


# ***GSTR 2002/5A1 - Addendum - Goods and services tax: when is a 'supply of a going concern' GST-free?***

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## Addendum

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### Goods and Services Tax Ruling

#### Goods and services tax: when is a 'supply of a going concern' GST-free?

This Addendum amends Goods and Services Tax Ruling GSTR 2002/5 to clarify the Commissioner's view in relation to section 38-325 of the *A New Tax System (Goods and Services Tax) Act 1999*. In particular, this Addendum clarifies the Commissioner's view with respect to what constitutes a 'supply of a going concern' pursuant to subsection 38-325(2).

#### **GSTR 2002/5 is amended as follows:**

**1. Paragraph 8**

Omit the first sentence; substitute:

Subdivision 38-J provides that, if certain conditions are satisfied, the 'supply of a going concern' is GST-free.

**2. Paragraph 9**

Omit 'of the GST Act'.

**3. Paragraph 12**

Omit the paragraph; substitute:

12. Subsection 38-325(1) provides:

- (1) The \*supply of a going concern is **GST-free** if:
  - (a) the supply is for \*consideration; and
  - (b) the \*recipient is \*registered or \*required to be registered; and
  - (c) the supplier and the recipient have agreed in writing that the supply is of a going concern.

#### 4. Paragraphs 15 and 16

Omit the paragraphs; substitute:

15. The statutory term 'supply of a going concern' is defined in subsection 38-325(2). Pursuant to the statutory definition of supply in section 9-10, there may be more than one supply made under an arrangement. However, in accordance with the definition of a 'supply of a going concern' in subsection 38-325(2), a 'supply of a going concern' is the aggregate of all of the supplies made under an arrangement which satisfies the conditions in paragraphs 38-325(2)(a) and (b).

16. There will be one 'supply of a going concern' when the relevant supply/supplies necessary for the continued operation of an enterprise are made under an arrangement which satisfies paragraphs 38-325(2)(a) and (b). However, in some cases, there may be more than one 'supply of a going concern' under one arrangement where all of the things necessary to operate separate parts of a larger enterprise are supplied under the arrangement, and those separate parts of the larger enterprise are operating and capable of continuing to operate separately and independently.<sup>2A</sup>

#### 5. Paragraphs 18A to 18J

After paragraph 18 insert:

18A. The meaning of the term 'going concern' for the purposes of subdivision 38-J was considered in the Administrative Appeals Tribunal (the Tribunal) decision of *Debonne Holdings Pty Ltd v Commissioner of Taxation*<sup>2B</sup> (*Debonne*).

18B. *Debonne* involved the sale of a hotel business pursuant to two interdependent contracts. One contract was a 'business contract' for the sale of the business assets and the other was a 'land contract' for the sale of the land on which the hotel stood. The 'business contract' expressly stated that the sale of the business was the sale of a 'going concern'. The contract for the sale of the land was silent on the question of 'going concern' and provided that the purchase price included any GST liability for which the vendor might be liable.

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<sup>2A</sup> See paragraphs 31 and 131 of this Ruling.

<sup>2B</sup> [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154.

18C. In *Debonne*, the Tribunal found that the parties had agreed, pursuant to subsection 38-325(1),<sup>2C</sup> that the whole subject of the sale, which comprised both the land and business, was the sale of a 'going concern', and concluded that the totality of that sale was a GST-free supply of a going concern.<sup>2D</sup> The Tribunal reached this conclusion, notwithstanding that the business and the land were conveyed pursuant to separate contracts and the 'land contract' was silent on the issue of 'going concern'.

18D. In reaching the decision, referred to in paragraph 18C of this Ruling, the Tribunal relied on the fact that the 'business contract' expressly used the term 'going concern' with the meaning it has for the purposes of the GST Act. Although the term 'going concern' is not defined in the GST Act, the Tribunal considered that the relevant 'going concern' for the purposes of the GST Act was the whole subject matter of the sale, being the business together with the land.<sup>2E</sup> The Tribunal also stated that had the parties' agreement been limited to the extent of the 'business contract' it would have been ineffective for the purposes of section 38-325 because the 'business contract' alone did not amount to, or give rise to, a supply of a going concern.<sup>2F</sup>

18E. Paragraph 5.108 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (the Explanatory Memorandum) refers to the supply of enterprises as 'going concerns' being GST-free under subdivision 38-J. This reference to a supply of 'enterprises' as 'going concerns' is consistent with the Tribunal's finding in *Debonne* that it was the total subject matter of the sale, comprising the separate contracts for the sale of the land and the business, that was the relevant 'going concern' for the purposes of the GST Act.

18F. On the basis of the Tribunal's decision in *Debonne* and the Explanatory Memorandum referred to in paragraph 18E of this Ruling, we consider that the phrase 'supply of a going concern' in subsection 38-325(2) is a reference to the sum of all of the things necessary for the continued operation of an enterprise.

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<sup>2C</sup> Paragraph 38-325(1)(c) provides that a supply of a 'going concern' is GST-free if, amongst other things, the supplier and recipient have agreed in writing that the supply is of a 'going concern'. See also paragraphs 178 to 185 of this Ruling.

<sup>2D</sup> [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154 at paragraphs 24 and 26.

<sup>2E</sup> [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154 at paragraph 26.

<sup>2F</sup> [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154 at paragraph 27.

18G. Paragraph 9-10(2)(h) contemplates that two or more things listed in paragraphs 9-10(2)(a) to 9-10(2)(g) can be a single supply. This lends contextual support to the view that a number of things supplied under an arrangement that satisfies the requirements of subsection 38-325(2) can be characterised as one 'supply of a going concern'.

18H. Furthermore, it was open to the legislature to aggregate what would be a number of separate supplies, in accordance with the definition of supply under section 9-10, into the concept of one 'supply of a going concern' for the purpose of making the aggregate of those supplies GST-free in the context of the sale of an operating business or other enterprise. The use of the definite article in subsection 38-325(1) and the expression 'supply of a going concern' as the defined term also support this view. It is unlikely that the drafter would have adopted the expression 'going concern', which has a well-known ordinary meaning referring to an operating business in its entirety, to encompass, for example, a single asset of an enterprise.

### **Alternative View**

18I. An alternative view to that set out in paragraph 18F of this Ruling, is that individual items supplied under an arrangement, whereby everything necessary for the continued operation of an enterprise is conveyed to a purchaser, may each be a 'supply of a going concern' for the purposes of subsection 38-325(2). Applying this view to the facts in *Debonne*, the land and the hotel business, which were conveyed under separate contracts, would each be an individual 'supply of a going concern' pursuant to subsection 38-325(2) and the parties could have opted to agree, under subsection 38-325(1), that only one of those supplies was GST-free.

18J. However for the reasons set out in paragraphs 18A to 18H of this Ruling, the Commissioner considers that it is the supply of everything necessary for the continued operation of an enterprise which constitutes a 'supply of a going concern' pursuant to subsection 38-325(2).

## **6. Paragraph 20**

Omit the first sentence; substitute:

The supplier and the recipient may identify the arrangement and the supplies under the arrangement, which in aggregate, may comprise the 'supply of a going concern', in the written agreement which is required under paragraph 38-325(1)(c) or in any other written agreement that relates to the arrangement entered into on or prior to the day of the supply.

**7. Footnote 3**

Omit the footnote; substitute:

<sup>3</sup> Refer to Goods and Services Tax Determination GSTD 2006/6 and Miscellaneous Taxation Ruling MT 2006/1 for discussion on the meaning of the term 'enterprise'.

**8. Paragraphs 31 and 32**

Omit the paragraphs; substitute:

31. *Stay-Puff Bakeries is a chain of retail bakeries conducted by Pufferies Pty Ltd ('Pufferies'). Pufferies sells the bakery operating in a particular suburb to Pies and Things partnership. As the suburban bakery is part of the larger enterprise being conducted by Pufferies and is operating as an independent enterprise, the aggregate of all of the things necessary to operate the suburban bakery, supplied under the arrangement, will be a 'supply of a going concern'.*

32. A supply of all the things necessary for the continued operation of an activity which is part of an enterprise cannot be a 'supply of a going concern' unless the conduct of the activity is itself an 'enterprise' as defined in section 9-20.

**9. Paragraph 79**

Omit the last sentence; substitute:

The relevance of any particular factor would depend on the nature of the enterprise in question; a particular factor may not be present in each and every case where a 'supply of a going concern' is made.

**10. Paragraph 81**

Omit first sentence; substitute:

The intended and actual use by the recipient of all of the things supplied are not relevant in determining if there is a 'supply of a going concern'.

**11. Paragraph 86**

Omit second sentence; substitute:

*That is, it is not one of the things that must necessarily be supplied under the arrangement in order for the sale of Bill's insurance broking firm to qualify as a 'supply of a going concern'.*

## 12. Paragraph 89

Omit the paragraph; substitute:

89. *Ben's motor vehicle is essential to the continued operation of his enterprise and is one of the things that must necessarily be supplied under the arrangement for the sale of his business to qualify as a 'supply of a going concern'.*

## 13. Paragraph 103

Omit the paragraph; substitute:

103. The supply of all of the things that are necessary for the continued operation of an enterprise that has or is required to have, as part of its business activities, statutory licences, permits, quotas or similar things, other than personal qualifications discussed in paragraph 130 of this Ruling, must include those things as part of the supply in order for there to be a 'supply of a going concern'.

## 14. Paragraph 107

Omit the second last sentence; substitute:

In these circumstances the supplier will not be making a 'supply of a going concern'.

## 15. Paragraph 117

Omit the second sentence; substitute:

A franchisee cannot sell its franchise as a 'supply of a going concern' to another entity which is to become the franchisee, unless the franchisee is capable of supplying all of the things that are necessary for the continued operation of the enterprise.

## 16. Paragraph 123

Omit the first sentence; substitute:

However, continuity of employment of the existing workforce is not an entirely irrelevant consideration in determining whether there is a 'supply of a going concern'.

**17. Paragraph 124**

Omit the second sentence; substitute:

However, as the recipient of a 'supply of a going concern' may choose not to carry on the enterprise after the day of supply, a recipient need not take on the existing workforce in order to establish that the necessary operating structure and process has been acquired.

**18. Paragraph 127**

Omit the last sentence; substitute:

*GoingCom agrees to sell its entire business to DigiConcern Pty Ltd ('DigiConcern'). GoingCom agrees that the sale of its entire business to DigiConcern is a 'supply of a going concern'.*

**19. Paragraph 130**

Omit the last sentence; substitute:

*Provided that everything else necessary to continue to operate the practice is supplied, including the client list, the supply of Marco's practice will be a 'supply of a going concern'.*

**20. Paragraph 131**

Omit the paragraph; substitute:

131. Paragraph 38-325(2)(a) expressly recognises that the supply under the relevant arrangement of all of the things that are necessary for the continued operation of part of a larger enterprise that is capable of separate independent operation may be a 'supply of a going concern'. Therefore, there may be more than one 'supply of a going concern' when separately identifiable parts of a larger enterprise are supplied.

**21. Paragraph 135**

Omit the last sentence; substitute:

*Assuming all other requirements of subdivision 38-J are satisfied, Smithers is making a GST-free 'supply of a going concern', provided that the property is supplied with the lease intact.*



## 22. Paragraph 140

Omit the first sentence; substitute:

*Mr Flintrock is carrying on an enterprise of leasing and can supply everything necessary for the continued operation of that enterprise to Stoneage as a GST-free 'supply of a going concern', provided that the property is supplied with the lease intact.*

## 23. Paragraph 141

Omit the first sentence; substitute:

The supply of everything necessary for the continued operation of an enterprise will only be a 'supply of a going concern' where the enterprise is carried on by the supplier until the day of the supply.

## 24. Paragraph 145

Omit the paragraph; substitute:

145. A supplier, who temporarily ceases some activities of an enterprise for a short period, for example, for cleaning and maintenance purposes, to facilitate its supply of everything necessary for the continued operation of the enterprise under the arrangement,<sup>17A</sup> has not ceased to carry on the enterprise for the purposes of paragraph 38-325(2)(b).

## 25. Paragraph 148

Omit the paragraph; substitute:

148. *Old Salt did not carry on the enterprise of leasing the trawler and licence up to the day of the supply and therefore cannot sell the trawler with the licence as a 'supply of a going concern'.*

## 26. Paragraph 151

Omit 'of the GST Act'.

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<sup>17A</sup> This is a reference to an arrangement that satisfies the requirements of paragraphs 38-325(2)(a) and (b).

**27. Paragraph 154**

Omit the last sentence; substitute:

Where the supplier can demonstrate that all of the floor space in the building is part of an enterprise of leasing on the day of the supply, the supply of the whole building together with all of the other things necessary for the continuation of the leasing enterprise may be a 'supply of a going concern'.

**28. Paragraph 157**

Omit the fourth sentence; substitute:

*Breakeven enters into a contract to sell the building and the agreement states that the supply will meet the requirements of a 'supply of a going concern'.*

**29. Paragraph 158**

Omit the last sentence; substitute:

*Provided the conditions in subsection 38-325(2) are satisfied, the supply of this portion of the building together with the other necessary things will be a 'supply of a going concern'.*

**30. Paragraph 159**

Omit the paragraph; substitute:

159. Where all of the things that are necessary for the continued operation of the same enterprise are supplied two or more times in succession, each supply subsequent to the initial 'supply of a going concern' cannot be a 'supply of a going concern' unless the relevant supplier of that supply has actually operated the enterprise and carries on the enterprise until the day of the supply.

**31. Paragraph 166**

Omit the first and second sentences; substitute:

The arrangement to which subsection 38-325(2) refers is the arrangement under which all of the things that are necessary for the continued operation of an enterprise are supplied (paragraph 38-325(2)(a)).

**32. Paragraph 167**

Omit the paragraph.

**33. Paragraph 168**

Omit the paragraph; substitute:

168. Supplies which are not made under the relevant arrangement will not form part of the 'supply of a going concern' and will not be GST-free under subsection 38-325(1).

**34. Paragraph 170**

Omit the second sentence; substitute:

*The supply of the business and any related buildings are supplied under the relevant arrangement.*

**35. Paragraph 171**

Omit the first sentence; substitute:

When all of the shares constituting the issued capital of a company are supplied as part of the supply of everything necessary for the continued operation of an enterprise under an arrangement, whether or not the supply of the shares will be under a relevant arrangement will be a question of fact.

**36. Paragraph 175**

Omit the second sentence; substitute:

*He enters into an agreement to supply everything necessary for the continued operation of his stockbroking enterprise to another registered stockbroker, Bob Bearish.*

**37. Paragraph 178**

Omit the paragraph; substitute:

178. One of the requirements of section 38-325 is that the supplier and the recipient have agreed in writing that the supply, being the supply under an arrangement of everything necessary for the continued operation of an enterprise, is a 'supply of a going concern'. This agreement need not necessarily form part of the arrangement under which the 'supply of a going concern' is made.

**38. Paragraph 181**

Omit the paragraph; substitute:

181. The term 'agreed in writing' means that the supplier and the recipient have made a mutual declaration in such form that clearly evidences that they agree that the supply, being the supply under an arrangement of everything necessary for the continued operation of an enterprise, is a 'supply of a going concern'.

**39. Paragraphs 183 and 184**

Omit the paragraphs; substitute:

183. An agreement in writing by the parties that there is a 'supply of a going concern' will not conclusively determine that there is a 'supply of a going concern' where the other requirements of subdivision 38-J are not satisfied. This will depend on a consideration of all factual circumstances. For example, there will not be a 'supply of a going concern' under subdivision 38-J where all of the things necessary for the continued operation of an enterprise are not supplied under the relevant arrangement, notwithstanding the terms of any agreement between the parties that the supply is a 'supply of a going concern'.

184. The supply of everything necessary for the continued operation of an enterprise to a recipient who is not registered or required to be registered<sup>20</sup> will not be a GST-free supply, despite the terms of any agreement between the parties that the supply is a 'supply of a going concern'.

**40. Paragraph 187**

Omit 'of the GST Act'.

**41. Paragraph 188**

Omit the first sentence; substitute:

The supply of an option to acquire a 'supply of a going concern' is a supply of a right to receive a 'supply of a going concern'.

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<sup>20</sup> Division 23.

## 42. Paragraph 189

Omit the first sentence; substitute:

When this principle is applied to the option to acquire a 'supply of a going concern', the parties to the option must agree that, on the exercise of the option, the supply will be a GST-free 'supply of a going concern'.

## 43. Paragraph 197

Omit the paragraph; substitute:

197. However, where an entity which conducts an enterprise is a company and the company supplies all of the things that are necessary for the continued operation of the enterprise in accordance with the conditions of subdivision 38-J, there will be a GST-free 'supply of a going concern'.

## 44. Paragraph 202

Omit the third sentence; substitute:

*The supply is for consideration, Gerald and Grace are both registered for GST and they agree in writing that the 'supply is of a going concern'.*

## 45. Paragraph 204

Omit the first sentence; substitute:

*The supply of the premises as a 'supply of a going concern' is GST-free and acquisitions made in the course of making that supply are made for a creditable purpose.*

## 46. Paragraph 205

Omit the paragraph; substitute:

205. Division 105 deals with supplies made by creditors of property belonging to a debtor where the supply is made in satisfaction of a debt owed to the creditor. The Division may be relevant when the property in question is being utilised to conduct an enterprise, such as the leasing of premises.

**47. Paragraph 209**

Omit the first sentence; substitute:

One view is that on a strict literal interpretation of subsection 105-5(3), a creditor could not sell a leasing enterprise, including the property from which it is conducted, that would otherwise have been a GST-free 'supply of a going concern' if hypothetically made by the debtor because the debtor would be unable to satisfy one or more of the three requirements in subsection 38-325(1).

**48. Paragraph 213**

Omit the second sentence; substitute:

*A purchaser is found and A Bank Ltd and the purchaser of the property agree that the sale is a 'supply of a going concern'.*

**49. Paragraph 216**

Omit the paragraph; substitute:

216. *Because the supply if notionally made by the debtor would have been a GST-free 'supply of a going concern', the supply will not be a taxable supply when actually made by the creditor.*

**50. Paragraph 217**

(a) Omit the second sentence; substitute:

*The supply, if notionally made by the debtor would have been a GST-free 'supply of a going concern'.*

(b) Omit the second sentence of the note and replace with:

*Liability for GST would rest with the receiver under Division 58 and Division 105 would not apply.*

**51. Paragraph 219**

Omit the fourth sentence; substitute:

*The contracts are to be completed on the same day and Rent Me, Big Bank and Driveby agree that the supply is a 'supply of a going concern'.*

## 52. Paragraph 220

Omit the paragraph; substitute:

*220. Had Rent Me supplied the vehicles in conjunction with the supply of its enterprise then the supply of the fleet vehicles would have formed part of a 'supply of a going concern' that would have been GST-free under subdivision 38-J. The supply of the vehicle fleet by Big Bank will not be a taxable supply in these circumstances.*

## 53. Related rulings/determinations

Omit the references; substitute:

TR 1999/16; GSTR 1999/1; GSTR 2000/37; GSTR 2001/5;  
GSTD 2006/6; MT 2006/1

## 54. Legislative references

Omit:

- ANTS(GST)A99 147

Insert:

- ANTS(GST)A99 9-10(2)(a)
- ANTS(GST)A99 9-10(2)(b)
- ANTS(GST)A99 9-10(2)(c)
- ANTS(GST)A99 9-10(2)(d)
- ANTS(GST)A99 9-10(2)(e)
- ANTS(GST)A99 9-10(2)(f)
- ANTS(GST)A99 9-10(2)(g)
- ANTS(GST)A99 9-10(2)(h)
- ANTS(GST)A99 Div 58

## 55. Case references

Insert:

- Debonne Holdings Pty Ltd v Commissioner of Taxation [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154

## 56. Other references

Insert:

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

**Date of Effect**

This Addendum amends GSTR 2002/5 to state the Commissioner's view of the law as it applies both before and after the date of issue of this Addendum. However, entities may rely on GSTR 2002/5, in its form prior to its amendment by this Addendum, with respect to supplies made pursuant to written agreements entered into before the date of issue of this Addendum.

If this Addendum conflicts with a previous private ruling that you have obtained this Addendum prevails for supplies made pursuant to written agreements entered into on or after its date of issue.

However, if you have relied upon a previous public ruling (including the public ruling that this Addendum amends), you are protected in what you have done in relation to supplies made pursuant to written agreements entered into before the date of issue of this Addendum. This means that if you have relied on the earlier ruling and have underpaid an amount of GST, you are not liable for the shortfall in relation to supplies made pursuant to written agreements entered into prior to the date of issue of this Addendum. Similarly, if you have relied upon the earlier ruling you are not liable to repay an amount overpaid by the Commissioner as a refund.

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**Commissioner of Taxation**1 December 2010

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## ATO references

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