GSTD 2009/2EC - Compendium

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Generated on: 1 June 2026, 03:24:29 AM

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Ruling Compendium – GSTD 2009/2

This is a compendium of responses to the issues raised by external parties to draft GSTD 2009/D1 – Goods and services tax: are there GST consequences when a partner in a partnership takes goods held as trading stock for private or domestic use?

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.	There are continuing concerns with the Commissioner's approach to supplies by an entity to one of its members for the member's private use, and whether or not such supplies are in the course or furtherance of an enterprise. The approach exists in other public GST rulings, notably GSTR 2003/13 (Goods and services tax: general law partnerships), GSTR 2009/2 (Goods and services tax: partitioning of land) and GSTD 2009/1 (Goods and services tax: is a supply by way of an in specie distribution of an asset that is applied in an enterprise carried on by a discretionary trust to a beneficiary of the trust made 'in the course or furtherance of' the trust's enterprise?) The Commissioner's approach in the above public rulings products may alleviate some unintended consequences in the context of real property, and when real property is supplied by an entity to one of its members for private use. However in terms of an item removed from the shelf of a delicatessen, or other similar enterprise, the approach is: • Inconsistent with the operation of Division 11 and Division 129 where an application otherwise than in carrying on an enterprise, or for an input taxed purpose results in a denial of input tax credits for the item so applied or an adjustment for input tax credits claimed in the past;	It is agreed that Division 11 operates to deny an input tax credit to a partnership for something that is acquired for the sole private use of one of its partners. In these circumstances the acquisition is not connected with the partnership's enterprise, it does not form part of the partnership's enterprise assets, and is not intended for use in the partnership's enterprise. However where goods are acquired for use in a partnership's enterprise, but at some later time are provided to one of its partners for their sole private use, the good is an asset of the partnership's enterprise that is subsequently supplied to one of the partners in the partnership. We consider that the connection of the good with the partnership's enterprise means that the supply to the partner is connected with the partnership's enterprise, and is therefore made in the course or furtherance of the partnership's enterprise.

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1. cont	• Inconsistent with the legislative scheme of Australia's GST which adjusts input tax for non-enterprise use rather than taxing at market value the benefit of the use of assets enjoyed by owners; • Creates compliance complexities. The result of the ATO's interpretation is thought to be that GST is payable on the 'market value', being the same amount of GST being payable as would be the case if the item was sold to a customer.	For the purposes of Division 129 and Division 130 of the GST Act, a supply of goods, such as a supply from a partnership to a partner, represents an application of those goods. However, it is considered that it is not the use or intended use of the asset by the recipient of the in-kind distribution that is relevant to determining the nature of that application by the partnership. Adopting such a view would be contrary to the scheme of the GST Act. Every time a consumer acquired something for private consumption, the supplier would be taken to have applied the thing for private purposes and to have an adjustment under Division 129 or Division 130, as opposed to making a supply in the course or furtherance of their enterprise. Another consequence of adopting the position that Division 129 or Division 130 applies to goods taken by a partner in a partnership for their private use is that the acquisition of an asset by a partner through an in-kind distribution from the partnership will not be a creditable acquisition under section 11-5 even though the partner may have acquired the asset for a creditable purpose (that is, the partner intends to apply the asset in the course or furtherance of an enterprise). The GST Act does provide for adjustments to previously claimed input tax credits in circumstances where an entity ceases to apply an asset for a creditable purpose. However when considered in the context of Subdivision 72-A, we consider that it is not in accordance with the overall scheme of the GST Act to apply the adjustment provisions with respect to an in-kind distribution by a partnership to a partner.

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2.	The approach in the public rulings referred to at issue 1 is at odds with the Commissioner's views on Division 11 (GSTR 2008/1) where an acquisition that is made for the purpose of benefiting a member of an entity/association is considered not to be made for a creditable purpose. It should then follow that the supply of something that was acquired for a creditable purpose to a member of an entity is not an application of that thing in the course or furtherance of the entity's enterprise for the purposes of Division 129, and an adjustment will arise. There should be symmetry between these two concepts, as a matter of policy, legislative scheme, logic, consistency and ATO administration. GSTR 2008/1 aligns creditable purpose with section 8-1 of the *Income Tax Assessment Act 1997*. An acquisition by a partnership will not be deductible if it is for the private or domestic benefit of a partner. Similarly where an acquisition was acquired for a deductible purpose and is provided to a partner for their private or domestic use.[1]	See the response to issue 1 in relation to the issue of symmetry between Divisions 11 and 129. In relation to the consistency with income tax, we consider that the GST approach is different. Under the income tax laws, there is no assessable income arising from the distribution of one of the partnership assets from a partnership to a partner. Income tax focuses on the purpose of expenditure to determine a taxpayer's taxable income for an income year. In contrast, GST is a transaction based tax that is imposed on taxable supplies. The income tax legislation provides for specific treatment of disposals of trading stock not made in the ordinary course of business. We do not consider that a disposal of trading stock, not in the ordinary course of business for income tax purposes, equates with that disposal being a supply that is not in the course or furtherance of an enterprise, for GST purposes.

[1] The 'private' vs 'non-enterprise' distinction is referred to below.

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2. cont	Consistent with the income tax approach, that the distribution of assets is not a disposal made in the course of an enterprise,[2] a gift of an asset to an owner or member is a non-enterprise application of the asset and a Division 129 adjustment ought to arise, rather than the view in the draft GSTD that there is a supply in the course or furtherance of the enterprise.	In considering the application of section 36(1) of the *Income Tax Assessment Act 1936* (ITAA 1936),[3] the High Court held in *Federal Commissioner of Taxation v. St Hubert's Island Pty Limited*[4] that an *in specie* distribution of trading stock by a liquidator of a company to a creditor or shareholder was not made in the ordinary course of the business carried on by the company. Mason J. (as he then was) stated: > It is sufficient for me to say that the language of sec. 36(1) is wide enough to embrace a transfer, executed by a liquidator on behalf of a company in the course of voluntary winding up, of its assets to a sole shareholder in satisfaction of its rights as a shareholder and creditor …[5] An *in specie* distribution of an asset by a partnership that is carrying on a business (which forms an enterprise)[6] to a partner will therefore not typically be a disposal of an asset in the ordinary course of their business.

[2] But is deemed to be assessable income at market value under subsection 36(8) of the ITAA 1936.
[3] Section 36(1) of the ITAA 1936 was the predecessor to section 70-90 of the ITAA 1997. It stated:
> Subject to this section, where –
> (a) a taxpayer disposes by sale, gift, or otherwise of property being trading stock, standing or growing crop, crop-stools, or trees which have been planted and tended for the purpose of sale;
> (b) that property constitutes or constituted the whole or part of the assets of a business which is or was carried on by the taxpayer; and
> (c) the disposal was not in the ordinary course of carrying on that business,
> the value of that property shall be included in the assessable income of the taxpayer, and the person acquiring that property shall be deemed to have purchased it at a price equal to that value.

[4] (1978) 138 CLR 210; 78 ATC 4104; (1978) 8 ATR 452.
[5] (1978) 138 CLR 210 at 233; 78 ATC 4104 at 4116; (1978) 8 ATR 452 at 465.
[6] See paragraph 9-20(1)(a).

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2. cont		We consider that the term 'in the ordinary course of a business' is afforded a narrower interpretation than the more general term 'in the course of business'. The term 'in the course of a business' may be considered to be more analogous with the GST concept of 'in the course or furtherance of an enterprise'. Paragraph 3.10 of the Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Act 1999* does provide that 'in the course or furtherance' is broad enough to cover any supplies made in connection with your enterprise.' This statement, when considered with the comments of the Full Federal Court in *Sterling Guardian v. Commissioner of Taxation* (2006) 149 FCR 255 at 258 on the policy of the GST system by reference to supplies made to ultimate consumers, suggests that a disposal of trading stock that is made outside the ordinary course of a business for income tax purposes may still be a supply made 'in the course or furtherance of' an enterprise for the purposes of GST. This distinction has been recognised in paragraph 71 of GSTR 2008/1 Goods and services tax: when do you acquire anything or import goods solely or partly for a creditable purpose? which states that in some cases an acquisition can be made in carrying on an enterprise, even if the relevant outgoing is not 'necessarily incurred in carrying on a business for the purposes of gaining or producing assessable income for income tax purposes'.

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3.	No other jurisdiction treats a supply from a partnership to a partner to be in the course or furtherance of the partnership enterprise under its general provisions. There are specific provisions that pick up non-enterprise use and deem them to be supplies made 'in the course or furtherance of' the enterprise (see NZ section 21). Under the NZ rules, once the non-enterprise application has been deemed to be a supply in the course or furtherance of the enterprise (and so a taxable supply) the value is deemed to be the lower of cost or market value[7] – that is, claw back the input tax credits not already consumed.	Other jurisdictions frame the law on their own policy imperatives. New Zealand has an express legislative provision deeming non-enterprise use to be a supply made 'in the course or furtherance of'' the enterprise. A similar provision does not exist in the Australian GST legislation. Accordingly, we consider that a consideration of the issues addressed in the GSTD, in the context of the New Zealand legislation, does not provide relevant guidance as to the application of the relevant provisions in the Australian GST law.
4.	There should not be separate treatment between tax law partnerships and general law partnerships. It is noted that the definition of an entity in the Income Tax Assessment Act is the same as the GST Act and includes a partnership. The Income Tax law does not differentiate between a tax law and a general law partnership.	The current GST law does not allow for the same outcomes between general law partnerships and tax law partnerships. Any alignment is a policy decision. It is noted that the Government has announced that, in accordance with recommendations of the Board of Taxation, it has decided to amend the GST legislation to clarify the treatment of general law partnerships and tax law partnerships.

[7] The Institute has previously pointed out that the term 'market value' requires an assessment of the market in which the supply takes place. In this regard we have previously referred to the decision in *Edge v. CIR* ([1958] NZLR 42). This case considered the operation of the income tax equivalent of Division 129 for the disposal of trading stock, other wise than in the course of a business. Under income tax (Division 27 of the ITAA 97 and section 36 of the ITAA 1936) theses disposals are taxed at market value. But Edges case demonstrates that this is not retail selling price. In Edges case, the question involved the sale of sheep in a going concern. The court found that the appropriate market was 'cost' not retail. Accordingly, even if the supply might be dealt with under Division 72, depending on the circumstances, market might be cost. In this regard, the assessment of 'market' is also discussed *in Empire Stores v. Customs and Excise Commissioners* (Case C-33/93 where market value was again found to be the cost.

Issue No.	Issue raised	Tax Office Response/Action taken
5.	It is accepted that there is a supply when an entity provides something to one of its members for the member's own use. Often this supply will not be for consideration. However it is submitted that Division 72 cannot apply because this supply is not in the course or furtherance of the entity's enterprise. Where the supply is made in satisfaction of a debt there may be a sale. The correct approach to supplies is to work out if there is a sale, a conveyance or a gift. Then determine if Division 72 can apply. Division 72 cannot apply to something that is not in the course or furtherance of the enterprise and a gift will generally not assist aid or further the enterprise. It is important to note that the mere fact that there may be consideration for a supply does not necessarily mean that the supply is in the course or furtherance of the enterprise of the entity.[8]	It is agreed that there is a supply when an entity provides something to one of its members for the member's own use. We also consider that the supply made to the member is a supply in the course or furtherance of an enterprise. As indicated in our response to Issue 1 above, we consider that the connection of the goods with the partnership's enterprise means that the supply to a partner is connected with the partnership's enterprise, and is therefore made in the course of furtherance of the partnership's enterprise. Accordingly, Division 72 may apply to a supply to a partner that is made for inadequate or nil consideration. As referred to in our response to issue 2 above, paragraph 3.10 of the Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Act 1999* does provide that 'in the course or furtherance' is broad enough to cover any supplies made in connection with your enterprise.' This statement, when considered with the comments of the Full Federal Court in *Sterling Guardian v. Commissioner of Taxation* (2006) 149 FCR 255 at 258 on the policy of the GST system by reference to supplies made to ultimate consumers, suggests that a disposal of trading stock that is made outside the ordinary course of a business for income tax purposes may still be a supply made 'in the course or furtherance of' an enterprise for the purposes of GST. We do not consider that for a supply to be 'in the course or furtherance of' the enterprise, that it must necessarily be of benefit to the enterprise. As explained above, it is the supply of goods that are connected to the partnership enterprise that makes that supply 'in the course of furtherance' of the enterprise'. This would include 'giveaways' to promote the business.

[8] See *Stirling v. Commissioners of Customs and Excise* [1985] VATTR 232.

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6.	An example of where something provided by an entity to someone would be a supply in the course or furtherance of the enterprise is where the thing is provided to an employee in respect of their employment, since the employee is part of the enterprise. If the purpose or object of giving the thing to an employee is for the furtherance of that enterprise (for example, to motivate the employee – a remuneration benefit) or is something that the employee is to use in the course of the employment (a work benefit). It is, in these circumstances something that promotes or benefits the enterprise. It is an enterprise expenditure, therefore creditable (refer Division 11). If the employee makes a 'contribution' to the employer entity in respect of the thing it may be a taxable supply. These issues are dealt with under Division 111 as well – where reimbursements of employee costs are granted credits because the reimbursement is in carrying on the enterprise.	See responses to issues 1, 2 and 5.
7.	Another example of a supply in the course or furtherance of an enterprise is promotional goods given away. This activity furthers, promotes and benefits the enterprise. While no consideration is received for the thing supplied, the acquisition is made or used for the purpose of the enterprise benefiting through making profitable sales in the future.	See responses to issues 1, 2 and 5.

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8.	By contrast, taking something out of the enterprise and giving it to a partner for their private use, does not promote, further or benefit the enterprise and is not in the course of the enterprise (unless the enterprise can be characterised as comprising this activity having regard to how it is ordinarily operated). We consider that it is essentially a question of defining 'what is the enterprise?' Where a partnership ordinarily supplies things to a partner such that this activity is in the ordinary course of the enterprise, this may be an exception to the general rule. [See *Carlton Lodge Club v. Customs and Excise Commissioners*]	See responses to issues 1, 2 and 5.
9.	The Institute observes that, for income tax purposes, the term 'private' has no separate meaning other than in contradistinction to outgoings that are incurred 'in gaining or producing assessable income or in carrying on a business'. In this regard, in *Magna Alloys* (1980) 49 FLR 183 the Court observed: As Menzies J. said in *Federal Commissioner of Taxation v. Hatchett* (1971) 125 C.L.R.494 at p.498: It must be a rare case where an outgoing incurred in gaining assessable income is also an outgoing of a private nature. In most cases the categories would seem to be exclusive. What his Honour said with respect to outgoings incurred in gaining assessable income may be said of outgoings necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Expenditure falling under the second limb of s51(1) is incidental to the carrying on of a business and it must be a rare case where the same expenditure can at once possess that character and be an outgoing of a private nature.	We do not consider that a supply of an enterprise asset by a partnership to one of its partners is a 'non-enterprise use'. See also, responses to issues 1, 2 and 5.

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9. cont	On this basis, an acquisition is either for 'enterprise' or 'non-enterprise' purposes when made, and likewise, when subsequently applied it is for 'enterprise' or 'non-enterprise' use or application. If the use or application does not further, promote or benefit the enterprise, or is not made in carrying on the enterprise,[9] it is a non-enterprise use or application. This is mutually exclusive from enterprise use. Accordingly, non-enterprise use cannot be an application 'in the course or furtherance of the enterprise'. Rather, it is an application which takes the acquisition out of the enterprise. It is not a supply in the course or furtherance of the enterprise.	
10.	In light of the Board of Taxation's recommendations to Government and the Government's acceptance of the recommendation that the terms 'apply' and 'application', in the context of the adjustment provisions be reviewed, during consultation the professional bodies will be raising concerns with respect to the approach adopted in GSTD 2009/D1 and other public rulings products. The professional bodies are concerned that the Commissioner may put forward suggestions that result in legislative amendments that create further uncertainty in relation to this area of the law.	Comment is noted.
11.	It is not considered that the giving of things away will be in the course or furtherance unless it relates to the enterprise itself, such as 'giveaways' to promote the company's business or products, as mentioned above.	See responses to issues 1, 2 and 5.

[9] A term that is said in Magna Alloys and earlier cases to mean 'in the course of'.

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12.	Under the Commissioner's view in the rulings a gift to a cousin will be in the course or furtherance of the partnership's enterprise but will not be taxable due to the lack of consideration and the exclusion of a 'cousin' from the associate rules. This is an example where it is clear that the supply by the partnership is for 'non-enterprise' purposes and an adjustment should be made under Division 129. If this remains the Commissioner's view, then it should be put into an example in the Tax Determination.	It is agreed that in the example described the supply would not be a taxable supply. This is because of the limited scope of the application of Division 72, which as a matter of policy does not extend to supplies between cousins, or other relatives not covered by the definition of 'associate'.
13.	The sentence in paragraph 4, 6th line of the GSTD states; The Commissioner considers that the partner's entitlement or ***claim over the assets*** of the partnership forms part of the partner's interest in the partnership. *FC of T v. Everett* 80 ATC 4076 is authority that a partner does not have a claim over any of the assets of the partnership; rather a partner has a claim to a share in the income of the partnership and in a distribution on winding up the partnership.	Agreed, the wording of the GSTD has been amended accordingly.
14.	The GST payable on the supply from a partnership to a partner may not be deductible for income tax and will thus lead to higher compliance costs because of the interaction between Divisions 17 and 27 of the ITAA 1997 and the GST Act. This has proved to be a problem in the securitisation arrangements.	It is agreed that any GST applicable to a supply in these circumstances will not be deductible. Similarly any GST applicable to the supply will not be included in assessable income.
15.	Divisions 129, 130, 132 and 138 all require the reclaiming of input tax credits for non-enterprise use. This demonstrates the legislative scheme and shouldn't be abandoned in favour of Division 72 in a way that is contrary to the fundamental creditable purpose rule in Division 11.	See response to issues 1, 2 and 5.

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16.	Paragraph 6 'registered or required to be registered' should be used, not just 'registered'.	Agreed, the GSTD has been amended to include the words 'required to be registered'.
17.	Paragraph 7 – What distinction is there between an 'in specie distribution' and a transfer to the partners for no consideration. I would have thought the transfer of an asset for no consideration is like an in specie distribution. Perhaps this should be discussed. Further, given the in specie distribution is said to be in the course of the partnership's enterprise what makes it different to a transfer for no consideration in the course of the partnership's usual trading activities.	An in-specie distribution is made to a partner in a partnership as a result of them being a partnership in a partnership, and in satisfaction of capital contributions that the partner has made to the partnership, or in satisfaction of the share of partnership profits to which the partner is entitled to. As explained at paragraph 4 of the draft GSTD, we consider that an in-specie distribution made to a partner in a partnership will be made for consideration. In contrast to goods being provided to a partner in a partnership by way of an in-specie distribution, the partnership may supply an item of trading stock to a partner, as it would to any other consumer, but the partner may not provide consideration for that supply. For example, a partner in partnership that runs a general retail shop may take home an item of trading stock for private consumption, rather than purchasing the item from another retailer.