GSTD 2025/2EC - Compendium

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Australian Government
Australian Taxation Office

Public advice and guidance compendium – GSTD 2025/2

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Goods and Services Tax Determination GSTD 2024/D2 *Goods and services tax: supplies of sunscreen*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

All legislative references in this Compendium are to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), unless otherwise indicated.

Issue number	Issue raised	ATO response
1	**Date of effect** Retrospective application is not appropriate. The final Determination should only have prospective application from the date of publication. While the draft Determination replaces Goods and Services Tax Industry Issues GSTII PH5 *What are 'sunscreen preparations for dermal application'?* and Goods and Services Tax Industry Issues GSTII PH6 *When is a sunscreen preparation marketed principally as a sunscreen?* listed in the Pharmaceutical Health Forum issues register, these industry issue rulings did not provide any substantive guidance. This is the first time the ATO has fully and meaningfully explained its view with respect to the phrase 'marketed principally for use as sunscreen' in the context of contemporary products.	We note this submission. However, no change has been made in the final Determination. We have carefully considered whether the ATO's view should be applied prospectively only and consider there is no basis for doing so. The ATO has not facilitated or contributed to taxpayers adopting a different view or industry practice of the marketed principally test. Merely not having a published view on the application of the marketing test to contemporary products does not facilitate or contribute to taxpayers adopting a different view or industry practice. In reaching this conclusion, we have considered the following law administration practice statements: • Law Administration Practice Statement PS LA 2009/4 *Decisions made by the Commissioner in the general administration of the taxation laws* (as updated 31 July 2024)

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		• Law Administration Practice Statement PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only.* The Commissioner's duty is to apply the law as he understands it to be. (See *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 at [11].)
2	**Of a kind – therapeutic and cosmetic sunscreens** Sunscreen products can be divided into 2 groups, therapeutic sunscreens regulated by the Therapeutic Goods Administration (TGA) and cosmetic sunscreens not regulated by the TGA. This grouping provides a compelling and definitive interpretation of 'of a kind' and should be determinative of the GST classification of sunscreen products. Therapeutic or primary sunscreens should be GST-free. Aligning the GST classification of sunscreen products with the classification of sunscreen products under the Australian Register of Therapeutic Goods (ARTG) would improve the subjective and uncertain marketing approach set out in the draft Determination. The case law cited in the draft Determination with regards to 'of a kind' is distinguishable in this context, as those cases did not involve extrinsic regulations that could assist in ascertaining the 'kind' of good.	We note this submission. However, no change has been made in the final Determination. We consider the phrase 'of a kind' as used in section 38-47 and the *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022* (Health Minister's Determination), takes on its ordinary meaning in context. This is consistent with how the Courts have approached the interpretation of the phrase in food classification cases. Further, in the absence of contrary intention, it is assumed that words are used consistently throughout a statute. We do not consider there is evidence in section 38-47 or the Health Minister's Determination of a contrary intention. The Health Minister's Determination sets out the specific requirements for a supply of sunscreen to be GST-free. The requirement to be registered on the ARTG is only one of 4 requirements and it alone is not determinative of the GST status of the supply. The GST Act and the Health Minister's Determination do not otherwise import any terms or requirements from the *Therapeutic Goods Act 1989* (TG Act). The Commissioner's duty is to apply the tax law as written. We consider the underlying concerns on the alignment of the TG Act and the GST Act are policy matters for Government.
3	**Inconsistency with public policy objectives** The common thread among the GST-free health goods is that they have a public health benefit. The key reason certain sunscreen products are GST-free is to encourage their use for skin cancer prevention (public health benefit).	We note this submission. However, no change has been made in the final Determination. The Commissioner's duty is to apply the tax law. The Determination applies the Health Minister's Determination, which specifies 4 requirements for a sunscreen product to be GST-free under subsection 38-47(1). The Commissioner cannot apply an alternative approach on public policy grounds. We consider these comments raise policy matters for Government.

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	Taxing sunscreen products that are used to prevent skin cancer is inconsistent with the policy of section 38-47 and the Health Minister's Determination.	
4	**Potential inconsistencies in the classification of products through the supply chain** The Commissioner should further explain how differing marketing approaches taken across the supply chain can affect the GST classification of a product. While the GST classification of a supply is determined at the precise time of the supply, it is unclear whether this may lead to the same sunscreen product being classified differently under subsection 38-47(1) as it is supplied through the supply chain and ultimately to the end-user. For example, can a supply to consumers be taxable even if the retailer markets it exclusively and robustly in a manner that's GST-free? And vice versa?	We have clarified, in paragraph 27 and Example 7 of the final Determination, that a single retailer's marketing that is inconsistent with the overall marketing of a sunscreen product across the supply chain will not alter the GST treatment of the supply. Whether a product is of a kind marketed principally for use as sunscreen is determined by an overall impression of the product which is to be formed by an objective and common sense assessment of the marketing of the product across the supply chain. Practically, this results in products having the same GST treatment as they move through the supply chain.
5	**Reviewing marketing across the supply chain** In determining whether a product is of a kind marketed principally for use as sunscreen, paragraph 22 of the draft Determination instructs that the 'activities of all suppliers in a supply chain will be relevant, including those of a manufacturer, importer, wholesaler and retailer'. Practically, the question then becomes 'who are the suppliers?'. How broadly does a taxpayer need to look to identify suppliers and consider the marketing activities of suppliers? It would place an unreasonable burden on suppliers, were they required to individually source and review the marketing materials of each other supplier in the chain. This onerous analysis would need to be performed on a regular and ongoing basis, as marketing by other suppliers is likely to change over time. The approach is likely to result in	We have clarified, in paragraph 28 of the final Determination, that suppliers do not need to undertake an exhaustive review of all product marketing by every supplier. Rather, an overall impression approach is to be taken to evaluating marketing of the product across the supply chain and by competitors. The Determination highlights that more weight is generally given to the labelling and packaging of a product and the consistent market-wide strategy by the manufacturer of a product in considering if a product is of a kind marketed principally for use as sunscreen. The labelling and packaging of a sunscreen product are not likely to change as it moves through the supply chain.

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	inconsistencies in the treatment of products by suppliers as it involves subjective assessment. The Commissioner needs to provide commentary in relation to the level of reasonable expectations with respect to the level of comparison and analysis that may need to be conducted by a taxpayer when considering the activities of suppliers, noting that a taxpayer will not have visibility across the whole market. To leave this open-ended would create uncertainty. Alternatively, the Commissioner should consider whether the current drafting is appropriate. The final Determination could be limited to only require a supplier to consider the packaging and labelling of the product and the supplier's own marketing materials.	
6	**Marketing of sunscreen** While the draft Determination aligns with previous case law dealing with food products, this interpretation is not directly applicable to sunscreen products sold as medicines in Australia. Unlike prepared foods, sunscreen products are often marketed with additional skincare benefits that cater to specific skin conditions such as dehydrated, sensitive, breakout-prone or eczema-prone skin. The featuring of any terms like sunscreen, sun protection factor (SPF) or ultraviolet A (UVA) and Ultraviolet B (UVB) broad spectrum in the name of the product significantly influences consumer perception and marketing efforts. Such products are marketed primarily for sun protection and health benefits, aligning with the definition of 'principally' as 'in the chief place' or 'in a special or marked degree'.	We note this submission. However, no change has been made in the final Determination. The Determination refers to applicable case law that specifically deals with the meaning of the phrases 'of a kind' and 'marketed principally' as they appear in the GST Act. While those cases were decided in the context of food classification disputes, the approaches in those cases are equally applicable to the use of the same phrases in other parts of the GST Act (such as the health provisions). While the use of terms like sunscreen, SPF, or UVA and UVB broad spectrum are consistent with marketing for use as sunscreen, use of those terms does not necessarily mean that the product is marketed principally for use as sunscreen. Use of those terms needs to be considered alongside the overall marketing of the product including the use of other terms that may be inconsistent with marketing principally for use as sunscreen.
7	**Marketed 'principally'** The strongest matching synonyms for 'principally' include words 'importantly' and 'notably'. Using these interpretations,	We note this submission. However, no change has been made in the final Determination. The meaning of the term 'principally' outlined in the Determination reflects case law that specifically deals with the term as it appears in the GST Act. While those cases were decided in the context of food classification disputes,

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	products that are 'principally for use as sunscreen' can have other equally important and notable uses. To put into context, a consumer chooses a product that is a sunscreen product and a personal insect repellent, because it is both a sunscreen and a personal insect repellent. It is 'notably' and 'importantly' a sunscreen. If sun protection was not an important factor for their product choice, then they would simply use a personal insect repellent. Similarly, for moisturisers containing sunscreen with SPF 15 or more, consumers are actively choosing these products as they offer sun protection as well as moisturising, the 2 being equally important considerations. These products are generally used in the mornings but not in the evenings, which shows deliberate action by the consumer to use sun protection.	the approaches in those cases are equally applicable to the use of the same phrases in other parts of the GST Act (such as the health provisions). The inclusion of sunscreen in a product does not necessarily mean the product is, or is of a kind of product, marketed principally for use as sunscreen. It is the marketing of the product rather than its composition that is the subject of the 'marketing test.' In this context, the word 'principally' distinguishes products that are marketed as merely containing sunscreen or having some use as sunscreen from products that are marketed 'principally' for use as sunscreen. To satisfy the marketing test, the product must be marketed 'mainly, chiefly, predominantly or preponderantly' for use as sunscreen.
8	**Marketing emphasised over composition** The draft Determination places too much emphasis on the 'marketed principally' factor. The lack of more prescriptive guidance means that 2 products with almost identical ingredients, but different marketing, may conceivably be treated differently for GST purposes. This seems likely to produce inconsistent outcomes.	We note this submission. However, no change has been made in the final Determination. The requirement in the Health Minister's Determination is that the sunscreen preparation is 'marketed principally for use as sunscreen'. This requirement results in product marketing determining the GST classification. The marketing test can result in products that have the same composition or ingredients being classified differently for GST purposes due to their different marketing. The GST outcomes are consistent with the way in which the products are marketed.
9	**Sunscreen usage directions** The final Determination should consider the inclusion of relevant usage directions as essential for products marketed primarily for sun protection. These include: • applying generously to the skin 20 minutes before sun exposure • reapplying frequently	We have included at paragraph 35 (through footnote 23) of the final Determination, specific reference to the Therapeutic Goods Advertising Code. References to the 'Australian regulatory guidelines for sunscreens' have also been updated to the URTS. The requirements in the TG Act and the GST law are different. While therapeutic sunscreens that are required to be included on the ARTG must also comply with other requirements in the TG Act, other legislation and

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	• reapplying after swimming, sweating, or towelling, and • using within the expiry date and storing in cool, dry conditions. These recommendations should align with the mandatory requirements outlined in AS/NZS 2604:2021 *Sunscreen products - Evaluation and classification* and *Understanding the Regulation of Therapeutic Sunscreens* (URTS) by the TGA. Paragraph 29 of the draft Determination incorrectly suggests that the inclusion of usage directions is not definitive for products marketed primarily as a sunscreen. The TGA mandates that sunscreens with a primary purpose of ultraviolet (UV) protection must include specific directions.	AS/NZS 2604:2021, compliance with those requirements is not a part of the test in the GST Act or the Health Minister's Determination. For GST, the sunscreen product must be of a kind for dermal application, have SPF of 15 or more, be required to be included on the ARTG and be marketed principally for use as sunscreen. We have inserted paragraph 41 in the final Determination to highlight features that we consider to be a strong indicator that a product is of a kind marketed principally for use as sunscreen: • an SPF for high protection (30, 40 or 50) or very high protection (50+) • the directions for use include all the directions outlined in paragraph 34 of the Determination, and • therapeutic claims that the product can aid in the prevention of solar keratoses, sunspots and some skin cancers. Ultimately, whether a sunscreen product is of a kind marketed principally for use as sunscreen is a matter of overall impression. No one factor is determinative. We have clarified, in paragraph 42 of the final Determination, our view that products will not be GST-free if there are indicators of another use which are strong, prescriptive and consistent enough to lead an objective observer to conclude, as a matter of overall impression, that the marketing of the other use is equal to or greater than the sunscreen use. Sun protection usage directions are a relevant feature, but not by themselves determinative of the principally marketed use. Products with these usage instructions can also have significant marketing for a use other than sunscreen. The absence of usage directions for effective sun protection, while also not of itself determinative, is uncharacteristic of the kind of products marketed principally for use as sunscreen. We consider the comment on the alignment of AS/NZS 2064:2021 and URTS with the GST law are policy matters for Government.
10	**Dual-purpose or multi-purpose** There appears to be a presumption in the draft Determination that any product with a dual-purpose or multi-purpose will not be marketed principally as sunscreen – that is, that dual-	We note this submission. However, no change has been made in the final Determination.

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	purpose implies that the purposes are split fifty-fifty. Whereas, in practice, dual-purpose could equally mean that a product has a primary use and a secondary use. The test that must be applied is whether the product is marketed principally, that is, 'mainly, chiefly, predominantly or preponderantly' for use as sunscreen. Therefore, with a dual-purpose product 50.1% of its marketing must point towards use as a sunscreen for the product to be considered a GST-free sunscreen (or if it was a '3-in-1' product over 33.34% the marketing).	The Determination does not presume that any product with any dual-purpose or multi-purpose will not be of a kind marketed principally for use as sunscreen. Paragraph 46 of the final Determination states that sunscreen products marketed as having a dual-purpose or multi-purpose may still be marketed principally for use as sunscreen, provided the sunscreen use is the main, chief, predominant or preponderant marketed use. Paragraph 46 of the final Determination also refers to the usage of descriptors such as 'multi-use', 'multi-functional', '2-in-1', or '3-in-1' as being a strong indication that the product is marketed as having multiple equal uses, and no clear 'principal' use. But it is not determinative. Whether a sunscreen product is of a kind marketed principally for use as sunscreen is a matter of overall impression. No one factor is determinative, although the labelling and packaging, including the name of the product, is of particular importance in the overall objective assessment of the marketing of a particular product.
11	**Table 1 of the draft Determination – subjectivity** Some words and phrases in Table 1 of the draft Determination appear to have been assigned subjectively, which has the potential to cause confusion in the application of subsection 38-47(1).	The words and phrases in Table 1 of the draft Determination were assigned based on practical insights gained through ATO reviews, compliance actions, and industry consultation. We adjusted the wording used in the final Determination, following this consultation process.
12	**Table 1 of the draft Determination – sunscreen specific features** The terms and features 'water and sweat resistant' and 'reef friendly' in column 1 of table 1 of the draft Determination are not sunscreen-specific features. Both terms could be applied to a range of different products and should be moved to columns 2 or 3.	In the final Determination, the terms and features 'water and sweat resistant' and 'reef friendly' have been moved from column 1 to column 2 of Table 1.
13	**Table 1 of the draft Determination – terms and features inconsistent with a principal sunscreen use** The references in the last column to '2-in-1', '3-in-1', 'multi-use', and 'BB cream' are not terms and features that	We note this submission. However, no change has been made in the final Determination. These terms are indicative that the product is marketed with multiple equal or primary uses other than use as sunscreen.

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	automatically indicate a 'strong indication' that the product is not marketed principally for use as sunscreen.	
14	**Examples 1 and 3 of the draft Determination** AS/NZS 2604:2021 prohibits the term 'sunblock' in relation to sunscreen products (section 6.1(c) of the Standard). The product names in Examples 1 and 3 of the draft Determination, 'Sting-Ray Block' and 'Face Block' respectively should be amended in the final Determination to set a good example.	Example 1 of the draft Determination is now Examples 6 and 7 of the final Determination and Example 3 of the draft Determination is now Example 3 of the final Determination. To ensure compliance with AS/NZS 2604:2021, the product names 'Sting-Ray Block' and 'Face Block' in these examples have been altered. The examples also now focus on the 'marketed principally' requirement that they are intended to demonstrate.
15	**Example 2 of the draft Determination** Moisturising skin care products containing sunscreen with an SPF of 15 or less may be exempt from the requirement to be listed on the ARTG. See Schedule 2, item 5 of the *Therapeutic Goods (Excluded Goods) Determination 2018* (Excluded Goods Determination).	The final Determination raises the SPF of the product in this example (now Example 1) to SPF 30. The examples in the final Determination also now focus on the 'marketed principally' requirement that they are intended to demonstrate.
16	**Example 4 of the draft Determination** Example 4 of the draft Determination relates to a CC cream with SPF protection and states that the product is required to be listed on the ARTG. CC creams, like other tinted bases and foundations, are exempt therapeutic goods as cosmetic products. See Schedule 1, item 15 of the Excluded Goods Determination.	This example is now Example 3 of the final Determination. We have confirmed with the TGA that it is possible for a product with a tint to be required to be listed in the ARTG if the product does not meet the criteria for exclusion under the Excluded Goods Determination. We have also updated the examples to focus on the 'marketed principally' requirement that they are intended to demonstrate. In recognition of the practical difficulties suppliers across the supply chain may encounter in determining whether a sunscreen preparation is required, or in a class of goods required, to be included in the ARTG under the TG Act, we have included a compliance approach in the final Determination. The compliance approach is on whether a sunscreen product is required, or in a class of goods required, to be included in the ARTG.
17	**Example 6 of the draft Determination** Example 6 of the draft Determination relates to a lip balm with high SPF and states that the product is required to be listed on the ARTG.	This example is now Example 5 of the final Determination. We have confirmed with the TGA that it is possible for a lip balm to be required to be listed in the ARTG if the product does not meet the criteria for exclusion under the Excluded Goods Determination.

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	Lip products with high SPF are not required to be listed on the ARTG if they are marketed as secondary sunscreen products. See Schedule 1, item 14 of the Excluded Goods Determination.	The examples in the final Determination now also focus on the 'marketed principally' requirement that they are intended to demonstrate. In recognition of the practical difficulties suppliers across the supply chain may encounter in determining whether a sunscreen preparation is required, or in a class of goods required, to be included in the ARTG under the TG Act, we have included a compliance approach in the final Determination. The compliance approach is on whether a sunscreen product is required, or in a class of goods required, to be included in the ARTG.
18	**Example 6 of the draft Determination** Example 6 of the draft Determination provides guidance in relation to when a lip balm product is not marketed principally as sunscreen. Would it be possible for the ATO to provide an example of when a lip balm is marketed principally as sunscreen?	We note this submission. However, no change has been made in the final Determination. Based on practical insights gained through ATO reviews, compliance actions, and industry consultation, the lip balm used in Example 6 (now Example 5 of the final Determination) is representative of the marketing of the majority of lip balms. That is, marketing themselves as protecting the wearer from all environmental elements and moisturising and conditioning the lips. Therefore, it provides the most useful example of how the Commissioner's view applies to these products. We consider the guidance, including the other examples, in the Determination provides sufficient guidance to apply the view to other products and it is not necessary to include a specific example of a lip balm that would be marketed principally for use as sunscreen.
19	**Further practical measures** Practical measures that could be taken to improve consistency in the GST classification of sunscreen products include: • a public register of sunscreen products that the Commissioner has considered under subsection 38-47(1) (similar to the existing food and beverage search tool) • a safe harbor whereby retailers may rely on the GST classification made by the manufacturer or wholesaler.	We note this submission. However, no change has been made in the final Determination. Given the nature of the legislative requirements under the GST law, for a register of sunscreen products to be useful, it would need to identify specific products. The Commissioner could not publish a public register listing the GST status of individual products due to the taxpayer secrecy provisions contained in Division 355 of Schedule 1 to the *Taxation Administration Act 1953*. The Commissioner could not provide the suggested safe harbour. A GST classification decision made by a manufacturer or wholesaler is not a relevant or appropriate circumstance for the Commissioner to consider in deciding not to take compliance action to apply the ATO view of the law to other taxpayers in the supply chain under PS LA 2011/27. This Practice Statement focuses

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		on the extent to which the ATO has facilitated or contributed to taxpayers adopting a different view of the law.