

GSTD 2013/2 - Goods and services tax: when are second-hand goods acquired for the purpose of sale in the ordinary course of business under Division 66 of the A New Tax System (Goods and Services Tax) Act 1999 (GST Act)?

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Goods and Services Tax Determination

Goods and services tax: when are second-hand goods acquired for the purpose of sale in the ordinary course of business under Division 66 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)?

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Ruling

1. Second-hand goods are acquired for the purpose of sale in the ordinary course of business under Division 66 of the GST Act where an entity that acquires second-hand goods is in the business of **buying and selling** second-hand goods, and the goods are acquired for the purpose of being sold in the ordinary course of that business.
2. Second-hand goods are not acquired for the purpose of sale in the ordinary course of business under Division 66 of the GST Act, where the goods are acquired only in order to be leased, or where there is simply an intention that the goods will ultimately be sold after they are no longer required.

GSTD 2013/2

3. However, one circumstance in which an entity that carries on a business involving the **leasing and selling** of second-hand goods satisfies the requirement in section 66-5 of the GST Act that the second-hand goods are acquired for the purpose of sale, is where:

- (a) the entity acquires the second-hand goods in the ordinary course of its business;
- (b) the contractual arrangements under which the second-hand goods were acquired and leased, contemplate that the entity will lease the goods back to the vendor for a defined term and then sell the goods at conclusion of the lease term;
- (c) the contractual arrangements provide that the proceeds from selling the second-hand goods will be compared with the residual value agreed upon commencement of the arrangements, in order to determine the extent of any indemnity payable by the lessee, or, entitlement of the lessee to participate in profits from the sale of the goods; and
- (d) the way the entity conducts its business objectively supports the conclusion that the second-hand goods are in fact acquired for the purpose of sale. For example, as in *LeasePlan Australia Limited v. Commissioner of Taxation (LeasePlan)*¹, the entity monitors expected sale proceeds for the second-hand goods in order to determine their residual value before they are leased, and promptly sells second-hand goods after the end of a lease.²

Examples

Example 1

4. *Integrity Co is registered for GST and carries on the business of selling second-hand boats. It acquired a second-hand boat from an entity that was not registered, nor required to be registered for GST. Upon its acquisition, the boat became part of the trading stock of Integrity Co. Therefore, Integrity Co acquired the boat for the purpose of sale in the ordinary course of its business and satisfies subsection 66-5(1) of the GST Act.*

5. *Integrity Co would have acquired the boat for the purpose of sale in the ordinary course of business within the meaning of paragraph 66-40(1)(a) of the GST Act, if it carried on the business of selling second-hand boat parts and acquired the boat in order for parts of the boat to become its trading stock.*

¹ [2009] FCA 1309.

² Even if subsection 66-5(1) of the GST Act is satisfied, entitlement to an input tax credit will only arise if the other requirements of Divisions 11 and 66 of the GST Act are met. Goods and Services Tax Determination GSTD 2012/6, *Goods and services tax: when an entity makes a taxable supply of second-hand goods by way of lease before making a taxable supply of the goods by way of sale (or exchange), are both taxable supplies taken into account to quantify and attribute input tax credits under Subdivision 66-A of the A New Tax System (Goods and Services) Tax Act 1999?*, explains how input tax credits are quantified and attributed where second-hand goods that are acquired for the purposes of sale or exchange in the ordinary course of business are leased before being sold.

Example 2

6. *Fleet Co is registered for GST and purchases, leases, manages and sells second-hand motor vehicles in the ordinary course of its business. Fleet Co acquired a second-hand motor vehicle from an entity that was not registered, nor required to be registered for GST. The contractual arrangements under which Fleet Co acquired the motor vehicle required it to lease the vehicle back to the vendor for a fixed term and provided that Fleet Co would take possession of the vehicle at the end of that term and then sell it.*
7. *The contractual arrangements under which Fleet Co acquired and leased the motor vehicle also contemplated that the lessee would indemnify Fleet Co, or, become entitled to share in any of its profit from sale of the vehicle. The amount of the indemnity or profit-share depended on the extent to which Fleet Co's sale proceeds for the vehicle differed from the vehicle's residual value. The residual value was calculated and agreed to by Fleet Co and the lessee upon acquisition of the vehicle. Before Fleet Co leased the vehicle it monitored the proceeds expected from selling the vehicle in order to determine its residual value. Additionally, Fleet Co has a history of promptly selling second-hand motor vehicles after the end of a lease.*
8. *The motor vehicle is a second-hand good acquired by Fleet Co for the purpose of sale in the ordinary course of business and subsection 66-5(1) of the GST Act is satisfied.*
9. *If the business of Fleet Co was such that second-hand motor vehicles were not sold until returns from leasing ceased being commercially viable, or the terms on which Fleet Co acquired and leased the vehicle did not contemplate that Fleet Co would subsequently sell the vehicle, subsection 66-5(1) of the GST Act would not be satisfied.*

Date of effect

10. 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).
11. Paragraphs 43 to 45F of Goods and Services Tax Ruling GSTR 2005/3, *Goods and services tax: arrangement of the kind described in Taxpayer Alert TA 2004/9 – exploitation of the second-hand goods provisions to obtain input tax credits* are withdrawn with effect from the date of the issue of this Determination.

Commissioner of Taxation28 August 2013

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.*

All legislative references in this Explanation are to the GST Act unless otherwise stated.

Division 66

12. Division 11 contains the basic rules about whether an acquisition is a 'creditable acquisition'. Under section 11-20, an entity is entitled to an input tax credit for any creditable acquisition they make provided the entity satisfies section 11-5. Paragraph 11-5(b) requires that the supply of the thing to the entity is a 'taxable supply' within the meaning of section 9-5.

13. The sale by an unregistered entity of second-hand goods to a GST registered entity is not a taxable supply under section 9-5. As it is not a taxable supply, the acquisition of the second-hand goods by the registered entity is not a creditable acquisition under section 11-5.

14. However, if subsection 66-5(1) is satisfied and the requirements of section 11-5 are otherwise met, the acquisition of second-hand goods by a registered entity will be a creditable acquisition.

15. Subsection 66-5(1) is satisfied if second-hand goods are acquired for the purposes of sale or exchange (but not for manufacture) in the ordinary course of business. However, subsection 66-5(1) does not apply if any of the exceptions in subsection 66-5(2) apply.

16. Subsection 66-40(1) deals with acquisitions of second-hand goods that are divided for re-supply. If satisfied, subsection 66-40(1) enables application of a global accounting method to reduce the GST payable when parts of the divided second-hand goods are later supplied.³ However, subsection 66-40(1) does not apply if an entity makes a single supply of the entirety of the second-hand goods, or if any of the exceptions in subsection 66-40(2) apply.

17. To satisfy subsection 66-40(1), the requirement in paragraph 66-40(1)(a) must be met. Paragraph 66-40(1)(a) requires that second-hand goods are acquired for the purposes of sale or exchange (but not manufacture) in the ordinary course of business.

18. It follows that to be entitled to an input tax credit in accordance with Division 66, second-hand goods must have been acquired for the purposes of sale or exchange (but not for manufacture) in the ordinary course of business.⁴

³ See sections 66-45 and 66-50 of the GST Act.

⁴ This Goods and Services Tax Determination does not consider when second-hand goods are acquired for the purpose of exchange in the ordinary course of business.

Meaning of second-hand goods

19. For the Commissioner's view on the meaning of 'second-hand goods' for the purposes of Division 66 see Goods and Services Tax Ruling GSTR 2000/8, *Goods and Services Tax: special credit for sales tax paid on stock*, and, Goods and Services Tax Ruling GSTR 2005/3, *Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/9 – exploitation of the second-hand goods provisions to obtain input tax credits*.

Acquired for the purpose of sale (but not for manufacture) in the ordinary course of business

20. Subsection 66-5(1) and paragraph 66-40(1)(a) require that second-hand goods are acquired for the purposes of sale or exchange (but not manufacture) in the ordinary course of business.

21. Subsection 66-5(1) and paragraph 66-40(1)(a) will be satisfied where an entity that acquires second-hand goods is in the business of buying and selling second-hand goods, and the goods are acquired for the purpose of being sold in the ordinary course of that business.

22. Where an entity carries on a business involving the leasing and selling of second-hand goods, the decisions in *LeasePlan* and *Case 6/2012*⁵ are relevant to determining whether second-hand goods are acquired for the purpose of sale in the ordinary course of business.

23. In *LeasePlan* an entity purchased, leased, managed and sold second-hand vehicles in the ordinary course of its business. The entity acquired second-hand vehicles from individuals that were not registered for GST. The contractual arrangements under which the acquisitions were made provided that the entity would lease the vehicles back to the individuals, and then sell them at conclusion of the lease.

24. Those contractual arrangements also contemplated that the lessees would indemnify the entity, or, become entitled to share in any profit from the entity's sale of the vehicles.⁶ The amount of the indemnity or profit-share depended on the extent to which the sale proceeds differed from a vehicle's residual value. The residual value was calculated and agreed at inception of the sale and lease-back arrangements.⁷

25. The Federal Court accepted that the terms of the contractual arrangements that encompassed these features demonstrated that the entity acquired the vehicles for a purpose of sale in the ordinary course of business. Also supporting this conclusion was evidence:

- (a) that an integral aspect of the entity's business involved it monitoring potential sale proceeds for the vehicles in order to determine their residual value before they were leased, and
- (b) that the entity promptly sold the vehicles after the end of a lease.⁸

⁵ [2012] AATA 407.

⁶ *LeasePlan Australia Limited v. Commissioner of Taxation* [2009] FCA 1309 at paragraphs 33 and 34.

⁷ *LeasePlan Australia Limited v. Commissioner of Taxation* [2009] FCA 1309 at paragraph 29.

⁸ *LeasePlan Australia Limited v. Commissioner of Taxation* [2009] FCA 1309 at paragraphs 46 and 48.

26. In *Case 6/2012*, an entity acquired and then leased second-hand aircraft to numerous lessees continuously throughout a seventeen year period, after which time the aircraft were sold.⁹

27. On the facts before the Administrative Appeals Tribunal, the terms on which the aircraft were acquired did not require the entity to sell the aircraft at the end of a lease. Neither did those terms oblige a lessee to indemnify the entity, or, entitle a lessee to share in any profit, should the entity's sale proceeds for an aircraft differ from a pre-determined residual value.¹⁰

28. Additionally, the Tribunal found that:

- (a) there was no evidence to demonstrate that the entity regularly bought and sold second-hand aircraft;¹¹
- (b) the entity held the aircraft for much of their useful lives;¹² and
- (c) the aircraft were not sold until returns from leasing ceased being commercially viable.¹³

29. These findings led the Tribunal to conclude that the entity did not acquire the second-hand aircraft for the purpose of sale in the ordinary course of business.¹⁴

30. The decisions in *LeasePlan* and *Case 6/2012* illustrate that applying subsection 66-5(1) and paragraph 66-40(1)(a) requires careful consideration of the circumstances surrounding the acquisition of second-hand goods, particularly where the acquirer carries on a business involving the leasing and selling of second-hand goods. In that context, consideration of how the entity conducts its business, and the contractual arrangements under which it acquires and leases second-hand goods is necessary to determine whether subsection 66-5(1) of the GST Act is satisfied.

31. In cases where a business is conducted with all the same features as discussed in *LeasePlan*,¹⁵ the acquisition of second-hand goods will satisfy the requirement in subsection 66-5(1) of the GST Act that the goods are acquired for the purpose of sale in the ordinary course of business.

32. However, this does not mean that entities are entitled to input tax credits in accordance with Division 66 in all cases where there is an intention that second-hand goods that have been acquired will ultimately be sold.

33. An entity that purchases second-hand goods for use in its enterprise and sells those goods after they are no longer required is not entitled to input tax credits under Division 66.

34. For instance, a tradesperson may purchase a second-hand vehicle (from an unregistered entity) for use in their enterprise but also with a view to selling it at some time in the future. In these circumstances, we are of the view that it would not be accurate to characterise the tradesperson as purchasing the motor vehicle for the purpose of sale (or exchange). On these facts, the purpose is to use the vehicle in the enterprise of the tradesperson.

⁹ *Case 6/2012* [2012] AATA 407 at paragraph 61.

¹⁰ *Case 6/2012* [2012] AATA 407 at paragraph 61.

¹¹ *Case 6/2012* [2012] AATA 407 at paragraph 61.

¹² *Case 6/2012* [2012] AATA 407 at paragraph 56.

¹³ *Case 6/2012* [2012] AATA 407 at paragraph 73.

¹⁴ *Case 6/2012* [2012] AATA 407 at paragraphs 62 and 73.

¹⁵ See paragraph 3 of this Goods and Services Tax Determination for a description of those features.

References

Previous draft:

GSTD 2013/D2

*Related Rulings/Determinations:*TR 2006/10; GSTR 2000/8; GSTR 2005/3;
GSTD 2012/6;*Subject references:*

- goods and services tax
- GST second hand goods
- input tax credits

Legislative references:

- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 Div 11
- ANTS(GST)A 1999 11-5
- ANTS(GST)A 1999 11-5(b)
- ANTS(GST)A 1999 11-20

- ANTS(GST)A 1999 Div 66
- ANTS(GST)A 1999 Subdiv 66A
- ANTS(GST)A 1999 66-5
- ANTS(GST)A 1999 66-5(1)
- ANTS(GST)A 1999 66-5(2)
- ANTS(GST)A 1999 66-40(1)
- ANTS(GST)A 1999 66-40(1)(a)
- ANTS(GST)A 1999 66-40(2)
- ANTS(GST)A 1999 66-45
- ANTS(GST)A 1999 66-50
- TAA 1953

Case references:

- Case 6/2012 [2012] AATA 407
- LeasePlan Australia Limited v. Commissioner of Taxation [2009] FCA 1309

ATO references

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