


GSTR 2006/10A2 - Addendum - Goods and services tax: insurance settlements and entitlement to input tax credits

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Addendum

Goods and Services Tax Ruling

Goods and services tax: insurance settlements and entitlement to input tax credits

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2006/10 to reflect the reasoning of the Full Federal Court's decision in *Commissioner of Taxation v Secretary to the Department of Transport (Victoria)* 2010 FCAFC 84, 2010 ATC 20-196 (*Department of Transport*).

The amendments to reflect the *Department of Transport* reasoning result in a broader approach than that taken by the Commissioner to date to determine if a supplier makes a supply to an insurer for a payment that an insurer makes to the insured or a third party.

GSTR 2006/10 is amended as follows:

1. Paragraph 5

Omit the paragraph; substitute:

5. This Ruling explains the Commissioner's view of the law as it applied from 1 July 2000. You can rely upon this Ruling on and from its date of issue for the purposes of former section 105-60 or section 357-60 of Schedule 1 to the *Taxation Administration Act 1953* (as applicable).

2. Paragraph 6

Omit the paragraph and note; substitute:

6. If this Ruling conflicts with a previous private ruling that you have obtained or a previous public ruling, this public ruling prevails. However, if you have relied on a previous ruling, you are protected in respect of what you have done up to the date of issue of this public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of issue of this later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

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Note: the following Addenda affect when you can rely on certain parts of this Ruling:

- The Addendum to this Ruling that issued on 15 August 2007, explains the Commissioner's view of the law as it applied from 1 July 2007. You can rely upon the Addendum on and from its date of issue for the purposes of former section 105-60 or section 357-60 of Schedule 1 to the *Taxation Administration Act 1953* (as applicable).
- The Addendum to this Ruling that issued on 14 December 2011 explains the Commissioner's view of the law as it applied before and after its date of issue. Subject to the transitional arrangements at paragraphs 6A and 6B of this Ruling, you can rely on this Addendum from its date of issue (14 December 2011) for the purposes of section 357-60 of Schedule 1 to the *Taxation Administration Act 1953*.

Transitional arrangements

6A. In the context of health services, some entities have treated certain payments as being third party payments for GST-free supplies, based on the views in this Ruling as it existed before the Addendum that issued on 14 December 2011. Some of these arrangements will be affected by the Addendum. In some cases, based on the views in that Addendum, such payments will instead be treated as consideration for taxable supplies to the payers. To allow these affected entities sufficient time to make necessary changes to their practices and systems, entities may continue to rely on this Ruling as it existed before the Addendum that issued on 14 December 2011 up to and including 30 June 2012.

6B. In the above circumstances, if an affected supplier relies or has relied on this Ruling to determine that they did not make a taxable supply then no GST is payable on that supply. This means that the amount of input tax credit to which a recipient is entitled is zero.^{1A}

6C. The Addendum that issued on 14 December 2011 is intended to reflect the law as enacted at the time of issue.

^{1A} Section 11-25 of the GST Act and subsection 357-60(3) of Schedule 1 to the *Taxation Administration Act 1953*, which applies from 1 July 2010. Before 1 July 2010, the Commissioner's view is that section 11-25 of the GST Act and former section 105-60 of Schedule 1 to the TAA apply to provide the same outcome, that is the recipient's input tax credit in respect of that payment is zero.

However a measure has been announced that if enacted may affect the GST treatment of certain multiparty arrangements.

6D. In the 2011-12 Federal Budget, the government announced it would amend the GST law to ensure that certain supplies made to health insurers in the course of settling health insurance claims are GST-free and subsequently released a Consultation Paper on 7 June 2011. As a result of that consultation, the government released Exposure Draft legislation on Monday 21 November 2011, which proposed to extend the circumstances under which certain health-related supplies would be GST-free. For further details about this proposed measure, see the Australian Taxation Office website: www.ato.gov.au.

3. Paragraph 35

Omit the paragraph; substitute:

35. If the insurer merely facilitates the payment as part of the settlement of an insurance claim or provides consideration for a supply by a supplier to the insured or a third party (which does not give rise to a taxable supply to the insurer), the insurer is not making a creditable acquisition and, therefore, has no entitlement to an input tax credit. However, the insurer may be entitled to a decreasing adjustment.

4. Paragraph 41

Omit the paragraph; substitute:

41. An examination of the surrounding circumstances, which together with the agreement form the total fact situation, is relevant for determining whether the agreement correctly records the supplies that are being made between the parties. This is discussed in Proposition 16 at paragraphs 222 to 246 of Goods and Services Tax Ruling GSTR 2006/9.

5. Paragraph 46

Omit the paragraph; substitute:

46. The identification and characterisation of supplies in tripartite transactions have received judicial consideration in the United Kingdom (UK), New Zealand (NZ) and in the recent Australian Full Federal Court decision in *Federal Commissioner of Taxation v. Secretary to the Department of Transport (Vic)*^{21A} (*Department of Transport*). Some of these cases are discussed in this Ruling. The Commissioner considers that a principle that can be derived from UK cases

^{21A} [2010] FCAFC 84; 2010 ATC 20-196; (2010) 76 ATR 306.

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such as *Customs and Excise Commissioners v. Redrow Group plc*²² (*Redrow*) is that the entity that contracts for a supply from a supplier is the recipient of that supply, even if the supply is provided to another entity.

6. Paragraph 47

After the paragraph; insert:

47A. Alternatively, an insurer may enter into a pre-existing framework or agreement with a supplier which contemplates that the parties act in a particular manner in respect of supplies by the supplier to the insured or third party and which establishes a liability owed by the insurer to the supplier (not the insured or third party) in the event that there is a supply by the supplier to the insured or third party (see paragraph 64B of this Ruling).

7. Paragraph 48

Omit the paragraph; substitute:

48. In these cases, the insurer makes an acquisition as defined in section 11-10 and the acquisition is a creditable acquisition for the purposes of section 11-5.

8. Paragraphs 49 to 54

Omit the paragraphs.

9. Paragraph 55

Omit the paragraph; substitute:

55. When identifying to whom a supply is made, it is necessary to look at the whole arrangement, including the contractual and other agreements made between the parties. In *WHA Limited and Viscount Reinsurance Company Limited v. HM Commissioners of Customs and Excise (WHA Ltd)*,^{24A} Lord Justice Neuberger said that 'one must look at the way the parties have actually structured, and indeed, expressed, their transaction or transactions'.²⁵ He also agreed with the observation by Justice Lloyd that:

the contractual position is not conclusive as to what taxable supplies are made to whom, but it must be the starting point.²⁶

²² [1999] 2 All ER 13; [1999] STC 161; [1999] 1 WLR 408.

^{24A} [2004] EWCA Civ 559; [2004] BVC 485.

²⁵ Paragraph 29 of *WHA Ltd*.

²⁶ Paragraph 35 of *WHA Ltd*.

10. Paragraph 60

Omit the paragraph; substitute:

60. A supplier may undertake a single activity that results in more than one supply being made (see Proposition 15 at paragraphs 217 to 221 of GSTR 2006/9). This is illustrated in *Department of Transport and Redrow*.

11. Paragraph 60

After paragraph 60 insert:

60A. In *Department of Transport* the activity undertaken by the taxi operator of transporting the eligible passenger resulted in two supplies being made:

- (i) the supply of transport to the passenger; and
- (ii) the supply to the Department of the service of transporting the eligible passenger.^{26A}

12. Paragraph 64

After the paragraph insert:

Identifying a pre-existing framework or agreement

64A. Having regard to all of the facts and circumstances, a supply may also be made to the insurer where there is a pre-existing framework or agreement between the insurer and the supplier.

64B. In the context of an insurance claim and having regard to the relevant factors and discussion listed at paragraphs 221A to 221G of GSTR 2006/9, the Commissioner considers that the following factors, in combination, may point to a supply being made by the supplier to the insurer under a tripartite arrangement:

- (a) there is a pre-existing framework or agreement between the insurer and the supplier which contemplates that the parties act in a particular manner in respect of supplies by the supplier to the insured or third party;
- (b) the pre-existing framework or agreement:
 - (i) identifies a mechanism by which the insured or third party is to be identified such that the supplies made to the insured or third party come within the

^{26A} See paragraph 56 of the Full Federal Court judgment.

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- scope of the pre-existing framework or agreement; and
- (ii) specifies that the insurer is under an obligation to pay the supplier if there is a relevant supply by the supplier to the insured or third party and also sets out a mechanism by which such payment is authorised;
- (c) the framework or agreement and the mechanism for authorising the payment are in existence before the supply by the supplier to the insured or third party (that is, the supplier knows in advance that the insurer is obliged to pay some or all of the consideration in the event of the supply to the insured or third party);
- (d) the supplier makes the supply to the insured or third party in conformity with the pre-existing framework or agreement between the insurer and the supplier; and
- (e) the obligation of the insurer to make payment pursuant to the pre-existing framework or agreement is not an administrative arrangement to pay on behalf of the insured or third party for a liability owed by the insured or third party to the supplier. Rather, once the supply becomes a supply to which the pre-existing framework or agreement applies, the pre-existing framework or agreement establishes a liability owed by the insurer (not the insured or third party) to the supplier in the event that there is a supply by the supplier to the insured or third party.

64C. Ultimately, it is a question of fact and degree whether a supply to the insurer can be identified (and for which the payment is consideration). If such a supply is identified the payment by the insurer is consideration for an acquisition made by the insurer. See *Example 16A* in paragraphs 132A to 132D of this Ruling.

13. Paragraph 66

Omit the paragraph; substitute:

66. A feature of these arrangements is that the agreement for the supply of the goods or services is between the supplier and the insured and that an obligation to pay remains with the insured. The fact that the insurer meets the insured's liability does not alter this. There is no binding obligation between the supplier and the insurer for the supply of goods or services to the insured, nor a pre-existing framework or agreement which

establishes a liability owed by the insurer to the supplier (not the insured or third party) in the event that there is a supply by the supplier to the insured or third party (see paragraph 64B of this Ruling). The arrangement between the supplier and the insurer remains that of a payment arrangement.

14. Paragraph 67

Omit the paragraph; substitute:

67. Typical of a payment arrangement is where a person is injured at work and seeks medical treatment under a workers' compensation scheme. In some cases, workers' compensation insurers will have administrative arrangements in place where the invoices for supplies of hospital and ambulance services made to the injured person are sent directly to the workers' compensation insurer (though the obligation to pay remains with the insured). The supply of the medical and ambulance services can nevertheless be made to the injured person and not to the insurer, with consideration for these services being provided by the insurer on behalf of the insured.

15. Paragraph 117

Omit the paragraph; substitute:

117. If an employee makes a compensation claim against the employer and the employer's workers' compensation insurer accepts liability for the workplace injury, then the insurer may pay for certain goods and services to be provided to the employee. The same issues in relation to the payment of similar benefits as for other general insurance settlements arise. Whether the payment is subject to Division 11 or Division 78 depends on whether there is a binding obligation between the insurer and the supplier to provide goods and/or services to the insured's employee or a pre-existing framework or agreement between the insurer and the supplier (see paragraph 64B of this Ruling) which results in a supply being made by the supplier to the insurer.

16. Paragraph 131

Omit the paragraph; substitute:

131. *As part of Nick's therapy, he goes to a masseuse. The workers' compensation insurer informs Nick that he should attend a masseuse mentioned on the insurer's list of preferred masseuses because the insurer has an administrative arrangement with each of those masseuses to forward invoices to the insurer for payment. However, it is Nick that*

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has the liability to pay for the supply of massage services made to him.

17. Paragraph 132

Omit the paragraph; substitute:

132. The supply of the massage services by the masseuse to Nick is a taxable supply.⁴⁴ While there is a pre-existing framework or agreement surrounding the payment by the insurer which involves the supplier and Nick, it is merely an administrative arrangement to pay on behalf of Nick for a liability owed by him to the masseuse. Accordingly, the arrangement between the insurer and the masseuse does not give rise to any supply to the insurer. Therefore, the insurer is not entitled to an input tax credit in respect of payments to the masseuse. Also, there is no entitlement to a decreasing adjustment as the employer is entitled to a full input tax credit for its workers' compensation premium.

18. Paragraph 132

After the paragraph; insert:

Example 16A: Massage services

132A. In contrast to Example 16 above, the workers' compensation insurer informs Nick that he should attend a masseuse mentioned on the insurer's list of approved masseuses because the insurer has an agreement with each of those masseuses. Under the agreement with the masseuse the insurer is liable to pay the masseuse an agreed fee if there is a supply of the relevant service to the insured's employee.

132B. When Nick goes to the masseuse, the masseuse seeks authorisation from the worker's compensation insurer (pursuant to the agreement) that the insurer will pay the relevant fee applicable to the massage service before there is the supply of the service to the insured's employee. Upon receipt of the authorisation, the masseuse duly supplies the massage services to Nick for the agreed fee.

132C. In view of the pre-existing agreement which contemplated that the parties act in a particular manner with respect to massage supplies to third parties, including the processes for authorisation of the payment by the insurer and the fact that the insurer is liable for such payment (once authorised), the circumstances surrounding the payment by the insurer to the supplier are such that there is a supply of the

⁴⁴ These services do not meet the requirements of section 38-10 and therefore are not GST-free.

service of supplying a massage made by the masseuse to the insurer.

132D. Assuming the other elements of section 9-5 are met, the supply by the masseuse to the insurer is a taxable supply. The insurer, in turn, is entitled to an input tax credit under Division 11 for the fee paid to the masseuse, assuming the other elements of section 11-5 are met.

19. Detailed contents list

(a) Delete:

WHA Ltd 50

(b) Insert:

Identifying a pre-existing framework or agreement 64A

Example 16A: Massage services 132A

20. Subject references

Delete:

- contractual obligation
- third party payer

21. Case references

(a) Delete

- *WHA Ltd & Anor v. Customs and Excise Commissioners* [2003] BVC 537; [2003] EWHC 305 (Ch)

(b) Insert:

- *Commissioner of Taxation v Secretary to the Department of Transport (Victoria)* 2010 FCAFC 84, 2010 ATC 20-196; (2010) 76 ATR 306.

Date of effect

The Addendum amends GSTR 2006/10 to state the Commissioner's view of the law both before and after its date of issue, subject to the transitional arrangements described at paragraphs 6A to 6B of the Ruling.

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ATO references

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