

MT 2006/1A1 - Addendum - The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number

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Addendum

Miscellaneous Taxation Ruling

The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number

This Addendum amends Miscellaneous Taxation Ruling MT 2006/1 to update references to relevant legislation and cases, including *FCT v. Swansea Services Pty Ltd* [2009] FCA 402. This Addendum also amends MT 2006/1 to clarify Example 24 and paragraph 344.

Miscellaneous Taxation Ruling MT 2006/1 is amended as follows:

1. Footnote 13

Omit 'section 7 of the *Public Trustee Act 1913* (NSW)'; substitute 'section 8 of the *Public Trustee Act 1985* (ACT)'.

2. Paragraph 170

Omit the paragraph; substitute:

170. An enterprise includes an activity, or series of activities, done in the form of a business.⁵⁶ The phrase 'in the form of a business' is broad and has as its foundation the longstanding concept of a business. The meaning of this phrase has not been considered in significant detail by Australian courts.⁵⁷

⁵⁶ Paragraph 9-20(1)(a) of the GST Act.

⁵⁷ See AAT case *Body Corporate Villa Edgewater Cts 23092 v. FC of T* 2004 ATC 2056; 55 ATR 1162. *Toyama Pty Ltd v. Landmark Building Developments Pty Ltd* 2006 ATC 4160; [2006] NSWSC 83 involved civil litigation (regarding the proper exercise of a trustee's duty of care). The Commissioner of Taxation was not a party to the matter. While some reference was made to GSTD 2000/8, this was incidental to the ratio of the decision. In addition, also see *FCT v. Swansea Services Pty Ltd* [2009] FCA 402; 2009 ATC 20-100; 72 ATR 120.

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170A. In *FCT v. Swansea Services Pty Ltd*^{57A} at paragraph 99, McKerracher J. observed that the words ‘in the form of’ do not support a suggestion that form alone may prevail over substance. However, he said that they do ‘have the effect of extending the reach of ‘enterprise’ to those activities which are in the form of a business but would not, in the ordinary meaning of ‘business’ be considered such. But the activity must still be reasonably intended to be profit making in the case of an individual and cannot for any entity simply be a private recreational pursuit or hobby.’

170B. The definition clearly includes a business and the use of the phrase ‘in the form of’ indicates a wider meaning than the word ‘business’ on its own. In the case of non-profit entities, the Commissioner considers that not all of the main features of a business such as a capacity to earn and distribute profits need to be present before an activity has the form of a business.⁵⁸ In addition, smaller superannuation funds that arguably are not carrying on a business were however intended to be covered by the original definition of enterprise (that is, ‘in the form of a business’) and this was put beyond doubt by an amendment to section 5.⁵⁹

3. Footnote 68

Insert at the end of the footnote:

In *FCT v. Swansea Services Pty Ltd* at paragraph 95, the court noted that whether the passive nature of an activity affects the characterisation (of carrying on a business) will turn on the particular context. The court then went on to distinguish the critical facts in *Spassked Pty Ltd v. Commissioner of Taxation* from the situation presented in *FCT v. Swansea Services Pty Ltd*.

4. Paragraph 207

Insert at the end of the paragraph:

There is no business plan, the activities are not systematic and are less organised than would be typical for a business.

^{57A} *FCT v. Swansea Services Pty Ltd* [2009] FCA 402; 2009 ATC 20-100; 72 ATR 120 (*FCT v. Swansea Services Pty Ltd*).

⁵⁸ However, while a profit making purpose would normally be a feature of a business this is not necessarily always the case. See *The Queen v. Trade Practices Tribunal: ex parte St George County Council* (1973) 130 CLR 533; (1974) 48 ALJR 26; (1974) 2 ALR 371.

⁵⁹ Paragraph 11.2 of the Revised Explanatory Memorandum to the Indirect Tax Legislation Bill 2000. See also paragraphs 98 to 101 of this Ruling.

5. Footnote 70

Insert at the end of the footnote:

In addition, see *FCT v. Swansea Services Pty Ltd* at paragraph 63 where it was noted that the GST legislation does not preclude investment activities from amounting to the carrying on of an enterprise.

6. Paragraph 344

Omit the paragraph, substitute:

344. 'Holders of an office' are those included in items 2 and 3 of the table in subsection 9-20(4) of the GST Act. These are company directors and office holders to which section 12-45 of Schedule 1 to the TAA applies. Office holders include members of Parliament, statutory office holders, members of the Defence Force or police forces, common law office holders and some members of local governing bodies.¹¹⁴ The table in subsection 9-20(4) of the GST Act is set out in paragraph 341 of this Ruling.

7. Paragraph 358

Omit from second sentence 'client's'; substitute 'clients'.

8. Paragraph 363

Omit the extra full stop.

9. Footnote 126

Omit 'and *Eastern Nitrogen Ltd v. FC of T* [1999] FCA 1536; 99 ATC 5263; (1999) 43 ATR 112'.

10. Case References

Omit:

- *Eastern Nitrogen Ltd v. FC of T* [1999] FCA 1536, 99 ATC 5163; 43 ATR 112

Insert:

- *FCT v. Swansea Services Pty Ltd* [2009] FCA 402; 2009 ATC 20-100; 72 ATR 120

¹¹⁴ For further information on office holders see *Taxation Ruling TR 2002/21 Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses or allowances paid to office holders*.

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This Addendum applies both before and after its date of issue.

Commissioner of Taxation

22 August 2012

ATO references

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