

GSTR 2002/5A4 - Addendum - Goods and services tax: when is a 'supply of a going concern' GST-free?

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *15 July 2015*

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Addendum

Goods and Services Tax Ruling

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

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2002/5 to include an additional example which further illustrates, for the purpose of section 38-325 of the *A New Tax System (Goods and Services Tax) Act 1999*, those things that are necessary for the continued operation of an enterprise of leasing commercial property.

The addendum also adds a footnote reference to the High Court's decision in *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49; 2014 ATC 20-474; (2014) 92 ATR 241.

[Note: This is a consolidated version of this document. Refer to the Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

GSTR 2002/5 is amended as follows:

1. Paragraph 107

Insert after paragraph 107:

Management and services contracts relating to the lease of a property

107A. An identified enterprise may consist solely of the leasing of a property to a tenant or tenants. Such an activity is an enterprise under paragraph 9-20(1)(c).^{13A} This is the case even though the leasing of the property may be carried on as part of the supplier's broader enterprise.^{13B} Where the identified enterprise consists solely of leasing a property, management and services contracts related to the lease are not things necessary for the continued operation of that enterprise. That is, where the identified enterprise is one of leasing, the supply of the property subject to the existing leases to the tenant or tenants is all that is required to satisfy paragraph 38-325(2)(a).

^{13A} See paragraphs 23 and 24 of this Ruling.

^{13B} See paragraphs 30 and 131 of this Ruling. See also *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [37]; 2014 ATC 20-474; (2014) 92 ATR 241.

Example 16A: management and services contracts relating to an enterprise of leasing

107B. *As part of a portfolio of real estate assets, SellCo owns a large combined retail shopping centre and office tower known as Black Tower. SellCo is selling Black Tower to AcquireCo subject to all existing tenancies.*

107C. *SellCo outsources the management of all of its properties to ProManagement under a portfolio wide management agreement. SellCo has also entered into other services contracts with third parties specific to Black Tower only. Among other things, those contracts cover services such as electricity, gas, telephone, internet, lift and escalator maintenance, air-conditioning maintenance, cleaning, security, advertising and centre promotions.*

107D. *The management agreement with ProManagement cannot be transferred to AcquireCo in respect of Black Tower as it applies to all of SellCo's properties on a portfolio wide basis. Some of the services contracts in relation to Black Tower are due to expire and will not be renewed before settlement. Other services contracts will be assigned or novated to AcquireCo on settlement. However, AcquireCo has its own preferred service contractors for some services so requires SellCo to terminate those particular services contracts on settlement.*

107E. *Even though the management agreement and some of the services contracts are not being supplied by SellCo to AcquireCo, SellCo is supplying AcquireCo with all of the things that are necessary for the continued operation of the identified enterprise of leasing Black Tower. This is because the supply of Black Tower subject to the existing leases to the tenants is all that is required for this identified enterprise. Therefore, paragraph 38-325(2)(a) is satisfied and, provided the other requirements of section 38-325 are met, SellCo is making a 'supply of a going concern'.*

107F. *While none of the management or services contracts are necessary for the continued operation of the leasing enterprise, any services contracts that are assigned or novated to AcquireCo are transferred as part of the leasing enterprise, and can also be included as part of the 'supply of a going concern' by SellCo.*

2. Footnote 22

At the end of the footnote; insert:

See *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [46]; 2014 ATC 20-474; (2014) 92 ATR 241.

3. Detailed contents list

Insert:

<i>Management and services contracts relating to the lease of a property</i>	107A
<i>Example 16A: management and services contracts relating to an enterprise of leasing</i>	107B

4. Case References

Insert:

- Commissioner of Taxation v. MBI Properties Pty Ltd [2014] HCA 49; 2014 ATC 20-474; (2014) 92 ATR 241

This Addendum applies on and from its date of issue.

Commissioner of Taxation3 June 2015

ATO references

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