

GSTR 2006/9A2 - Addendum - Goods and services tax: supplies

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Addendum

Goods and Services Tax Ruling

Goods and services tax: supplies

This Addendum amends Goods and Services Tax Ruling GSTR 2006/9 to:

- clarify the scope of, and reasons for, Proposition 10, which is discussed in Part 2 of the Ruling. This proposition is that it is necessary to analyse the transaction that occurs, not a transaction that might have occurred. This further clarification is in response to the High Court decision in *Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 2008 ATC 20-028; (2008) 68 ATR 158, and to maintain consistency with the Goods and Services Taxation Ruling GSTR 2009/3 on cancellation fees;
- revise the Commissioner's view relating to the vesting of land in a government authority under statute. The view contained in the Ruling was reconsidered in the context of the Administrative Appeals Tribunal decision of *Re Hornsby Shire Council v. Commissioner of Taxation* [2008] AATA 1060; 2008 ATC 10-061; (2008) 71 ATR 442 (*Hornsby Shire Council*). The previous view was that an owner of land does not make a supply when their land vests in an authority as a result of the authority compulsorily acquiring the land. The revised view is that in some cases where the owner of land does something to cause its land to vest in the authority, as was the situation in the *Hornsby Shire Council* case, the owner will, in those circumstances, make a supply of its land to the authority; and
- clarify the existing Commissioner's view in relation to tripartite arrangements, in particular third party payer arrangements, by referring to the Federal Court decision of *TT-Line Company Pty Ltd v. Federal Commissioner of Taxation* [2009] FCA 658; 2009 ATC 20-110 and providing four further examples of supplies in this context.

GSTR 2006/9 is amended as follows:

1. Paragraph 8

After the paragraph, insert:

Note: The Addendum to this Ruling that issued on 1 July 2009 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 (1 July 2009) for the purpose of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

2. Footnote 14

Omit '[2006] FCAFC 115'; substitute '(2006) 152 FCR 461'.

3. Paragraph 76

After the words 'the ordinary meaning of 'supply' required a positive act', insert the footnote:

^{31A} In the Administrative Appeals Tribunal decision of *Re Hornsby Shire Council v. Commissioner of Taxation* [2008] AATA 1060; 2008 ATC 10-061; (2008) 71 ATR 442 at [70], although it was unnecessary to consider the issue, Deputy Presidents Walker and Block referred to the judgement in *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682 and were of the view that the making of a supply requires some positive action on the part of the supplier.

4. Footnote 32

Omit '[2006] FCAFC 115'; substitute '(2006) 152 FCR 461'.

5. Paragraph 82

Omit the paragraph; substitute:

82. The effect of the gazettal notice is that the legal ownership of the land, described in the notice, is vested in the authority acquiring the land, and that the land becomes freed from any other interests. The entity's interest in the land, whether legal or equitable, is extinguished. When land vests in an authority in consequence of a gazettal notice, it is necessary to examine the relevant facts and circumstances to determine whether or not the owner makes a supply of the land to the authority. In cases where land vests in the authority as a result of the authority seeking to acquire the land, and initiating the compulsory acquisition process pursuant to its statutory right, then the owner does not make a supply because it takes no action to cause its legal interest to be transferred or surrendered to the authority.

82A. However, in other cases the owner may do something or undertake some action such that it does make a supply of the land that vests in the authority. For example, see the decision in *Re Hornsby Shire Council v. Commissioner of Taxation*^{35A} in which the Administrative Appeals Tribunal found that, in the circumstances^{35B} the owner, CSR Limited, made a supply of its land by way of entry into an obligation and the surrender of its land when it issued a notice, pursuant to statute, compelling the Hornsby Shire Council to acquire its land.^{35C}

6. Paragraph 83

Omit the paragraph; substitute:

83. Some statutes provide that land remaining, where only part of the land (the 'target land') is to be compulsorily acquired, will also be compulsorily acquired if the owner and the acquiring authority agree that the remaining land will be of no practical use or value to the owner. In cases where, prior to the vesting of the target land, the owner and authority agree that the remaining land will also be acquired, and the remaining land is acquired contemporaneously with the target land, it is the Commissioner's view that the owner does not make a supply of the remaining land to the acquiring authority. Although the owner may have requested that the remaining land be acquired, the agreement reached between the parties, and the resulting acquisition of the remaining land is integral, ancillary or incidental to the compulsory acquisition of the target land.

83A. In contrast to the circumstances described in paragraph 83 of this Ruling, the land owner may, at a time subsequent to the authority's acquisition of the target land, request that the authority acquire the remaining land on the basis that it is of no practical use or value to the owner. Consistent with the decision in *Re Hornsby Shire Council v. Commissioner of Taxation*,^{35D} in these circumstances it is the Commissioner's view that the owner has taken some action by requesting that the remaining land be acquired and makes a supply of the remaining land by way of surrender to the authority. In such cases, the acquisition of the remaining land is not integral, ancillary or incidental to the authority's compulsory acquisition of the target land.

^{35A} [2008] AATA 1060; 2008 ATC 10-061; (2008) 71 ATR 442.

^{35B} The owner, CSR Limited (CSR), owned land which was zoned for a public purpose as open space. Under the Local Environment Plan (LEP), owners of land which was zoned open space could compel, under statute, the authority to compulsorily acquire its land. In accordance with CSR's rights under the LEP, it notified the Council that it required the Council to compulsorily acquire its land. The Council published a notice in the Gazette that had the effect of vesting the land in the Council.

^{35C} *Re Hornsby Shire Council v Commissioner of Taxation* [2008] AATA 1060; 2008 ATC 10-061; (2008) 71 ATR 442 at paragraph 71.

^{35D} [2008] AATA 1060; 2008 ATC 10-061; (2008) 71 ATR 442.

7. Paragraph 91

- (a) Omit the heading; substitute:

Acquisition by agreement under a standard land contract

- (b) Omit 'initiated'; substitute 'made'.

8. Paragraph 107

After the paragraph, insert:

107A. In the Federal Court decision of *TT-Line Company Pty Ltd v. Federal Commissioner of Taxation* [2009] FCA 658; 2009 ATC 20-110, Stone J confirmed that given the express statement in subsection 9-15(2), there does not have to be an enforceable relationship for there to be a sufficient nexus between a supply and a payment for the payment to be characterised as consideration. Stone J noted at paragraph 29 that the European Court of Justice decision of *Tolsma v. Inspecteur der Omzetbelasting Leeuwarden* [1994] BVC 117, which held that voluntary payments made to a busker were not consideration within the meaning of Article 2(1) of the Sixth Directive, is clearly inapplicable in light of subsection 9-15(2).

9. Paragraph 112

Omit the paragraph; substitute:

112. There may be a number of different ways by which an entity could achieve a desired end result. In addition, parties to an arrangement may contemplate an entity making a supply of a particular kind but, as events transpire, a different supply may actually be made by the entity. In determining whether the entity has made a supply, and the true character of any supply it has made, what is relevant is what the entity actually did, rather than what it might have done.^{45A}

10. Paragraph 177

- (a) Omit the last sentence.

^{45A} See *Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 2008 ATC 20-028; (2008) 68 ATR 158, and in particular paragraph 13 of the judgment. See also paragraphs 98 to 102 of Goods and Services Tax Ruling GSTR 2009/3 Goods and services tax: cancellation fees.

- (b) After the paragraph, insert:

177A. This point was confirmed in the Federal Court decision of *TT-Line Company Pty Ltd v. Federal Commissioner of Taxation* [2009] FCA 658; 2009 ATC 20-110. This case considered an arrangement under which a government entity made payments to a ferry operator to subsidise the transport of eligible passengers. The arrangement was administered by Ministerial Direction. The ferry operator was not obligated under the arrangement to make the supplies of transport to eligible passengers at a discounted fare.^{52A} However, if it did provide the discounted fare under the terms of the arrangement, it was entitled to be paid an amount by the government entity. In finding that the payments made by the government entity formed part of the consideration for the supply of transport made by the ferry operator to the eligible passengers, Stone J stated at paragraph 28:

It was clearly a payment 'in connection with' the supply of the travel services to Mr Egan and might also be described as having been made 'in response to or for the inducement of' the supply of travel services to Mr Egan. That being so, the fact the consideration for the supply of services to Mr Egan flowed in part from the third party (the Commonwealth) and that Mr Egan was never under any obligation to pay the full (unrebated) amount is not to the point.

11. Paragraph 178

Omit the paragraph, substitute:

178. Similar to section 9-15, section 2 of the NZ GST Act states that consideration in relation to a supply to anyone includes any payment made 'by any other person'. The New Zealand case of *Turakina Maori Girls College Board of Trustees & Ors v. C of IR* (1993) 15 NZTC 10,032 provides further support that a third party may pay for a supply but not be the recipient of the supply. That case considered whether attendance dues paid by parents and guardians were consideration for supplies made by the proprietors of the school property. In its decision the NZ Court of Appeal stated (at 10,036) that the NZ GST Act 'does not require that the supply be to the person who pays the consideration' and went on to say (at 10,036) that 'the identity of the recipient is not significant, as long as there is a supply and the provision by some person of consideration in respect of it'.

^{52A} The court was not asked to consider whether the ferry operator made a supply to the government entity under the arrangement.

12. Paragraph 192

After the paragraph, insert:

Example 7A: dental services – third party payer

192A. A State government's policy provides that eligible public patients (P) should be entitled to discounted dental services. A scheme for discounted dental services is administered through Ministerial Directions. The State government's administering department (G) operates a number of public facilities which provide the discounted dental services. To supplement the available number of public facilities, the Ministerial Directions state that private dental practitioners (D) may provide discounted dental services under the scheme.

192B. The Ministerial Directions define eligible public patients as those that hold a Public Patient Authorisation. It is G's responsibility to issue Public Patient Authorisations to eligible patients who consent to receive the discounted dental services.

192C. If D makes a supply of discounted dental services to P, the Ministerial Directions provide that D may make an application for payment from G of the amount of the discount.

192D. To qualify for payment, the Ministerial Directions require that D:

- provided a discount when it provided any of the agreed dental services to P, that is, P only pays D the amount of the price after the discount is deducted
- treated P as a private patient and did not represent that P was a patient of G, and
- provided his or her services on a 'best practice' basis, maintained professional licences, memberships and education, and performed the services within agreed timeframes.

192E. If D meets the requirements in the Ministerial Directions and qualifies for payment, G will pay D an amount for each service in accordance with an agreed schedule which identifies each service to be performed and its fee. The amount of the payment will not exceed the amount of the discount provided to P by D.

192F. Where D does not provide the discount to P, such as where P had a damaged card or left it at home, and P pays the full price for the dental services, P is able to seek payment of the discount directly from G.

192G. *Under this scheme, the payments from G to D are part of the consideration for the supply of dental services by D to P. Weighing up all the facts in the manner set out below indicates that G is, in effect, making a grant to P that is paid directly to D for administrative reasons.*

- *D does not undertake an obligation to provide discounted dental services to eligible patients and G has no enforceable right to compel D to make those supplies to P. D just acts in accordance with Ministerial Directions applicable to all dentists coming within its terms.*
- *The payment for the amount of the discount to D does not represent funding of D by G. Instead, the recipient of the funding is P and the reimbursement arrangement effected in accordance with the Ministerial Directions is a way for G to administer the policy. The fact that P can claim the discount directly from G if unable to obtain it from D strongly supports that conclusion.*
- *The payment to D is not made in response to, or in connection with, a supply from D to G. The reimbursement is only made where D makes the supply of discounted dental services to P in accordance with the requirements listed in paragraph 192D of this Ruling.*
- *The payment by G to D has a nexus with the supply of dental services by D to P, and is a third party payment to D for that supply.^{59A} The recipient of the supply of the dental services is P, not G.*

192H. *No one fact is conclusive on its own but taken together they indicate that the character of the arrangement is as set out in paragraph 192G of this Ruling.*

Example 7B: specialised equipment – two separate supplies contrasted with a third party payer arrangement

192I. *A State government's policy provides that eligible residents (E) of specified country areas should have access to telecommunications services that are accessible through specialised equipment, at a scheduled price.*

^{59A} The supply of the dental services is GST-free under Item 6 in the Table to subsection 38-10(1).

192J. *The State government (G) enters into a contract with a retailer of specialised equipment (R) where R will supply the specialised equipment to E for a scheduled price. The scheduled price is lower than the recommended retail price and under the agreement R is entitled to receive from G a specified amount when R sells specialised equipment to E for the scheduled price. The specified amount is calculated as the difference between the recommended retail price and the scheduled price.*

192K. *To assist R in identifying eligible residents, G issues an eligibility card to E that is presented to R when E purchases the specialised equipment.*

192L. *If R does not supply the specialised equipment to E for the scheduled price, for example, because E does not present the eligibility card, and therefore E buys the specialised equipment at the recommended retail price, E cannot seek the specified amount from G.*

192M. *Each time R sells specialised equipment to E for the scheduled price, R will be entitled to claim the specified amount from G. Under the contract, R makes a supply to G because it enters into and fulfils an obligation to provide specialised equipment to E for the scheduled price. The specified amount received by R from G is consideration for the supply made by R to G. The nexus between G's payment and R's supply is clear because the payment is the contractual consideration G provides to R under the contract between them in return for R undertaking and fulfilling its contractual obligations.*

192N. *If R is registered or required to be registered for GST, R has made a taxable supply to G for consideration which is calculated as the difference between the recommended retail price and the scheduled price charged to E. R issues a tax invoice to G where the specified amount is the GST-inclusive price of the supply to G. R is liable to remit GST and G has made a creditable acquisition and is entitled to claim input tax credits if the requirements of section 11-5 are met.*

192O. *When R supplies E with the specialised equipment this is a taxable supply made by R to E and is a separate supply to the supply that R makes to G. R issues a tax invoice to E where the GST-inclusive price of the supply to E is the scheduled price. R is liable to remit GST for this taxable supply and if E is registered or required to be registered for GST then E is entitled to claim input tax credits if the requirements of section 11-5 are met.*

Example 7C: provision of services – licensing arrangement with condition requiring the provision of subsidised services in certain circumstances

192P. A State's legislation provides that certain amusement related services may be provided to school age children only by providers issued with a licence by the relevant State government Minister. The legislation provides that licences may include such conditions that the Minister determines. The State government's policy is that eligible low income residents (E) should have access to such amusement services for their school age children at a scheduled price. In implementing this policy, the State government (G) issues eligibility cards to E.

192Q. G provides, through the Minister, a licence to a company (C) enabling it to provide the relevant amusement services to school age children. The licence includes a condition that, where C supplies services to E, C must supply those services to E for a scheduled price provided that E presents their eligibility card to C when the services are provided. The scheduled price is lower than the usual retail price, and in accordance with the licence condition C is entitled to receive from G a specified amount when C provides the services to E for the scheduled price. The specified amount is calculated as the difference between the usual retail price and the scheduled price.

192R. The payments made by G to C are consideration for the services provided by C to E. Although C is subject to a licence condition requiring it to provide the services to E at the scheduled price, the payment by G is not consideration for C undertaking the licence condition. That condition arises as a result of the licence being issued to C and exists regardless of whether or not any payments are, or will need to be, made by G to C. C's compliance with the licence condition is directed to C maintaining its licence to provide the relevant services. G's payment is more closely connected to, and is in response to, the services provided by C to E.

13. Paragraph 270

Omit the paragraph; substitute:

270. The payments from the Department are consideration for the supplies of transport made by the Bus Company to the students. The payments are best characterised as a subsidy to the students that are paid to the Bus Company as a matter of administrative procedure. The Department is not the recipient of the supplies of transport and does not make creditable acquisitions in connection with the payments. *[Proposition 14: a third party may pay for a supply but not be the recipient of the supply, paragraphs 177 to 216 of this Ruling.]*

Tripartite arrangement – input tax credits available

270A. In contrast to the arrangement described at paragraph 269 of this Ruling, the Department governs a number of bus routes used for transporting students. The Bus Company tenders for these bus routes and is awarded a contract by the Department to operate its bus services on those routes as a contractor for the Department and to provide discounted fares to students that use the service. Under the agreement, the consideration paid by the Department to the Bus Company comprises of a \$500,000 per year lump sum plus a top-up payment determined by a formula, being 50% of the total full price student fare multiplied by the number of student fares taken in a year.

270B. Under the arrangement, the Bus Company has a binding obligation to the Department to make a supply of bus services. That is, the Department has an enforceable right to compel the Bus Company to provide the bus services. Outside of the arrangement, the Bus Company would not be able to operate the relevant bus routes. Further, the payment made by the Department is in response to the supply by the Bus Company to the Department.

270C. In this arrangement, the top-up payment made by the Department to the Bus Company is part of the total consideration for the taxable supply of operating the bus service, which is made by the Bus Company to the Department. The Department is not a third party payer of consideration for the supply of discounted fares to students. The Department is the recipient of the supply of bus services and does make a creditable acquisition in connection with the payments.

14. Paragraph 273**(a) Omit:**

Acquisition by agreement 91

Substitute:

Acquisition by agreement under a standard land contract 91

(b) Insert:

Example 7A: dental services – third party payer 192A

Example 7B: specialised equipment – two separate supplies contrasted with a third party payer arrangement 192I

Example 7C: provision of services – licensing arrangement with condition requiring the provision of subsidised services in certain circumstances 192P

Tripartite arrangement – input tax credits available 270A

15. Related Rulings/Determinations

- (a) Insert:
GSTR 2009/3

16. Case References

- (a) Omit:
- Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd [2006] FCAFC 115; 2006 ATC 4363; (2006) 62 ATR 682

Substitute:

- Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682
- (b) Insert:
- Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd [2008] HCA 22; (2008) 2008 ATC 20-028; (2008) 68 ATR 158
 - Re Hornsby Shire Council v. Commissioner of Taxation [2008] AATA 1060; 2008 ATC 10-061; (2008) 71 ATR 442
 - TT-Line Company Pty Ltd v. Federal Commissioner of Taxation [2009] FCA 658; 2009 ATC 20-110

This Addendum explains the Commissioner's view of the law as it applies both before and after its date of issue. You can rely upon this Addendum on and from its date of issue for the purpose of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

Commissioner of Taxation

1 July 2009

ATO references

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