GSTR 2005/4 - Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises

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This ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statement: Commissioner of Taxation v Unit Trend Services Pty Ltd (Published 26 June 2013).

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Goods and Services Tax Ruling

Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises

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Preamble

*This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 37 of the **Taxation Administration Act 1953** and former section 105-60 of Schedule 1 to the **Taxation Administration Act 1953**.*

*From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the **Taxation Administration Act 1953**.*

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you - provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

*[**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.]*

What this Ruling is about

1. This Ruling provides the Commissioner's view in relation to arrangements referred to in Taxpayer Alert TA 2004/6: Use of the Grouping provisions of the GST Act to avoid Goods and Services Tax (GST) on the sale of new residential premises and Taxpayer Alert TA 2004/7: Use of the Grouping provisions and the Margin Scheme to avoid or reduce the Goods and Services Tax (GST) on the sale of new residential premises.

2. In particular it considers:

- whether the intra-group sale of completed premises is the first sale of residential premises for the purposes of Subdivision 40-C of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act);
- whether the acquiring GST group member can apply the margin scheme under Division 75 of the GST Act on the first supply of the new residential premises to third parties;
- the GST effect of the intra-group transfer of substantially completed premises within a GST group;
- whether the representative member of the GST group is entitled to input tax credits on the costs of construction and/or the acquisition of the land; and
- whether the general anti-avoidance provisions in Division 165 of the GST Act may apply to the arrangements in the Taxpayer Alerts.

3. Unless otherwise stated, all legislative references in this Ruling are to the GST Act.

Date of effect

4. This Ruling applies [to tax periods commencing] both before and after its date of issue. However, this Ruling 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 Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

5. [Omitted.]

6. [Omitted.]

Background

7. Taxpayer Alert TA 2004/6 was issued on 7 April 2004. It describes arrangements using the grouping provisions of the GST Act that purport to avoid GST on the supply of new residential premises.

8. The parties to the arrangements in TA 2004/6 use a GST group structure where one group member supplies the completed premises to another group member. It is argued that:

(a) the interposing of a group member is to reduce the commercial risk of the construction activity;

(b) the intra-group transaction is the first sale of 'new residential premises';

(c) the sale of the premises by the supplying group member to the acquiring group member is not a taxable supply because of subsection 48-40(2);

(d) the first subsequent supply of the residential premises by the acquiring group member to a third party is an input taxed supply as the premises are no longer 'new residential premises';[1] and

(e) the representative member is entitled to input tax credits for acquisitions in relation to the construction of the premises.

9. Taxpayer Alert TA 2004/7 was also issued on 7 April 2004. It describes arrangements using the grouping provisions and the margin scheme that purport to avoid or reduce GST on the sale of new residential premises.

10. The parties to the arrangements in TA 2004/7 use a GST group structure where one group member supplies substantially completed premises to another group member. It is argued that:

(a) the interposing of a group member is to reduce the commercial risk of the construction activity;

(b) the sale of the substantially completed premises by the supplying group member to the acquiring group member is not a taxable supply because of subsection 48-40(2);

(c) the acquiring group member completes the premises and the first subsequent supply of the premises by this member to third parties is the supply of new residential premises;

(d) the acquiring group member chooses to apply the margin scheme in relation to the first subsequent supply of the premises to a third party, paying GST on the margin calculated as the difference between its sale price and the intra-group sale price; and

(e) the representative member is entitled to input tax credits for acquisitions in relation to the construction or completion of construction of the premises.

11. The effect of the intra-group sale referred to in paragraph 10 is purportedly to reduce the margin for GST on the sale to the third party.

12. The arrangements in TA 2004/6 and TA 2004/7 exhibit one common feature, the intra-group sale of completed or substantially completed residential premises.

[1] Section 40-75, meaning of new residential premises.

Features of the arrangements

13. The arrangements exhibit some or all of the following features:

- participants are usually introduced to the arrangements by advisers who promote the purported GST benefits of the arrangement;
- two or more entities enter into an arrangement, for the purposes of constructing and marketing residential premises;
- the entities apply for approval as a GST group,[1A] or are currently members of a GST group. The entities may be newly created or previously existing;
- a GST group member (the supplying group member) owns or acquires land and:
  - (i) constructs or arranges the construction of residential units and/or houses on the land; or
  - (ii) substantially completes, or arranges the substantial completion of, residential units and/or houses on the land;
- the supplying group member sells:
  - (i) the completed premises; or
  - (ii) the substantially completed premises,

  to another GST group member (the acquiring group member). In some instances, the intra-group sale is claimed to be a GST-free supply of a going concern. Legal title to the premises is transferred and monetary consideration paid. There is no GST paid on the intra-group sale;
- the acquiring group member then:
  - (i) sells the completed premises to third parties, and treats the sales as input taxed for GST purposes. Having previously been sold by one GST group member to another, the premises are claimed to no longer be new residential premises; or
  - (ii) completes or arranges the completion of the premises and sells them to third parties, applying the margin scheme to calculate the GST on the supply; and

[1A] For tax periods starting on or after 1 July 2010, the approval of the Commissioner is no longer required for two or more entities to form a GST group. However, there is a requirement for the Commissioner to be notified, in the approved form, of the formation of the group – see paragraph 48-5(1)(c).

- input tax credits in respect of construction and other costs are claimed by the representative member in relation to the supplying and acquiring group entities.

The Commissioner's views on these arrangements are set out in this Ruling.

14. For details of the Commissioner's view in respect of arrangements where substantially completed premises are supplied between entities that are not members of the same GST group where section 38-325 is available and agreed to be used, see Goods and Services Tax Ruling GSTR 2005/5.

Legislative context

Residential premises – Subdivision 40-C

15. Sales of real property are input taxed under section 40-65 to the extent that the property is residential premises to be used predominantly for residential accommodation. However, under paragraph 40-65(2)(b) the sale is not input taxed if the premises are new residential premises. Accordingly, sales of new residential premises are taxable supplies if the requirements of section 9-5 are satisfied.

16. Section 40-75 provides the meaning of 'new residential premises'. Paragraph 40-75(1)(a) provides that residential premises are new residential premises if they have not previously been sold as residential premises.[2] The meaning of residential premises is contained in section 195-1 which provides:

> **residential premises** means land or a building that:
>
> (a) is occupied as a residence; or
>
> (b) is intended to be occupied, and is capable of being occupied, as a residence,
>
> and includes a floating home.

GST groups – Division 48

17. Broadly, Division 48 provides that entities within the same business structure may apply for approval as a GST group.[2A] One member of the GST group, the representative member, then deals with all the GST liabilities, adjustments and entitlements. A principal

[2] However, premises are not new residential premises if they have previously been the subject of a long term lease, or have been rented for a period of 5 years as residential premises (subsection 40-75(2)).

[2A] For tax periods starting on or after 1 July 2010, the approval of the Commissioner is no longer required for two or more entities to form a GST group. However, there is a requirement for the Commissioner to be notified, in the approved form, of the formation of the group – see paragraph 48-5(1)(c).

objective of the provisions in Division 48 is to eliminate the administrative and cash-flow costs associated with transactions between related entities.[3]

18. Subsection 48-5(1) provides that the Commissioner must approve two or more entities as a GST group if certain requirements are met. These include a requirement that the application nominates one of the entities to be the representative member for the group.[4]

19. Subsection 48-40(1) provides that the GST payable on a taxable supply or taxable importation that a member of a GST group makes:

- is payable by the representative member; and
- is not payable by the member that made it (unless the member is the representative member).[4A]

20. Subsection 48-40(2) provides that a supply that an entity makes to another member of the same GST group is treated as if it were not a taxable supply unless:

- it is a taxable supply because of Division 84 (which is about offshore supplies other than goods or real property); or
- the entity is a participant in a GST joint venture and acquired the thing supplied from the joint venture operator for the joint venture.

21. Subsection 48-45(1) gives the representative member the entitlement to input tax credits that would otherwise be an entitlement of the member of the GST group making the creditable acquisitions and creditable importations.[4B] Subsection 48-45(2) provides that

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[3] Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 paragraphs 11.22 and 11.23. See also the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 paragraph 6.3.

[4] Section 48-5 was amended with effect from tax periods starting on or after 1 July 2010. Prior to this amendment, entities were required to jointly apply for the Commissioner's approval to form a GST group and under paragraph 48-5(1)(c) as in force immediately before 1 July 2010, it was necessary for the application to nominate one of the entities to be the representative member for the group. For tax periods starting on or after 1 July 2010, the approval of the Commissioner is no longer required. However, the Commissioner must be notified, in the approved form, of the formation of the group and that notice must nominate one of the entities to be the representative member of the group.

[4A] GSTD 2008/1 explains the Commissioner's view that a member of a GST group, rather than the representative member of the GST group, is liable to pay GST that is attributable to a tax period in which the entity is not a member of the GST group. The Determination has been withdrawn due to amendments to subsection 48-40(1) that apply to tax periods starting on or after 1 July 2010. Although these amendments confirm the Commissioner's view as explained in GSTD 2008/1, the Determination continues to apply to tax periods starting before 1 July 2010.

[4B] GSTD 2008/1 explains the Commissioner's view that a member of a GST group, rather than the representative member of the GST group, is entitled to input tax credits that are attributable to a tax period in which the entity is not a member of the GST group. The Determination has been withdrawn due to amendments to subsection 48-45(1) that apply to tax periods starting on or after 1 July 2010.

those acquisitions and importations are treated as being solely or partly for a creditable purpose if they would be so treated if:

- the GST group were treated as a single entity; and
- the GST group were not treated as a number of entities corresponding to the members of the GST group.

22. Despite the representative member's entitlement in subsection 48-45(1) to group members' input tax credits, paragraph 48-55(1)(a) provides that a GST group is treated as a single entity, and not as a number of entities corresponding to the members of the GST group, for the purposes of working out the amount of any input tax credits to which the representative member is entitled.

23. Subsection 48-50(1) provides that any adjustment that a member of a GST group has is to be treated as if the representative member has the adjustment.[4C] Subsection 48-55(1) provides that the GST group is treated as a single entity for the purpose of working out any adjustments of the representative member and the amounts of any adjustments.

Margin scheme – Division 75

24. The margin scheme is a method of calculating the GST payable on the taxable supply of real property. Subsection 75-5(1) states that you may choose to apply the margin scheme in working out the amount of GST on taxable supplies of real property by:

- selling a freehold interest in land;
- selling a stratum unit; and
- granting or selling a long-term lease.

25. Subsection 75-5(2) provides that you cannot choose to apply the margin scheme if you acquired the freehold interest, stratum unit or long-term lease through a taxable supply on which GST has been worked out without applying the margin scheme.

26. Subsection 75-10(2) prescribes that the margin for the supply is the amount by which the consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question. However, if subsection 75-10(3) applies, the margin for the supply is the amount by which the consideration for the supply exceeds a valuation (made in accordance with that provision) of the interest, unit or lease in question.

Although these amendments confirm the Commissioner's view as explained in GSTD 2008/1, the Determination continues to apply to tax periods starting before 1 July 2010.

[4C] Subsection 48-50(1) was amended with effect from tax periods starting on or after 1 July 2010. The amendments provide that any adjustment that an entity has and that is attributable to a tax period during which the entity is a member of a GST group, is to be treated as if the representative member has the adjustment.

General anti-avoidance – Division 165

27. Division 165 operates to deter avoidance schemes that are designed to obtain GST benefits by taking advantage of the GST law in circumstances other than those intended by the GST law. The Division allows the Commissioner to make a scheme ineffective where it is reasonable to conclude that the scheme was entered into or carried out, for the dominant purpose of an entity obtaining a GST benefit, or the scheme had the principal effect of an entity obtaining a GST benefit.[5]

Ruling

Completed premises – intra-group sale and sale to third parties

28. The intra-group sale of completed residential premises, under arrangements of the kind described in paragraphs 8 and 13, is not the first sale of new residential premises. The sale of the premises by the acquiring group member to a third party is the first sale of new residential premises and is a taxable supply provided the requirements of section 9-5 are met. GST on the taxable supply is payable by the representative member. The margin scheme may apply to the sale by the acquiring group member if the supplying group member would have been able to choose to apply the margin scheme had it sold the premises directly to the third party. In calculating the margin under subsection 75-10(2), the consideration for the acquisition is the consideration for the supplying group member's acquisition and not the consideration for the acquiring group member's acquisition from the supplying group member.

29. The use of a group structure and the grouping provisions does not have any effect on the correct amount of GST payable by the group. The sale of residential premises from the supplying group member to the acquiring group member is not a previous sale of residential premises for the purposes of paragraph 40-75(1)(a).

30. Based on the Commissioner's view in paragraph 28 and 29, the representative member is entitled to input tax credits under section 48-45 as read in conjunction with section 48-55 for acquisitions in relation to the construction and sale of the premises. However, if contrary to the Commissioner's view, the intra-group sale is the first sale of new residential premises, the representative member would not be entitled to input tax credits for those acquisitions as they would relate to making a supply that would be input taxed. Where, as part of the arrangements, an entity becomes a member of a GST group or an existing GST group admits a new member, an adjustment under Division 129 may be required. A change in a group structure may be a later event that changes the

[5] Paragraphs 6.303 and 6.305 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

extent of creditable purpose of an acquisition which results in an adjustment in relation to input tax credits previously claimed.

31. If, contrary to the Commissioner's view, the intra-group sale is the first sale of new residential premises, the Commissioner would consider the application of Division 165 having regard to all the facts and circumstances of the particular case. On the basis of the facts outlined in this Ruling, Division 165 would apply to the arrangement.

Substantially completed premises – intra-group sale and sale of completed premises to third parties

32. The intra-group sale of substantially completed premises, under arrangements of the kind described in paragraphs 10 and 13, is not the first sale of new residential premises.

33. Depending on the degree of completion, substantially completed premises may not be new residential premises. They are not new residential premises if they are not capable of being occupied as a residence. The sale of completed premises by the acquiring group member to a third party is the first sale of new residential premises and is a taxable supply provided the requirements of section 9-5 are met. The GST on the taxable supply is payable by the representative member. The margin scheme may apply to the sale by the acquiring group member if the supplying group member would have been able to choose the margin scheme had it sold the premises directly to the third party. In calculating the margin under subsection 75-10(2), the consideration for the acquisition is the consideration for the supplying group member's acquisition and not the consideration for the acquiring group member's acquisition.

34. Based on the Commissioner's view in paragraph 32, the representative member is entitled to input tax credits under section 48-45 as read in conjunction with section 48-55. However, if contrary to the Commissioner's view, the intra-group sale is the first sale of new residential premises, the representative member would not be entitled to input tax credits in relation to acquisitions that relate to that sale.

35. If, contrary to the Commissioner's view, Division 75 does not operate as stated, the Commissioner would consider the application of Division 165 having regard to all the facts and circumstances of the particular case. On the basis of the facts outlined in this Ruling, Division 165 would apply to the arrangement.

Explanation (this forms part of the Ruling)

Residential premises – Subdivision 40-C

36. The purpose of paragraph 40-65(2)(b), when read in conjunction with the meaning of new residential premises in section 40-75, is to ensure that the first sale of new residential premises by registered entities (such as builders and developers) is subject to GST. The requirement that new residential premises have not previously been sold as residential premises in paragraph 40-75(1)(a) refers to a first sale where there has been a transfer of the full and complete ownership of the property in question where GST has been levied on the sale.

37. It is improbable Parliament intended that a supply between GST group members would be regarded as a previous sale of new residential premises for the purposes of paragraph 40-75(1)(a). The purported result of the arrangement described in paragraphs 8 and 13 is inconsistent with the evident policy of the legislation that new residential premises first sold after the introduction of GST should bear GST. The Commissioner considers a Court would prefer a construction of the words 'previously been sold as residential premises' that did not lead to the improbable outcome of the arrangement.

38. The above construction is based on the purposive method mandated for interpreting statutes, whether or not they are taxation statutes. A statement of the principle is to be found in the joint judgement of Brennan CJ, Dawson, Toohey, and Gummow JJ in *CIC Insurance Ltd v. Bankstown Football Club Ltd*[6] (*CIC Insurance Ltd*) where their Honours said:

> …the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a Statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v. Butler Pollnow Pty Ltd*[7] if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the Court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

[6] (1997) 187 CLR 384 at 408.
[7] (1986) 6 NSWLR 363 at 388.

39. The above principle has been applied in *Chaudhri v. FC of T*[8] and *Network Ten Pty Limited v. TCN Channel Nine Pty Ltd*.[9]

40. In relation to substantially completed premises, such premises cannot be regarded as residential premises until capable of being occupied as a residence. Therefore, substantially completed premises, depending on the degree of completion, are not new residential premises for the purposes of Subdivision 40-C.[10]

GST groups – Division 48

41. Under the arrangements of the kind described in paragraph 13, it is purported that there is no GST liability on the sale of the completed premises or substantially completed premises from the supplying group member to the acquiring group member. This view is based on the wording of subsection 48-40(2) that provides '…a supply that an entity makes to another member of the same GST group is treated as if it is not a taxable supply.'

42. Under Division 48 the GST payable on any taxable supply that a group member makes is payable by the representative member and is not payable by the member that made it unless the member is the representative member.[11] The purpose of the grouping provisions is to reduce the cost of accounting for intra-group transactions by ignoring those transactions for GST.[12]

43. The intention of the provisions is based on the assumption of a neutral GST effect within the group and that GST will be payable by the representative member on the added value within the group when a taxable supply is made out of the group. Subsection 48-40(3) provides that section 48-40 has effect despite section 9-40 and 13-15 (which are about liability for GST). However, this only applies to transactions between members of the group. It is improbable that it was ever intended that a transaction out of the group would not be subject to GST because of an intra-group transaction.

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[8] [2001] FCA 554; 2001 ATC 4214; (2001) 47 ATR 126.

[9] [2004] HCA 14 at paragraph 11.

[10] The meaning of 'residential premises' and 'new residential premises' was considered by Beaumont J in *Marana Holdings Pty Ltd v. Federal Commissioner of Taxation* [2004] FCA 233; 2004 ATC 4256; 55 ATR 161 and by the Full Federal Court in *Marana Holdings Pty and Anor v. FC of T* [2004] FCAFC 307; 2004 ATC 5068; 57 ATR 521.

[11] Subsection 48-40(1). GSTD 2008/1 explains the Commissioner's view that a member of a GST group, rather than the representative member of the GST group, is liable to pay GST that is attributable to a tax period in which the entity is not a member of the GST group. The Determination has been withdrawn due to amendments to subsection 48-40(1) that apply to tax periods starting on or after 1 July 2010. Although these amendments confirm the Commissioner's view as explained in GSTD 2008/1, the Determination continues to apply to tax periods starting before 1 July 2010.

[12] Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 paragraphs 11.22 and 11.23. See also the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 paragraph 6.3.

44. The Commissioner considers, given the evident policy of the provisions in Subdivision 40-C and the Commissioner's view on the meaning of previously sold in paragraph 40-75(1)(a), the intra-group sale does not prevent GST being payable by the representative member on the sale of the completed premises to a third party.

45. Division 48 provides advantages in relation to administrative and cash flow costs. The choice to use a group structure, the GST grouping provisions and an intra-group transaction do not override the intention of the Act that GST should be payable on the first sale of new residential premises.

46. The Commissioner considers it is improbable that Parliament intended that the intra-group sale should have the effect of avoiding or reducing the GST on the sale of new residential premises. That would be inconsistent with the evident policy of the legislation that new residential premises first sold after the introduction of GST should bear GST. Consistent with the principles in *CIC Insurance Ltd* set out at paragraph 38, the Commissioner considers that a Court would prefer a construction of Subdivision 40C and subsection 48-40(2) that did not lead to that improbable outcome.

Alternative view – intra-group supply is a taxable supply

47. It has been suggested that the intra-group supply remains a taxable supply despite the words in subsection 48-40(2). Proponents of this view argue that subsection 48-40(1) is specifically about the liability of the members of the GST group for GST *on intra-group supplies*. Subsection 48-40(1), it is claimed, ensures that the GST liability on a taxable supply is payable by the representative member, rather than the member that makes the supply and would otherwise have the liability.[12A]

48. With the understanding that the group member has no GST liability on an intra-group supply, subsection 48-40(2) provides that such supply from one member entity to another member entity incurs a GST liability in only two circumstances. Subsection 48-40(3) provides that the section has effect despite other sections that stipulate who must pay the GST liability on taxable supplies or taxable importations. Therefore, overall subsection 48-40 does not change the supply as a taxable supply and the intra-group supply only defers the GST liability of that supply.

49. On this view, on the basis that the intra-group supply is a taxable supply, the margin scheme on the sale to third parties would not be available. Rather subsection 75-5(2) would apply as GST has

[12A] Subsection 48-40(1) was amended with effect from tax periods starting on or after 1 July 2010. This amendment confirms the Commissioner's view in GSTD 2008/1 that a member of a GST group, rather than the representative member of the GST group, is liable to pay GST that is attributable to a tax period in which the entity is not a member of the GST group. GSTD 2008/1 has been withdrawn as a result of the amendments to subsection 48-40(1) but continues to apply to tax periods starting before 1 July 2010.

not been worked out by applying the margin scheme on the supply by the supplying group member. However, the Commissioner considers that a court would prefer a construction of subsection 48-40(2) together with subsection 75-5(2) that did not lead to this outcome. Accordingly, the Commissioner does not accept the view that intra-group supplies continue to be taxable supplies.

Margin scheme – Division 75

50. In the arrangements described in paragraphs 10 and 13, the margin scheme was not applied to the intra-group sale on the basis that the sale was not a taxable supply. However, the margin scheme was applied to the subsequent sale to third parties. The margin is purported to be the difference between the consideration for the supply to the third parties and the consideration for the acquisition by the acquiring group member.

51. Where the premises have been supplied by the acquiring group member as a taxable supply to a third party, the Commissioner considers that, applying the principles in *CIC Insurance Ltd* set out at paragraph 38, Division 75 applies as follows. The acquiring group member can choose to use the margin scheme only if the supplying group member would have been able to choose to apply the margin scheme had it made the supply to the third party. Where the margin scheme is applied to the supply from the acquiring group member to the third party, the margin under subsection 75-10(2) is the difference between the consideration for the supply to the third party and the consideration for the supplying GST group member's acquisition.

52. However, due to the operation of sub-section 75-5(2), the margin scheme is not available on the sale of the new residential premises to third parties if the supply to the supplying group member was a taxable supply and the margin scheme was not applied in working out the GST on that supply. It follows that the margin scheme would not be available if the representative member is entitled to input tax credits on the supplying group's member's acquisition of the land.

Entitlement to input tax credits

53. In the arrangements outlined in paragraphs 8, 10 and 13, the representative group member has claimed the input tax credits of the members of the group for acquisition of the land and the construction of the completed premises. This is despite some of the participants in the arrangements treating the sales to third parties as input taxed supplies.

54. The representative group member is entitled to input tax credits for creditable acquisitions and creditable importations made by a member of the GST group. However, an acquisition or importation by a member of a GST group is solely or partly creditable only if it would be treated that way if the GST group were a single entity. You

look at the creditable purpose of the group, as a whole, in making the acquisition to determine the extent to which it is creditable.[13]

55. In respect of the arrangements outlined in paragraphs 8, 10 and 13, the Commissioner considers the overall creditable purpose of the group, in constructing the residential premises, was to sell them to third parties. In the Commissioner's view the supply to third parties is a supply of new residential premises which is a taxable supply provided the requirements of section 9-5 are met. Therefore, the representative member is entitled to the input tax credits in respect of acquisition of land and the construction costs of the premises. This is so whether or not the intra-group sale was of completed or substantially completed premises.

Alternative view – completed residential premises

56. If, contrary to the Commissioner's view, the intra-group sale of completed premises is a supply of new residential premises and the subsequent sale to a third party is input taxed, the representative member would not be entitled to input tax credits for the supplying group member's acquisition of the land and construction of the premises. The acquisitions would not be creditable acquisitions under Division 11. The group member cannot acquire a thing for a creditable purpose if the acquisition relates to making supplies that are input taxed. The group, treated as a single entity for this purpose, would not have a creditable purpose if, contrary to the Commissioner's view, the supply to the third party is input taxed.

57. Further, where as part of the arrangements an entity becomes a member of a GST group or an existing GST group admits a new member, an adjustment under Division 129 may be required. A change in a group structure may be a later event that changes the extent of creditable purpose of an acquisition which results in an adjustment of input tax credits.[14]

General anti-avoidance – Division 165

58. If, contrary to the Commissioner's views, the supply of residential premises to a third party in the circumstances outlined in paragraphs 8 and 13 is an input taxed supply, or the arrangements in paragraphs 10 and 13 do have the effect of reducing the margin for the sale to a third party, the Commissioner will consider the application of the general anti-avoidance provisions in Division 165 on a case by case basis.

59. Under Division 165, the Commissioner may negate a GST benefit an entity gets from a scheme if it is reasonable to conclude that the dominant purpose or principal effect of the scheme is to secure such a benefit.[15]

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[13] See sections 48-45, 48-50 and 48-55.
[14] See sections 48-45, 48-50 and 48-55.
[15] Section 165-40.

60. For the Division to apply, the following four elements need to be satisfied:

- one or more of the steps in the arrangements is a 'scheme' as defined in subsection 165-10(2);
- a 'GST benefit', as defined in subsection 165-10(1), arises under the scheme;
- an entity gets a GST benefit from the scheme;[16] and
- it is reasonable to conclude, taking account of the matters described in section 165-15, that the dominant purpose or principal effect of entering into or carrying out the scheme was to get a GST benefit.[17]

61. The arrangements in paragraphs 8, 10 and 13 involve a scheme.

62. If, contrary to the Commissioner's view, the intra-group supply of completed premises is a sale of new residential premises for the purposes of paragraph 40-75(1)(a), a GST benefit arises for the acquiring group member as a consequence of the subsequent supply of the premises to the third party being input taxed.

63. In the case of completed premises, the supplying group member gets a GST benefit if it is postulated that, but for the scheme, it would or could reasonably be expected to have sold the completed premises directly to the third party rather than through the intra-group sale to the acquiring group member.

64. If, contrary to the Commissioner's view, the intra-group supply of substantially completed premises is not treated in the manner that the Commissioner has stated, a GST benefit arises for the acquiring group member on the supply to the third party. The calculation of the margin for the supply as the difference between the consideration for the acquiring group member's acquisition from the supplying group member and the sale price to the third party results, on this alternative view, in less GST being payable than would be the case if the intra-group sale did not occur.

65. In the case of the substantially completed premises, a GST benefit would arise as a consequence of the first supply of substantially completed residential premises to the acquiring group member being treated as if it were not a taxable supply. The supplying group member gets a GST benefit if it is postulated that, but for the scheme, it would have made a taxable supply of the completed residential premises directly to the third party, rather than through the intra-group sale of substantially completed premises to the acquiring group member. A smaller amount of GST would or could reasonably be expected to have been payable by the supplying group member than would have been apart from the scheme. This is based on the postulation that, apart from the scheme, the supplying

[16] Paragraph 165-5(1)(a).
[17] Paragraph 165-5(1)(c).

group member would or could reasonably have been expected to have fully completed the residential premises itself and then sold them directly to third parties.

66. Division 165 must be considered on a case by case basis to determine whether it would be concluded that the dominant purpose or principal effect of the scheme would be to get a GST benefit. This requires an assessment of the scheme against the twelve matters set out in subsection 165-15(1). The references to the particular matters in this Ruling should not be regarded as exhaustive or limiting the Commissioner in the application of Division 165 in other cases.

67. Consideration of some of the matters in subsection 165-15(1) may point in the direction of a tax avoidance purpose or effect, others may point in the opposite direction, and some may be neutral. It is the evaluation of these matters, alone or in combination, some for, some against, that section 165-15 requires in order to reach the conclusion to which section 165-5 refers.[18]

Application of Division 165 to the arrangement

Paragraph 165-15(1)(a) – the manner in which the scheme was entered into or carried out

68. Even if the transfer of the completed premises or substantially completed premises were carried out for commercial purposes, the manner in which they were carried out suggests the dominant purpose is to obtain a GST benefit.

69. In particular, the structured way the scheme was entered into and carried out suggests careful planning to get a GST benefit.

70. In particular, the application for approval as a GST group, sale of completed or substantially completed residential premises within the GST group, completion of the substantially completed residential premises, and then the on-sale of the completed premises to third parties are indicative of the structured way the scheme was entered into.

71. The manner in which the arrangement is entered into follows the advice of advisers promoting the GST benefits of the arrangements.

72. These factors suggest that the particular way in which the scheme is entered into is explicable only or predominantly by the taxation consequences.[19]

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[18] Cases concerning Part IVA of the *Income Tax Assessment Act 1936*, such as *Commissioner of Taxation v. Hart and Anor* [2004] HCA 26; 2004 ATC 4599; 55 ATR 712, *FC of T v. Consolidated Press Holdings Ltd (No. 1)* [1999] FCA 1199; 99 ATC 4945; 42 ATR 575 and *C of T v. Spotless Services Ltd* (1996) 186 CLR 404, provide guidance to the Commissioner in considering the Division 165 matters.

[19] *C of T v. Spotless Services Ltd* (1996) 186 CLR 404 at 420 and 423; 96 ATC 5201 at 5209 to 5210; 34 ATR 183 at 191 to 193.

Paragraph 165-15(1)(b) – the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme; and

(ii) the economic and commercial substance of the scheme

73. The form of the scheme involves an intra-group transfer of completed or substantially completed premises. The substance of the scheme is that the economic group which includes the supplying group member and the acquiring group member continues to hold the premises for the same purpose in carrying out the group's activities.

74. The acquiring group member does not provide substantial services in connection with its on-sale of the completed premises or completion and on-sale of the premises to third parties. It merely appears as a vendor in the sale contracts to third parties. In relation to substantially completed premises, the acquiring group member engages the supplying group member to complete the premises with the acquiring group member itself adding little or no additional value.

75. The supplying group member finances the purchase of the completed or substantially completed premises and any expenses in completing the premises and/or on-selling them. The supplying group member continues to finance insurance on the premises and guarantees the acquiring group member's obligations under the sale contracts to third parties.

76. While these factors in isolation would not be determinative, when combined with the other factors discussed, they would be consistent with a reasonable conclusion that the scheme was entered into with the dominant purpose of obtaining a GST benefit.

Paragraph 165-15(1)(c) – the purpose or object of the [GST] Act... and any relevant provision of this Act… [whether the purpose or object is stated expressly or not]

77. As previously discussed, the purpose of paragraph 40-65(2)(b) is to ensure that GST is levied on the first sale of new residential premises and a principal objective of Division 48 is to eliminate the administrative and cash flow costs associated with intra-group transactions. Division 48 was not intended to be used as a device for defeating the purpose of paragraph 40-65(2)(b) by converting new residential premises into previously sold residential premises where GST has either not been levied or substantially reduced.

78. The intention of Division 75 is to grant a concession on the sale of real property, in this case new residential premises, by ensuring, if a choice is made to apply the margin scheme, GST is only payable on the value added after the commencement of the GST system. It was not intended to be used by itself, or in combination

with the provisions in Division 48, as a means of reducing the margin on which GST is calculated under the margin scheme.

79. It would be contrary to the above purposes for an entity to obtain a GST benefit where GST on the value added after the commencement of the GST is avoided or reduced.

80. The Commissioner considers this matter points to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(d) – the timing of the scheme

81. Key steps in the arrangement occur either immediately or shortly after one another.

82. The careful attention to timing points to the scheme being for the dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(e) – the period over which the scheme was entered into and carried out

83. The period over which the scheme was carried out is relatively short especially the period between the sale from the supplying group member to the acquiring group member and the on-sale of the completed residential premises to third parties.

84. This points to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(f) – the effect that [the GST Act] would have in relation to the scheme apart from this Division

85. Apart from Division 165, in relation to the sale of completed residential premises from the supplying group member to the acquiring group member and the sale to third parties, it is argued that there is no GST on either of these sales.

86. Apart from Division 165, in relation to the sale of substantially completed residential premises from the supplying group member to the acquiring group member, followed by sale of the completed premises to third parties, it is argued that the margin on which GST is calculated on the sale by the acquiring group member to third parties is reduced.

87. The Commissioner considers these to be matters pointing to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(g) – any change in the avoider's financial position that has resulted or may reasonably be expected to result from the scheme

88. On behalf of the supplying group member, it is argued there is no GST liability levied on the sale of the completed or substantially completed premises from the supplying group member to the acquiring group member. This intra-group transaction reflects all or substantially all of the value added by the group since the commencement of the GST. It is also argued that where the intra-group sale involves completed residential premises, GST is not levied on the on-sale of the residential premises by the acquiring group member to third parties because it is an input taxed supply. Where the acquiring group member has chosen to apply the margin scheme to the sale of completed residential premises, it is argued the GST is levied on a reduced amount.

89. On this basis, but for Division 165, the supply by the supplying group member has either not borne GST or GST has been reduced.

90. But for the scheme, the supplying group member would have directly sold the completed premises to third parties or completed the premises and then sold them to third parties. A direct sale by the supplying group entity would have given rise to a GST liability. In other words, the scheme would, but for Division 165, enable the supplying group entity to obtain a significant GST benefit. The financial position of the supplying group member is substantially improved.

Paragraph 165-15(1)(h) – any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature

91. The acquiring group member has a relevant connection with the supplying group member as they are members of the same GST group. There has been a change in the financial position of the acquiring group entity. This is because, as a result of the scheme, the supply of the completed residential premises to third parties will either not be subject to GST on the basis that it would be an input taxed supply or, alternatively under the margin scheme, the margin on which GST is levied is significantly reduced.

92. In some cases, the directors of either the supplying or acquiring group member, their family members or advisers can purchase the completed residential premises at below market value.

93. The benefit to the acquiring group member points to the scheme being entered into for the dominant purpose or principal effect of the supplying group member obtaining a GST benefit.

Paragraph 165-15(1)(i) – any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out

94. In some cases the supplying group member finances the acquisition by the acquiring group member and all of its related expenses, and arranges for the completion of substantially completed premises. This is inconsistent with the interposition of the acquiring group member to insulate the supplying group member from commercial risk or to conduct its business more efficiently or profitably through an interposed entity. This points to the scheme being entered into for the dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(j) – the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arms length

95. The supplying group member and the acquiring group member are part of the same wholly owned group and are not dealing with each other at arm's length. This association is consistent with what would be expected in the context of a restructure entered into and carried out with or without a dominant purpose of obtaining a GST benefit. That is, it is a neutral matter.

Paragraph 165-15(1)(k) – the circumstances surrounding the scheme

96. The parties were introduced to the scheme by an adviser highlighting the GST benefits that may be obtained by entering into the scheme. While not conclusive, this factor when combined with other matters referred to above, points to a dominant purpose of obtaining a GST benefit.

Paragraph 165-15(1)(l) – any other relevant circumstances

97. The Commissioner will consider any other relevant circumstances. For example, the activities of the parties' advisers in relation to the promotion of the scheme.

Division 165 – conclusion

98. The Commissioner will consider the application of Division 165 to the particular matters having regard to all the facts and circumstances. On the basis of the facts and circumstances outlined in this Ruling, Division 165 will apply to the arrangement.

Alternative view – application of Division 165

99. There is an alternative view that the Commissioner is unable to negate any GST benefit arising from the arrangement. This view is based on paragraph 165-5(1)(b) which provides that Division 165 does not operate if a GST benefit is 'attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law'. Subsection 48-5(1) expressly allows entities to apply for approval as a GST group. It is argued paragraph 165-5(1)(b) will apply as the GST benefit arising under the arrangement will be attributable to the application made under subsection 48-5(1).

100. The Commissioner does not accept this argument. It is the Commissioner's view that any GST benefit arising under the arrangement is not attributable to the application for and approval as a GST group. Rather, it is considered the GST benefit will be attributable to the structuring of the arrangements so there is an intra-group supply, to allow either the sale of the residential premises from the supplying group member to the acquiring group member who on-sells to third parties or use of a higher acquisition consideration in calculating the margin under the margin scheme. The transfer of title in this way produces the benefit rather than the application made under subsection 48-5(1).

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Commissioner of Taxation
14 September 2005

Previous draft:

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Related Rulings/Determinations:

TR 2006/10; GSTR 2005/5; GSTD 2008/1

Subject references:

- GST anti-avoidance
- GST groups
- GST input tax credits and creditable acquisitions
- GST margin scheme
- GST new residential premises
- GST property and construction
- GST sale of residential premises

Legislative references:

- ANTS(GST)A99 9-5
- ANTS(GST)A99 9-40
- ANTS(GST)A99 Div 11
- ANTS(GST)A99 13-15
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- Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd (No. 1) (1999) FCA 1199; 99 ATC 4945; 42 ATR 575
- Isherwood v. Butler Pollnow Pty Ltd (1986) 6 NSWLR 363
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- Taxpayer Alert TA 2004/7: Use of the Grouping provisions and the Margin Scheme to avoid or reduce the Goods and Services Tax (GST) on the sale of new residential premises
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