GSTR 2009/3EC - Compendium

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Ruling Compendium – GSTR 2009/3

This is a compendium of responses to the issues raised by external parties to draft GSTR 2008/D4 – Goods and services tax: cancellation fees

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft Ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1	To consider including the goods and services tax (GST) implications on the acquisition side of the transactions as provided in examples 3 and 4 in the draft Ruling.	Example 3 in the draft Ruling has been deleted in view of the comments made at issue number 15 of this Ruling Compendium. In Example 4 of the draft Ruling (which is now Example 3 in the final Ruling) Ken is now described as an unregistered customer as such there will be no GST implications on the acquisition side of the transaction.
2	Paragraph 108 of Goods and Services Tax Ruling GSTR 2006/9 states: > For GST purposes the entity may still make a supply in the absence of enforceable obligations, provided there is something else, such as goods, services or some other thing, passing from the supplier to the recipient. This statement may not appear to be entirely consistent with the draft Ruling. The comment centres on the word 'enforceable' and the fact that in the draft Ruling, it is said that the entry into obligations may constitute a supply even where those obligations are not legally binding.	The final Ruling clarifies at paragraphs 44 and 45 that a supplier and a customer enter into mutual obligations when they enter into an arrangement involving an intended supply. The entry into obligations by the supplier constitutes a supply when the arrangement is entered into.[1]

[1] It is the Commissioner's view that an entity may still make a supply in the absence of enforceable obligations, provided there is something else, such as goods, services or some other thing, passing from the supplier to the recipient (see paragraph 108 of GSTR 2006/9).

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	For example in paragraph 49 of the draft Ruling it states: 49. Alternatively, under an arrangement not involving a formal contract, the supplier may be obliged to do certain things in the expectation, but with no certainty, that the intended supply will take place. For example, in the case of some appointments,…the supplier may be obliged to set aside an allotted time to see the customer on the understanding that the customer will pay a cancellation fee if they fail to turn up or cancel the appointment. It appears that Tax Office is moving away from the focus on 'enforceable' obligations which was taken in GSTR 2006/9.	
3	Clarification on the definition of the term 'travel agents' as referenced in paragraph 165 of the draft Ruling. 165. The Commissioner takes the view that package tour operators are travel agents for the purposes of the GST Act. Whether the reference to travel agents is a reference to the nature of the activities that package tour operators undertake and not that all travel agents only act in the capacity as agents for GST purposes.	The term 'travel agent' referred to in section 38-360 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)[2] is not restricted to a package tour operator acting as agent in the context of an agent/principal relationship. Paragraph 163 in the final Ruling clarifies that 'travel agent' referenced in section 38-360 includes a package tour operator that act as agent or as principal or both.
4	There is no guidance in relation to circumstances where the facilitation supply relates to input taxed supplies (supply of residential premises).	Paragraph 29 in the final Ruling has been inserted to provide guidance on this issue.

[2] Unless otherwise stated, all legislative references in this Ruling Compendium are to the GST Act.

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	There is a contradiction in the Commissioner's statement in footnote 70 and paragraph 171 of the draft Ruling. The Commissioner draws the conclusion that a 'facilitation supply' is the supply of 'arranging for other supplies to be made' which can also be treated as the supply of the right to receive a future supply and therefore, covered by subsection 9-30(1) or 9-30(2). We do not believe the same supply can be characterised as both the arranging of a future supply and the right to receive a future supply. We assume that the Commissioner considers that in some instances the supply may be an arranging supply and other instances the supply is of a right to receive a future supply. If this assumption is correct, then the Commissioner needs to provide some guidelines as to what it believes are the indicators to identify each supply. Without such guidelines, taxpayers do not have any surety that they have correctly treated a cancellation as a taxable supply (the 'facilitation supply') or as input taxed supply (the right to receive a future supply).	The Tax Office view is that the facilitation supply is broader than a supply of a right. A facilitation supply can include a supply of a right. In which case, the supply of the right may be a dominant part of the facilitation supply and paragraph 9-30(1)(b) or (2)(b) will apply.
5	Attachment 1 – summary of GST cancellation fees in the draft Ruling. The tables include five variables: whether package tour or airline/travel agent; booking cancelled; consideration; cancellation fee paid; and supply for GST purposes. Yet none of these variables has any impact on the GST status of supply. The only variable which impacts on the GST status is whether or not the service involves international or domestic tours.	The column with the heading 'Supply for GST purposes' has been removed in the final Ruling and the last column has been modified accordingly in relation to the terminology. To remove the other columns would compromise the technical accuracy and provide insufficient guidance.

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6	The approach adopted in the draft Ruling appears to apply the comments made by the High Court in the *Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd* [2008] HCA 22; 2008 ATC 20-028; (2008) 68 ATR 158 (*Reliance Carpet*) decision beyond their intended purpose in seeking to identify a number of potential supplies that could be made in relation to cancellation fee scenarios where the intended supply does not take place. The *Reliance Carpet* decision was heavily reliant upon the principles of property law, which means caution should be adopted in extending it application to non-property related transactions and transaction which are not executed under formal contracts.	The comments made by the High Court in *Reliance Carpet* were in relation to a transaction involving real property being the commercial land and building. They were not reliant specifically upon the principles of property law. Paragraphs 77 to 84 in the final Ruling under the heading 'Security deposits as cancellation fees' are consistent with the principles established in the *Reliance Carpet* case.
7	The broad use of the 'facilitation' label adds complexity to the analysis of transactions by characterising legal rights and obligations of the parties that arise merely due to the operation of contractual terms as constituting separate supplies for GST purposes. The use of the 'facilitation' label is also confusing as it encompasses a range of different scenarios and tends to blur the distinction between the acts of 'arranging' (as agent) and that of supplying (as principal on your own behalf). The draft Ruling is inconsistent with the Commissioner's established views with respect to having due regard to the substance and commercial reality of a transaction when characterising supplies made for GST purposes. With reference to paragraph 83 in the draft Ruling, it is not necessary to go beyond the concept that upon entry by two parties into an arrangement involving the doing of things, the supplier enters into an obligation to do certain things (that is, a paragraph 9(10)(2)(g) supply) or alternatively a paragraph 9-10(2)(e) supply so the analysis of whether section 9-30 can then be undertaken.	The Tax Office disagrees that the use of 'facilitation supply' adds complexity. The Tax Office view is that in circumstances where the intended supply does not proceed, it is appropriate for the Commissioner to use the term 'facilitation supply' to describe the things that are done (these things include those listed in paragraph 24 of the final Ruling) in preparing to make the intended supply. The Tax Office considers that this approach is consistent with commercial reality and gives due regard to the substance of the arrangement.

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8	For the purposes of the Australian GST legislation, the nexus test for a payment to be regarded as consideration for a taxable supply does not require a direct connection between the supply and the consideration for example, an indirect connection could suffice. However, if a payment can be viewed as potentially having a number of different characteristics, due consideration should be given to the most direct connection with regard to the true economic character and commercial intent of the payment. For example, where a payment can either be construed as compensation or potential consideration for a supply, the fact that an indirect connection could be established between the payment and a supply, should not, where a direct connection exists with a compensation payment, automatically override the true nature of the payment for GST characterisation purposes. Perhaps after paragraph 100 in the draft Ruling, there could be a statement that states that it is the substantive characteristic which is determinative. Such an approach would lead to a position where the more direct connection would take precedence with respect to forming the basis for the characterisation of the supply for GST purposes (for example, a direct and established connection would be preferred to an indirection connection in determining whether there is a supply for consideration). This approach is also consistent with the High Court's comments in the *Reliance Carpet* decision that it is not appropriate to fix on one characteristic of a payment to suggest that it cannot be consideration for another supply.	The Tax Office considers that the position taken in the final Ruling in respect to nexus is consistent with the *Reliance Carpet* decision.

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9	There would appear to be an inconsistency in the draft Ruling's approach in the application of the concept of a 'facilitation supply' to circumstances in which there is no binding obligation upon the parties (in relation to a right to receive a service or an entry into an obligation to provide a service) when compared with the position expressed in Goods and Services Tax Rulings: GSTR 2001/4; GSTR 2000/11; and GSTR 2006/9.[3] We consider that the creation of an appointment where there is no contract made between a customer and a service provider merely amounts to the creation of an expectation that the services would be provided to the customer upon presentation for the appointment, which in the absence of anything else (with reference to the Commissioner's stated position) would not be sufficient to create a supply for GST purposes.	The Tax Office disagrees with the comment. The position taken in the final Ruling is consistent with the Tax Office view in relation to 'supply', 'consideration' and 'nexus' in GSTR 2006/9, GSTR 2001/4 and GSTR 2000/11. The final Ruling has been amended to remove references to 'unenforceable obligations' to improve clarity.
10	Paragraph 109 of the draft Ruling considers that preparatory activities undertaken by a service provider in relation to an appointment can constitute a 'facilitation supply' on the basis that a 'real advantage or benefit' is conferred upon the customer. This last reference appears to introduce a new element that must exist before it can be said to be a supply as defined in section 9-10. We consider that this method of analysis to determine whether a supply for consideration exists in a particular circumstance is technically weak on the basis that the conferral of a 'benefit' (which is a relative concept) is not determinative of the existence of a supply for GST purposes.	The phrase 'confer a real advantage or benefit to the customer' as referred to in paragraph 109 of the draft Ruling has been deleted in the final Ruling.

[3] See for example paragraphs 38 -38 of GSTR 2001/4 and paragraphs 102-108 of GSTR 2006/9.

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11	The concept of a 'facilitation supply' does not adequately address the alternative argument that, as a matter of standard industry practice, some business activity has to be undertaken by a supplier regardless of whether a supply is made to a customer. The approach adopted by the draft Ruling in introducing the concept of a 'facilitation supply' being a separate and distinct supply until it is 'subsumed' into the 'intended supply' appears inconsistent with the Commissioner's analysis in GSTR 2001/8 in relation to composite and mixed supplies. We consider that the better view is that the 'facilitation supply' (or as outlined above, the obligation to provide certain things) will always be a separate supply to the 'intended supply' that is made. However, if the intended supply does proceed, the consideration paid by the recipient attaches fully to the intended supply (for example, no separate consideration is attributable to the facilitation supply/the obligation to provide certain things). That is, the better view is that the 'facilitation supply' still remains, but on the basis that there is no consideration attributable to it, it will not constitute a taxable supply for the purposes of the GST Act (as considered in paragraph 105 of the draft Ruling). We also note that to introduce the concept of a 'facilitation supply' being subsumed into the 'intended supply' on completion of the service, could lead to the unintended consequence of the potential aggregation of otherwise distinct supplies.	While the first comment does have some merit it is difficult to provide certainty in relation to what are essentially business inputs that do not constitute a facilitation supply. Therefore, we do not accept the comment. The Tax Office view in the final Ruling is that where the intended supply does occur, there is still a separate facilitation supply that was made. However, the consideration has nexus with the intended supply and not the facilitation supply. Where the intended supply does not proceed, the consideration (cancellation fee) has nexus with the facilitation supply.

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12	The draft Ruling does not adequately address the alternative arguments that certain cancellation fees could represent liquidated damages under contract and is inconsistent with well established principles of contract law. With reference to the package tour discussion and Example 18 provided in the draft Ruling, we would assume that where the concept of the 'facilitation services' can be validly applied, the value of the 'facilitation services' provided would not vary substantially in the period prior to the intended supply being made (for example, the cost/value of arranging the travel booking would not be altered by how late the customer cancels). However, we note that the increasing scale of the cancellation fee (depending on how late the package tour is cancelled) lends itself more readily to a liquidated damages characterisation (that is, it appears that the amount payable reflects the opportunity cost of the cancellation and is effectively determined by the ability to re-supply the cancelled package tour to limit the costs incurred/economic loss suffered as a result of the cancellation).	The Tax Office view on damages is explained in GSTR 2001/4. Paragraphs 64 to 67 in the final Ruling explain that if a payment is characterised as liquidated damages, this is not determinative of the treatment under the GST Act. That is, regard must be had to all the relevant factors in deciding whether the payment is consideration for a supply. The Tax Office view is that the cancellation fee is consideration for the facilitation supply made by the package tour operator in arranging for other supplies to be made (see paragraph 169 of the final Ruling). The cancellation fee is imposed regardless of whether the package tour operator is able to resell the cancelled tour.
13	In circumstances where travel is cancelled and the arrangement is such that the fare originally paid is held as a credit for the customer to undertake travel within a specified period (usually 12 months), the draft Ruling indicates that the initial cancellation does not give rise to an adjustment event and that any adjustment event, if applicable, would only arise at the time a re-booking occurs. This would appear to be at odds with the basic principles of when an adjustment event is deemed to arise under subsection 19-10(1), which states that amongst other things, a cancellation of a supply is an adjustment event.	When a particular flight is not taken and the supplier holds a credit for the customer, the Tax Office view is that the supplier holds a credit under the terms and conditions of the contract. When a particular flight is not taken and a credit is held, the contract is still on foot. As such, this does not give rise to an adjustment event upon cancellation or no show, as no adjustment event under section 19-10 has arisen.

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	Presumably, with reference to section 19-10, there would be potential scope for the travel provider to adjust its output tax position if applicable in the tax period in which the cancellation occurs and then attribute any output tax liability (if applicable) in the tax period in which the subsequent re-booking occurs. There may be corresponding adjustments for recipients in these circumstances.	
14	Example 1 in the draft Ruling – it appears unnecessary for the concept of 'facilitation supply' to be discussed within this example (for example, at paragraph 37 of the draft Ruling). The better view is that the amount retained is simply consideration for administrative services under paragraph 38-85(b).	The Tax Office disagrees with the comment.
15	Example 3 in the draft Ruling – professional services are a poor example in seeking to demonstrate the application of the concept of a cancellation fee being charged for a 'different supply'. It is assumed that the professional services are provided to Mining Giant under a letter of engagement, which would allow for Capri to charge any work in progress up to the point where the project is cancelled. As such, the amount payable by Mining Giant would represent consideration for the services provided under the engagement, albeit that no Report is ultimately produced, as opposed to constituting a cancellation fee.	This comment is accepted and the example has been excluded in the final Ruling.
16	Examples 9 and 10 in the draft Ruling – it is difficult to see the distinction as to why the 'facilitation supply' is a taxable supply in Example 10 without further clarification. Why is there not a contract in Example 9? Why is the argument in paragraph 130 of the draft Ruling with regards to a contractual right not applicable to the medical service examples?	In the final Ruling, Examples 9 and 10 have been deleted and replaced by a principled explanation of the GST consequences where the facilitation supply includes a right to receive a GST-free supply under Division 38 or a provision of another Act, and the appointment is subsequently cancelled.

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17	Example 11 in the draft Ruling – an explanation should be inserted in the example that the supply is a taxable supply because it does not satisfy the definition of medical service as the recipient of the supply is the Board and it cannot receive medical treatment.	This comment is accepted and the explanation is included in a footnote in the example in the final Ruling.
18	The 'release supply' discussed at paragraph 178 in the draft Ruling with respect to the overseas tour package would arguably constitute a supply in relation to rights that are for use outside Australia and therefore, more properly classified as GST-free under Item 4 of section 38-190(1). Paragraph 64 of the draft Ruling should also be altered to reflect this.	The comment in regard to paragraph 178 in the draft Ruling is accepted and it has been deleted in the final Ruling. However, it is not proposed to amend paragraph 64 in the draft Ruling (paragraph 56 in the final Ruling) as the paragraph accurately reflects the Commissioner's views that the GST status of the release supply is not determined by the GST status of the intended supply.
19	The draft Ruling is inconsistent with the principle of taxpayer neutrality as it differentiates between taxpayers in the financial services industry and other taxpayers on the basis that it specifically excludes early termination fees for the cancellation of financial supplies.	Paragraph 29 of the final Ruling provides that a facilitation supply that includes a right to receive an input taxed supply would itself be an input taxed supply under paragraph 9-30(2)(b) if the substance of the facilitation supply is the supply of the right. This addresses the comment received.