case references:

- *HP Mercantile Pty Limited v. Federal Commissioner of Taxation* [2005] FCAFC 126; 2005 ATC 4571; (2005) 60 ATR 106

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