GSTR 2006/5 - Goods and services tax: meaning of 'Commonwealth, a State or a Territory'

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Generated on: 29 November 2026, 01:38:14 AM

Goods and Services Tax Ruling

Goods and services tax: meaning of 'Commonwealth, a State or a Territory'

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Preamble

This document is a ruling for the purposes of section 37 of the ***Taxation Administration Act 1953****. You can rely on the information presented in this document which provides advice on the operation of the GST system.*

[Note: This is a consolidated version of this document. Refer to the Tax Office 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 discusses the meaning of 'Commonwealth, a State or a Territory' for the purposes of the following provisions of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act):

(a) section 9-20 – Enterprises;

(b) section 38-15 – Other government funded health services;

(c) section 38-25 – Residential care etc;

(d) section 38-30 – Community care etc;

(e) section 38-445 – Grants of freehold land and similar interests by governments;

(f) section 38-450 – Leases preceding grants of freehold land and similar interests by governments;

(g) section 72-95 – Commonwealth government entities;

(h) section 72-100 – State or Territory government entities; and

(i) section 75-10 – The amount of GST on taxable supplies (of freehold interests etc).

2. This Ruling does not address:

- the meaning of 'an authority of the Commonwealth or of a State or Territory' in paragraph (b) of the definition of 'Australian government agency';[1] or

[1] Section 195-1 states that Australian government agency has the meaning given by section 995-1 of the *Income Tax Assessment Act 1997.* Section 995-1 defines an Australian government agency as:
(a) the Commonwealth, a State or Territory; or
(b) an authority of the Commonwealth or of a State or Territory.

- when an entity shares the immunities and privileges of the Crown.

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

Date of effect

4. This Ruling explains our 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 section 37 of the *Taxation Administration Act 1953*. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

5. If this Ruling conflicts with a previous private ruling that you have obtained, this public ruling prevails. However, if you have relied on a private 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.

Ruling with Explanation

6. The Commissioner considers that the Commonwealth, a State or a Territory includes a department, agency or organisation of the type referred to in the definition of 'government entity' in section 195-1.

7. Section 195-1 adopts the meaning of 'government entity' given by section 41 of the *A New Tax System (Australian Business Number) Act 1999*. This means that the Commonwealth, a State or a Territory, as the case may be, includes any of the following:

(a) a Department of State of the Commonwealth;

(b) a Department of the Parliament;

(c) an Executive Agency, or Statutory Agency, within the meaning of the *Public Service Act 1999*;

(d) a Department of State of a State or Territory; and

(e) an organisation that:

(i) is not an entity;[2] and

(ii) is either established by the Commonwealth, a State or a Territory (whether under a law or not)

[2] Entity is defined for this purpose in section 37 of the *A New Tax System (Australian Business Number) Act 1999* in the same terms as the definition of 'entity' in section 184-1 of the GST Act.

to carry on an enterprise or established for a public purpose by an Australian law; and

(iii) can be separately identified by reference to the nature of the activities carried on through the organisation or the location of the organisation;

whether or not the organisation is part of a Department or branch described in paragraph (a), (b), (c) or (d) or of another organisation of the kind described in this paragraph.

Corporations

8. The Commonwealth, a State or a Territory is not limited to the departments, agencies and organisations described at paragraph 7 and may include a corporation which is not a 'government entity' as defined in section 195-1.[3] However, not every corporation in which the Commonwealth or a State or Territory has an interest is part of the Commonwealth or the State or Territory.

9. The Commissioner considers that this issue is to be determined in accordance with the principles developed by the High Court of Australia in the cases concerning the meaning of 'a State' in section 114 of the Australian Constitution, most recently in *SGH Ltd v. Commissioner of Taxation* [2002] HCA 18; (2002) 2002 ATC 4366; (2002) 49 ATR 521; (2002) 210 CLR 51 (the *SGH* case).[4] The discussion which follows is drawn from these cases.

10. For ease of reference, the discussions refer to a State, as that is the context in which the issue most commonly arises for GST purposes, but the principles apply equally in determining whether a corporation is the Commonwealth or a Territory. Similarly, while the discussion focuses upon corporations, many of the principles could apply to other structures, such as a trust.

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[3] 'Government entity' has the meaning given by section 41 of the *A New Tax System (Australian Business Number) Act 1999*.

[4] Other relevant cases include *South Australia v. The Commonwealth of Australia & Anor* [1992] HCA 7; (1993) 174 CLR 235; (1992) 92 ATC 4066; (1992) 23 ATR 10 (*South Australia v. The Commonwealth*), *Deputy Commissioner of Taxation v. State Bank of New South Wales* (1992) 174 CLR 219; (1992) 92 ATC 4079; (1992) 23 ATR 1 (*DCT v. State Bank*), *State Bank of NSW v. Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 (*State Bank NSW v. Commonwealth Savings Bank*), *Superannuation Fund Investment Trust v. Commissioner of Stamps (SA)* (1979) 145 CLR 330; 79 ATC 4429; (1979) 10 ATR 97 (*the SFIT case*) and *Inglis v. Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 (*Inglis*).

11. The fundamental principle established by these cases is that, if the corporation is discharging governmental functions for the State – that is, the State is carrying on the relevant business or other function through the corporation – the corporation is the State.[5] On the other hand, if the intention is for the corporation to perform its functions independently of, and not as an instrument of, the State – so that the concept of a State activity cannot be realistically applied to that which the corporation does – the corporation is not the State.[6]

12. To determine which of these characterisations applies in a particular case, the following principles should be considered:

(a) whether a corporation is the State requires consideration of every feature relevant to its relationship with the State;[7]

(b) it is the ownership and management of a corporation, and the purposes it is required to pursue, that will most often reveal whether the corporation is the State. If examination of those features reveals that the corporation is wholly owned and controlled by the State, and must act solely in the interests of the State, the conclusion that it is the State will readily follow;[8]

(c) it follows that it is not sufficient to demonstrate a government policy of favouring or facilitating the creation of the corporation in pursuit of some aspect of the public interest. If the State does not control the conduct of the affairs of the corporation, the State cannot be said to be carrying on activities of government through the corporation;[9]

(d) a provision that the corporation must pursue the interests of the State or the public or that its policies could be determined by the executive government of the State is an indicator that the corporation is the State; [10]

(e) conversely, a provision that positively permits the corporation to take account of other external interests is a contrary indicator.[11] An example would be such a provision in relation to the interests of shareholders who do not represent the State;

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[5] See the joint judgment in the *SGH* case at paragraph 16. The issue is not determined by asking whether the entity is entitled to the privileges and immunities of the Crown: *SGH case* at paragraph 15.
[6] See *Inglis*, per Kitto J at paragraph 4, adopted by the joint judgment in *State Bank NSW v. Commonwealth Savings Bank* at paragraph 3.
[7] See the joint judgment in the *SGH* case at paragraph 22.
[8] See the joint judgment in the *SGH* case at paragraph 22.
[9] See the joint judgment in the *SGH* case at paragraph 22.
[10] See the joint judgment in the *SGH* case at paragraph 31 and Callinan J at paragraph 131. Also, *Inglis* per Kitto J (with whom Windeyer J agreed) at paragraph 8.
[11] See the joint judgment in the *SGH* case at paragraphs 28 and 32.

(f) a corporation may be the State even though its functions are not traditional and inalienable functions of government, but extend to commercial functions.[12] However, that a corporation's functions are traditional or generally accepted governmental functions may assist in forming the view that the corporation is an instrument of the State;[13]

(g) the participation of the executive government in formulating policy and making decisions is an indicator that the corporation is the State.[14] For example, a power for a Minister or the Executive Council to override decisions of the board is indicative that the corporation is an instrument of the State;

(h) conversely, the absence of control by the executive, and the absence of guidelines in the exercise of its functions, point to the corporation not being the State.[15] However, the weight to be given to the absence of a power to interfere with the day to day control of the corporation's activities will depend upon the occasion for the exercise of such a power. The absence of the power will be of little significance where the occasion for the exercise of it would be rare, for example, where a duty to pursue the interests of the State or the public is imposed on the Board in any case;[16]

(i) the absence of corporators (shareholders) has been held to be a relevant factor indicating that the corporation may be the State;[17]

(j) the ability of the executive government to control the appointment and, more particularly, the removal of directors is an indicator that the corporation is the State;[18]

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[12] *DCT v. State Bank* at paragraph 21.
[13] *Inglis* per Kitto J (with whom Windeyer J agreed) at paragraph 4.
[14] See the joint judgment in the *SGH* case at paragraph 22 and Callinan J at paragraph 131.
[15] See generally the *SFIT* case.
[16] *State Bank of NSW v. Commonwealth Savings Bank* at paragraph 16.
[17] See the *SGH* case per Callinan J at paragraph 131, *State Bank of NSW v. Commonwealth Savings Bank* at paragraphs 3 and 11 and *Inglis* per Kitto J (with whom Windeyer J agreed) at paragraphs 6.
[18] See the *SGH* case per Callinan J at paragraph 131, *State Bank of NSW v. Commonwealth Savings Bank* at paragraph 12 and *Inglis* per Kitto J (with whom Windeyer J agreed) at paragraph 10.

(k) the financial arrangements for the corporation are likely to be indicative. These include whether there is a requirement that the corporation's accounts are to be audited by the State Auditor-General and the results reported to the State's Treasurer, whether the corporation's borrowings are guaranteed by the State or may only be made with the consent of the Treasurer, and the destination of profits of the corporation, that is, whether they are distributed to the State;[19]

(l) a regulatory role, even a modest one, such as the power to make by-laws, is an indicator that the corporation is an instrument of the State;[20]

(m) in the consideration of whether a corporation is the Commonwealth, a requirement for the corporation to pay income tax is unlikely to be relevant. It may increase the Commonwealth's participation in profits of the corporation, but otherwise it merely assimilates the financial accounts of the corporation or those of other non-government corporations.[21] The Commissioner considers that similar comments apply in respect of an obligation to pay income tax equivalents under National Compensation Policy arrangements; and

(n) while it may be that there is no impediment to a corporation established under the general corporations or associations incorporation law being the State, the Commissioner is not aware of any decided case where such a corporation has been held to be the State.[22] A submission that such a corporation is the State would require careful consideration by the Commissioner. This is so whether the corporation's shares are owned directly by the State, such as through a Minister of the Crown, or by another corporation controlled by the State.

[19] *State Bank of NSW v. Commonwealth Savings Bank* at paragraph 14.
[20] *State Bank of NSW v. Commonwealth Savings Bank* at paragraph 14.
[21] *Inglis* per Kitto J (with whom Windeyer J agreed) at paragraph 10.
[22] See Gummow J in the *SGH* case at paragraph 63 where it is suggested that drawing a distinction between a 'general' and a special or particular law of corporations in the context of section 114 of the Constitution would be to complicate the section, 'which is concerned with matters of substance rather than form'. On the other hand, Callinan J at paragraph 149 thought it 'not irrelevant' that SGH was not created directly by the State but by another corporation which was the State. Contrast *The Commonwealth of Australia v. Bogle* (1953) 89 CLR 229 per Fullagar J (with whom Dixon CJ and Web and Kitto JJ agreed) at 267-268.

Local governments

13. Local governments are not a State or a Territory. A local government performs its functions independently of, and not as an instrument of, the State. It neither operates solely in the interests of the State, nor is controlled by the State, but is an autonomous body, separate from the State.

14. This is confirmed by the High Court case of *Federated Municipal and Shire Council Employees Union of Australia v. The Lord Mayor, Aldermen, Councillors and Citizens of the City of Melbourne* (1918-19) 26 CLR 508. The Court held that municipal corporations established under State laws are not, with regard to the making, maintenance, control and lighting of public streets, instrumentalities of State government.

15. Also, in *Sydney City Council v. Reid* (1994) 34 NSWLR 506 at 520, Kirby J in describing what a local government is said:

> Whilst local government is indeed a form of government, it is also a creature of statute. Out of recognition of the imperatives of democratic self government, the statutory provisions have enacted the creation of largely independent corporations accountable (in the ordinary course) not to the Minister (that is the Crown), but to the people who elect them. In this sense, the measure of independence of statutory corporations, by which the government is ordinarily carried out is inconsistent with viewing their employees as servants of the Crown.[23]

Detailed contents list

16. Below is a detailed contents list for this Goods and Services Tax Ruling:

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Commissioner of Taxation
26 April 2006

[23] See also *Bodney v. Westralia Airports Corporation Pty Ltd* (2000) 180 ALR 91; [2000] FCA 1609; (2000) 109 FCR 178 and *Townsend v. Waverley Council* (2001) NSWSC 384.

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 1999/1

Subject references:

- agency
- Commonwealth
- corporation
- entity
- government department
- local government
- State
- Territory

Legislative references:

- ANTS(ABN)A 1999 37
- ANTS(ABN)A 1999 41
- ANTS(GST)A 1999 9-20
- ANTS(GST)A 1999 38-15
- ANTS(GST)A 1999 38-25
- ANTS(GST)A 1999 38-30
- ANTS(GST)A 1999 38-445
- ANTS(GST)A 1999 38-450
- ANTS(GST)A 1999 72-95
- ANTS(GST)A 1999 72-100
- ANTS(GST)A 1999 75-10
- ANTS(GST)A 1999 184-1
- ANTS(GST)A 1999 195-1
- Commonwealth of Australia Constitution Act 114
- ITAA 1997 995-1
- Public Service Act 1999
- TAA 1953 37

Case references:

- Bodney v. Westralia Airports Corporation Pty Ltd (2000) 180 ALR 91; [2000] FCA 1609; (2000) 109 FCR 178
- Deputy Commissioner of Taxation v. State Bank of New South Wales (1992) 174 CLR 219; (1992) 92 ATC 4079; (1992) 23 ATR 1
- Federated Municipal and Shire Council Employees Union of Australia v. The Lord Mayor, Aldermen, Councillors and Citizens of the City of Melbourne (1918-19) 26 CLR 508
- Inglis v. Commonwealth Trading Bank of Australia (1969) 119 CLR 334
- SGH Ltd v. Commissioner of Taxation [2002] HCA 18; (2002) 2002 ATC 4366; (2002) 49 ATR 521; (2002) 210 CLR 51
- South Australia v. The Commonwealth of Australia & Anor [1992] HCA 7; (1993) 174 CLR 235; (1992) 92 ATC 4066; (1992) 23 ATR 10
- Sydney City Council v. Reid (1994) 34 NSWLR 506
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- Superannuation Fund Investment Trust v. Commissioner of Stamps (SA) (1979) 145 CLR 330; 79 ATC 4429; (1979) 10 ATR 97
- The Commonwealth of Australia v. Bogle (1953) 89 CLR 229
- Townsend v. Waverley Council (2001) NSWSC 384

ATO references

NO: 2006/3079
ISSN: 1443-5160
ATOlaw topic: Goods and Services Tax ~~ Miscellaneous rules ~~ agency