

# ***GSTR 2006/9A7 - Addendum - Goods and services tax: supplies***

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## Addendum

### Goods and Services Tax Ruling

#### Goods and services tax: supplies

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2006/9 to clarify when an entity makes a supply as a result of the decision of the High Court in *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49.

#### **GSTR 2006/9 is amended as follows:**

##### **1. Paragraph 8**

Insert the dot point at the end of the list:

- The Addendum to this Ruling that issued on 18 December 2017 explains the Commissioner's view of the law as it applies both before and after its date of issue. You can rely on this Addendum from its date of issue for the purposes of section 357-60 of Schedule 1 to the *Taxation Administration Act 1953*.

##### **2. Paragraph 17**

Omit the paragraph; substitute:

17. Because GST is intended to be broad based, a supply may manifest itself in various ways. For example, a supply may be mixed, composite or neither and an analysis of a transaction may indicate one or more supplies. However, the scheme of the GST Act is not so broad as to include: an entity making a supply to itself; a supply being made by more than one entity; a supply arising out of the creation of expectations alone without more; or a supply without the supplier providing something.

##### **3. Paragraph 22**

Omit the description of '**Proposition 5**' in the table; substitute:

*An entity will make a supply if it provides something to another entity (paragraphs 71 to 91).*

##### **4. Paragraph 50**

Omit the description of '**Proposition 5**' in the table; substitute:

*An entity will make a supply if it provides something to another entity (paragraphs 71 to 91).*

## 5. Paragraphs 71 to 79

Omit the paragraphs; substitute:

***Proposition 5: an entity will make a supply if it provides something to another entity***

71. An entity will make a supply whenever that entity (the supplier) provides something of value to another entity (the recipient).<sup>27</sup> This is consistent with the ordinary meaning of 'supply', being to furnish or provide.

72. The High Court said in *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 (*MBI Properties*) that it is not necessary that the making of a supply must always involve the taking of some action on the part of the supplier.<sup>28A</sup> In this regard, the reasoning adopted in some earlier court and tribunal decisions that considered when an entity makes a supply needs to be qualified to reflect this observation.<sup>28B</sup> The High Court recognised that an entity can provide something, and therefore make a supply, by means of refraining from acting or by means of tolerating some act or situation, just as it can by means of doing some act.<sup>29</sup>

73. The High Court noted that a transaction which involves a supplier entering into and performing an executory contract will in general involve the supplier making at least two supplies. The first being creation of contractual rights and obligations at the time of entry into the contract and secondly, a supply by means of contractual performance of the obligation.<sup>30</sup> The High Court recognised that providing continuing use and enjoyment of premises by observing an express or implied covenant of quiet enjoyment under a lease, the supplier was providing something, albeit by means of refraining from doing something or tolerating some act or situation.

74. It was therefore in the context of observing an obligation on the supplier originally sourced in an executory contract, and subsequently 'assumed by operation of law' on purchase of the premises, that the High Court considered that a supply could be made by the supplier refraining from doing something or tolerating some act or situation. The High Court observed that MBI intended at the time of purchasing the premises that it would observe the ongoing obligation of providing use and occupation of the leased premises.<sup>31</sup>

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<sup>27</sup> *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [34].

<sup>28</sup> [Omitted.]

<sup>28A</sup> *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [33].

<sup>28B</sup> See *Shaw v. Director of Housing and State of Tasmania (No 2)* [2001] TASSC 2, *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682 *Re Hornsby Shire Council v. Commissioner of Taxation* [2008] AATA 1060 and *Reglon Pty Limited v. Commissioner of Taxation* [2011] FCA 805. The High Court decision does not show that any of the earlier cases were wrongly decided.

<sup>29</sup> *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [34]-[36].

<sup>30</sup> *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [35].

<sup>31</sup> *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [40].

75. In light of the High Court's comments, read in the context of the case, we consider that an entity may be said to be making a supply by refraining from doing something or tolerating some act or situation if the entity was subject to an obligation to do so and then performed accordingly. While the circumstances in *MBI Properties* involved the performance of an obligation originally sourced in contract, and 'assumed by operation of law', we do not see any reason why performance of an obligation sourced otherwise could not also involve a supply by an entity in circumstances where the performance of that obligation involves no more than refraining from doing something or tolerating some act or situation.

76. While an entity may make a supply by observing an obligation, even if that involves no more than refraining from doing something or tolerating some act or situation, there will be no supply where something occurs by operation of law without an entity providing something or without any obligation being placed on the entity to provide something. Examples of such situations are:

- *Shaw v. Director of Housing and State of Tasmania (No 2)* [2001] TASSC 2 in which Underwood J held that a judgment creditor makes no supply on extinguishment of the obligation to pay the judgment sum; and
- *Reglon Pty Limited v. Commissioner of Taxation* [2011] FCA 805 in which Emmett J analysed an action in conversion and found no supply was made when vesting of title in goods occurred by operation of law on satisfaction of the judgment in full.

77. In *MBI Properties* the High Court did not address whether there could be a supply of entry into an obligation where an obligation is 'assumed by operation of law'. In *Westley* the Full Federal Court stated at paragraph 22:<sup>34</sup>

While the matter is not free from doubt, we have concluded that when the appellants purchased the reversion they assumed the obligation of Lake Eerie to honour the lease according to its terms and in that sense entered into an obligation to tolerate an act or situation and in consequence, made a 'supply' by virtue of s 9-10(2)(g). The fact that the obligation arises by operation of law does not, in our view, impede this conclusion; after all, the reference to 'obligation' in s 9-10(2)(g) must be a legal obligation, although not necessarily one sourced in contract.

78. The High Court only confirmed existence of a supply constituted by performance of obligations in this context. The Commissioner considers that an entity does not make a paragraph 9-10(2)(g) obligation supply simply by having a legal obligation imposed on it by reason only of circumstances existing which brings the entity within the terms of the obligation in question.

79. Because of the inclusions in subsection 9-10(2), however, the ordinary meaning of supply is extended for the purposes of the GST Act.<sup>35AA</sup> Therefore, there may be circumstances where an entity will not need to provide something for there to be a supply. The inclusion of a 'financial supply' in paragraph 9-10(2)(f), which in turn includes an acquisition of a specified interest, is one example where an entity may make a supply without necessarily providing something.

<sup>34</sup> *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682 at [22].

<sup>35AA</sup> This was recognised by the Full Federal Court in *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461; 2006 ATC 4363; (2006) 62 ATR 682 at [16].

# GSTR 2006/9

## 6. Paragraphs 82 to 82A

Omit the paragraphs; 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. This is because the owner does not provide anything to the authority. It takes no action to cause its legal interest to be transferred or surrendered to the authority. It has no obligation to do anything, to refrain from doing something or to tolerate an act or situation.

82A. However, in other cases the owner may provide something or undertake some action so 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*<sup>35A</sup> in which the Administrative Appeals Tribunal found that, in the circumstances<sup>35B</sup> the owner, CSR Limited, made supplies by way of entry into obligations as well as by surrender of land when it issued a notice.<sup>35C</sup>

## 7. Paragraph 273

Omit:

*Proposition 5: to 'make a supply' an entity must do something*

Substitute:

*Proposition 5: an entity will make a supply if it provides something to another entity*

## 8. Case references

Insert:

- Commissioner of Taxation v. MBI Properties Pty Ltd (2014) 254 CLR 376; [2014] HCA 49
- Reglon Pty Limited v. Commissioner of Taxation (2011) 212 FCR 422, 2011 ATC 20-267, (2011) 81 ATR 599

Omit:

- Federal Commissioner of Taxation v. St Hubert's Island Pty Ltd (in liq) (1978) 138 CLR 210; 78 ATC 4104; (1978) 8 ATR 452
- Walter Construction Group Ltd v. Walker Corporation Ltd (2001) 47 ATR 48; [2001] NSWSC 283.

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<sup>35A</sup> [2008] AATA 1060; 2008 ATC 10-061; (2008) 71 ATR 442.

<sup>35B</sup> 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.

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

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This Addendum explains the Commissioner's view of the law as it applies both before and after its date of issue.

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**Commissioner of Taxation**20 December 2017

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## ATO references

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Supplies ~~ Taxable supplies  
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Entity structures  
Goods and services tax ~~General rules and concepts ~~  
Enterprise ~~ Course or furtherance  
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Consideration  
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