


# ***GSTR 2006/1A1 - Addendum - Goods and services tax: guarantees and indemnities***

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## Addendum

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### Goods and Services Tax Ruling

#### Goods and services tax: guarantees and indemnities

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2006/1 to reflect amendments made to the *A New Tax System (Goods and Services Tax) Regulations 1999* by the *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No. 1)* and the *A New Tax System (Goods and Services Tax) Amendment Regulation 2013 (No. 2)*.

This addendum also updates the Date of Effect section to reflect amendments within the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010* which came into effect on 1 July 2010.

#### **GSTR 2006/1 is amended as follows:**

**1. Paragraph 1**

In the first sentence, omit 'item 7 in the table to subregulation 40-5.09(3) (item 7)'; substitute 'items 7 and 7A in the table in subregulation 40-5.09(3)'.

**2. Paragraph 2**

Omit 'item 7'; substitute 'items 7 or 7A'.

**3. Paragraph 4**

Omit the paragraph; substitute:

4. This Ruling applies 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).

**4. Paragraph 5**

Omit the paragraph.

## 5. Paragraph 7

Omit 'item 7' in the first sentence; substitute 'items 7 and 7A in the table in subregulation 40-5.09(3) of the GST Regulations'.

## 6. Paragraph 8

Omit the paragraph.

## 7. Paragraph 9

Omit 'item 7'; substitute 'items 7 or 7A'.

## 8. Paragraph 21

Omit:

Item 7 in the table lists:

A guarantee, including an indemnity (except a warranty for goods or a contract of insurance or reinsurance).

Substitute:

Item 7 of the table specifies a guarantee.<sup>1A</sup> Item 7A specifies an indemnity that holds a person harmless from any loss as a result of a transaction the person enters with a third party.

## 9. Paragraph 22

Omit the paragraph, substitute:

22. Parts 5 and 5A of Schedule 7 to the GST Regulations provide the following examples of guarantees covered by item 7 and indemnities covered by item 7A:

1. a surety bond that is a guarantee (item 7);
2. a performance bond (item 7); and
3. an indemnity that is not a contract of insurance (item 7A).<sup>1B</sup>

## 10. Paragraph 23

Omit 'is'; substitute 'are'.

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<sup>1A</sup> Item 7 was amended by *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No. 1)* with effect from 1 July 2012. Item 7 previously covered 'a guarantee, including an indemnity (except a warranty for goods or a contract of insurance or reinsurance)'.

<sup>1B</sup> *A New Tax System (Goods and Services Tax) Amendment Regulation 2013 (No. 2)* amended the examples for guarantees and indemnities previously listed under Part 5 of Schedule 7 to the Regulations.

**11. Paragraph 32**

Omit 'item 7'; substitute 'item 7A'.

**12. Paragraph 39**

Omit the second sentence; substitute 'Unlike a surety under a guarantee or indemnity covered by item 7 or 7A, an insurer has no underlying right to be indemnified by the insured.'

**13. Paragraph 48**

After 'Ruling and Explanation', omit the heading; substitute:

**Meaning of the terms 'guarantee' and 'indemnity' in items 7 and 7A**

**14. Paragraphs 48, 49 and 50**

Omit the paragraphs including the footnotes.

**15. Paragraph 51**

Omit the paragraph; substitute:

51. Common characteristics of guarantees and indemnities, in the context of items 7 and 7A of the table in subregulation 40-5.09(3) of the GST Regulations, are that the arrangements involve three parties, and in each arrangement there is an underlying indemnity which flows from the relationships between the parties.

**16. Paragraph 67**

(a) Omit 'item 7' in the first sentence; substitute 'item 7A'.

(b) Omit the second sentence; substitute 'The Commissioner considers that the intention of listing a 'guarantee' in item 7 and an 'indemnity' in item 7A was to ensure that supplies of interests in guarantees and those indemnities covered by item 7A are financial supplies.'

**17. Paragraph 69**

Omit the paragraph.

## 18. Paragraph 70

(a) After the heading 'Indemnities'; insert:

69A. Item 7A, which applies from 1 July 2012, covers an indemnity that holds a person harmless from any loss as a result of a transaction the person enters with a third party. An income guarantee is therefore not covered by item 7A as it does not involve holding a person harmless from any loss as a result of a transaction the person enters into with a third party.

69B. Prior to the introduction of item 7A, the provision of an interest in an indemnity made before 1 July 2012 was covered by item 7. The expression 'indemnity' takes different meanings according to its context. At its broadest, it is used to refer to an undertaking to hold another harmless against loss. In this broad sense, it may embrace recompense for any loss or liability which one person has incurred, arising out of contract or by operation of law. An example of the latter is a guarantor's right of indemnity from a principal.<sup>23A</sup>

69C. The High Court in *Sunbird Plaza Pty Ltd v. Maloney (Sunbird Plaza)*<sup>23B</sup> has described an indemnity as 'a promise by the promisor that he will keep the promisee harmless against loss as a result of entering into a transaction *with a third party*' (emphasis added). Given its use in former item 7 as part of the expression 'Guarantee including an indemnity' in the context of guarantees and indemnities of the type supplied for consideration, we consider that 'indemnity' was used in former item 7 in the sense articulated by the High Court in *Sunbird Plaza*.

69D. Although item 7A expressly limits the type of indemnity that it covers, the introduction of item 7A does not indicate that the previous use of the term 'indemnity' in former item 7 had a broader meaning. In discussing the introduction of item 7A, the Explanatory Statement to *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No. 1)* states:

It is not intended that these amendments change the existing interpretation of the terms guarantee, indemnity or warranty as set out under item 7 of the table in subregulation 40-5.09(3). The amendments merely clarify the drafting and confirm the existing treatment.

(b) Omit the first sentence.

(c) Insert 'covered by item 7A' after 'indemnity' in the second sentence.

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<sup>23A</sup> J Phillips and J Donovan, *The modern contract of guarantee*, 3<sup>rd</sup> Edn, LBC Information Services, Sydney, 1996 at page 25.

<sup>23B</sup> (1988) 166 CLR 245 at 254; (1988) 77ALR 205 at 207.

**19. Paragraph 72**

Omit 'item 7' in the first sentence; substitute 'item 7A'.

**20. Paragraph 73**

After the paragraph; insert:

73A. Not every arrangement involving three parties that results in the creation of an indemnity involves a supply of an indemnity under item 7A. For example, there is a requirement arising in law that a principal indemnifies its agent, or a third party that contracted with its agent, if the agent is unwilling or unable to do so. These indemnities are not treated as being separate to the contract under which they arise, in a similar way to the underlying indemnity.

**21. Paragraph 94**

Omit the first sentence; substitute 'Under item 21 in the table in regulation 40-5.12, a supply of, or an interest in or under a warranty for goods is not a financial supply.<sup>27A</sup>'.

**22. Paragraph 95**

Omit the paragraph; substitute:

95. A warranty for the quality of services, or property other than goods, although not covered by item 21 in the table in regulation 40-5.12, does not fall within item 7 in the table in subregulation 40-5.09(3) unless it has the character of a guarantee. This is because item 7 deals with guarantees, and only arrangements which have the characteristics of a guarantee described in paragraphs 24 to 28 and 53 to 55 fit within the item. Should a warranty for services or property other than goods have the necessary characteristics, it will fall within item 7.

**23. Paragraph 98**

Omit 'paragraphs 7 and 48 to 52' in the last sentence; substitute 'paragraphs 24 to 28 and 53 to 55'.

**24. Paragraph 105**

In the second sentence, omit 'or an indemnity'.

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<sup>27A</sup> Item 21 applies from 1 July 2012. Prior to 1 July 2012, item 7 in the table in subregulation 40-5.09(3) excluded a warranty for goods.

**25. Paragraph 106**

Omit the paragraph (including the heading); substitute:

**Examples of interests included in items 7 and 7A**

106. The following paragraphs discuss particular types of guarantees and indemnities covered by items 7 and 7A.

**26. Paragraph 107**

Omit the paragraph; substitute:

107. The example in Part 5A of Schedule 7 to the GST regulations for item 7A is 'an indemnity that is not a contract of insurance'. Insurance is a special form of indemnity and is included in item 10 of regulation 40-5.12. Therefore, a supply of, or an interest in or under insurance is not a financial supply. The characteristics of guarantees covered by item 7, indemnities covered by item 7A and contracts of insurance are quite different. Paragraphs 38 to 41 discuss the features of insurance.

**27. Paragraph 108**

Omit the paragraph (including footnote 30); substitute:

108. Some contracts of indemnity are neither indemnities covered by item 7A in the table in subregulation 40-5.09(3) nor contracts of insurance.

**28. Paragraph 111**

In the first sentence, omit 'second'; substitute: 'first'.

**29. Paragraph 113**

Omit 'or indemnities'.

**30. Paragraph 114**

Omit 'third'; substitute: 'second'.

**31. Paragraph 124**

Omit the second and third sentences (including footnote 33); substitute 'The provision, creation, or acquisition of an interest in an insurance bond that is a performance bond falls within item 7 and is an input taxed supply. However, to the extent that a product is a contract of insurance, the product falls within item 10 of the table in subregulation 40-5.12 as it is not a financial supply.'

**32. Paragraph 125**

Omit the first sentence of the paragraph; substitute 'Regardless of the name given to the product, it is a guarantee under item 7 if it has the characteristics outlined at paragraphs 24 to 28 and 53 to 55 of this Ruling or an indemnity under item 7A if it has the characteristics outlined at paragraphs 27 to 28 and 69A to 73A of this Ruling.'

**33. Footnote 35**

Omit 'Subparagraph 9-15(3)(a)(ii)'; substitute 'Paragraph 9-17(1)(b)'.

**34. Paragraph 139**

Omit '69'; substitute '68 and 71 to 73'.

**35. Detailed contents list****(a) Omit:**

The meaning of item 7: 'guarantee, including indemnity'	48
Indemnities	70
Examples of interests included in item 7'	106

**(b) Substitute:**

Meaning of the terms 'guarantee' and indemnity' in items 7 and 7A	48
Indemnities	69A
Examples of interests included in items 7 and 7A'	106

**36. Related Rulings/Determinations**

Omit 'GSTR 1999/1'; Insert 'TR 2006/10'.

**37. Legislative references**

Omit:

- ANTS(GST)A 1999 9-15(3)(a)(ii)

# GSTR 2006/1

Insert:

- ANTS(GST)A 1999 9-17(1)(b)
- ANTS(GST)R 1999 40-5.12
- A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No.1)
- A New Tax System (Goods and Services Tax) Amendment Regulation 2013 (No. 2)
- TAA 1953 Sch 1 Div 358

## 38. Other references

Insert:

- Explanatory Statement to the A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No. 1)

This Addendum applies both before and after its date of issue, subject to the commencement and application provisions of each amending Act or Regulation to which it refers.

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## Commissioner of Taxation

11 December 2013

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ATO references

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