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

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Goods and Services Tax Ruling

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

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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 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
- 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 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).

4A. The Addendum to this Ruling that issued on 28 March 2012 explains the Commissioner's view of the law as it applied before and after its date of issue. You can rely on this Addendum from its date of issue (28 March 2012) for the purposes of section 357-60 of Schedule 1 to the Taxation Administration Act 1953.

5. [Omitted.]

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;

[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.

(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) 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.

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[2] Entity is defined for this purpose in section 41 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.

[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*).

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.

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]

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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.

(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;

(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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[11] See the joint judgment in the *SGH* case at paragraphs 28 and 32.
[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 may be a State or Territory. As is the case for corporations, the Commissioner considers that the principles developed by the High Court of Australia in cases concerning the meaning of 'a State' in section 114 of the Constitution, as described at paragraphs 8 to 12 of this Ruling, also apply in determining whether a particular local government is a 'State' or 'Territory' for the purposes of the GST Act.

14. There have been several cases in which the Courts have considered whether a local government is a 'State' for the purposes of section 114 of the Constitution.

15. In *The Municipal Council of Sydney v. The Commonwealt1h*[23] *('Municipal Council of Sydney'),* in three separate judgements, all judges of the High Court agreed that the Municipal Council of Sydney was the 'State' for the purposes of section 114 of the Constitution. The power delegated to the Council, by State legislation, which allowed the Council to levy rates, was the determinative factor in that case.

15A. In *Deputy Commissioner of Taxation v. State Bank of New South Wales*,[24] the High Court referred to the *Municipal Council of Sydney* decision and said:

> Indeed, the decision in *Sydney Municipal Council v The Commonwealth* is direct authority for the proposition that a corporation exercising governmental functions is 'a State' for the purposes of section 114.

15B. The Full Federal Court's decision in *Greater Dandenong City Council v. Australian Municipal, Administrative, Clerical and Services Union*[25] *('Dandenong City Council)* is another instance where a local government was considered to be a 'State' for the purposes of section 114 of the Constitution, albeit that it was the constitutional immunity under paragraph 51(xxxv) of the Constitution that was the key focus of that case. In his judgement, Finkelstein J referred to the *Municipal Council of Sydney* decision and considered several aspects of the statute under which the Council was established in reaching the conclusion that the Council was a 'mere instrumentality of the State'.[26]

15C. The *Municipal Council of Sydney* decision and the *Dandenong City Council* decision both turned upon the specific features of the particular Councils involved; those specific features being bestowed upon them by State legislation.

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[23] (1904) 1 CLR 208; (1904)10 ALR (CN) 29
[24] (1992) 174 CLR 219 at 233.
[25] [2001] FCA 349; 112 FCR 232; 184 ALR 641.
[26] [2001] FCA 349 at 226.

15D. These decisions demonstrate that the legislation constituting a particular local government must be considered to determine whether or not it is a State for the purposes of section 114 of the Constitution. These decisions do not stand for a general proposition that local governments are a State for the purposes of section 114 of the Constitution.

15E. The decisions in *Municipal Council of Sydney* and *Dandenong City Council* are contrasted with decisions where the Court has determined that local governments do not operate as instrumentalities of a State or Territory Crown, and therefore are not considered to have the immunities of the Crown.[27] However, the principles for determining whether an agency or instrumentality represents the 'Crown' and has been endowed with the privileges and immunities of the 'Crown' for a particular purpose are different to the principles applied to determine whether a body is a 'State' for the purposes of section 114 of the Constitution.[28] Therefore, a local government that does not share the immunities of the Crown may, nevertheless, be the State for the purposes of section 114 of the Constitution and may, similarly, be the State or Territory for the purposes of the GST Act.

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

[27] See *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; *Sydney City Council v. Reid* (1994) 34 NSWLR 506; *Bodney v. Westralia Airports Corporation Pty Ltd* (2000) 180 ALR 91 at 103-4; *Townsend v. Waverley Council* [2001] NSWSC 384.

[28] See *Deputy Commissioner of Taxation v. State Bank of New South Wales* (1992) 174 CLR 219; 92 ATC 4079; 23 ATR 1.

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

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 51(xxxv)
- Commonwealth of Australia Constitution Act 114
- ITAA 1997 995-1
- Public Service Act 1999
- TAA 1953 Sch 1 357-60
- TAA 1953 Sch 1 Div 358

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
- Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union [2001] FCA 349; 112 FCR 232; 184 ALR 641.
- Inglis v. Commonwealth Trading Bank of Australia (1969) 119 CLR 334
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- 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
- State Bank of NSW v. Commonwealth Savings Bank of Australia (1986) 161 CLR 639
- 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

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