CR 2013/19 - Goods and services tax: GST treatment of waste management services supplied by NSW councils

This cover sheet is provided for information only. It does not form part of *CR 2013/19 - Goods and services tax: GST treatment of waste management services supplied by NSW councils*

This Ruling contains references to provisions of the *A New Tax System (Goods and Services Tax) Regulations 1999,* which have been replaced by the *A New Tax System (Goods and Services Tax) Regulations 2019.* This Ruling continues to have effect in relation to the remade Regulations.

Paragraph 32 of TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed and rewritten.

A comparison table which provides the replacement provisions in the *A New Tax System (Goods and Services Tax) Regulations 2019* for regulations which are referenced in this Ruling is available.

Class Ruling

Goods and services tax: GST treatment of waste management services supplied by NSW councils

Contents Para

This Ruling contains references to provisions of the *A New Tax System (Goods and Services Tax) Regulations 1999*, which have been replaced by the *A New Tax System (Goods and Services Tax) Regulations 2019*. This Ruling continues to have effect in relation to the remade Regulations.

Paragraph 32 of TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed and rewritten.

A comparison table which provides the replacement provisions in the *A New Tax System (Goods and Services Tax) Regulations 2019* for regulations which are referenced in this Ruling is available.

This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the Taxation Administration Act 1953.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- Section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act);
- Division 81 of the GST Act; and
- Regulation 81 of the *A New Tax System (Goods and Services Tax) Regulations 1999* (GST Regulations).

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

Class of entities

3. The class of entities to which this Ruling applies consists of all councils that are members of the Local Government and Shires Association of New South Wales.

4. Within this Ruling the class of entities is collectively referred to as Council.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 11 to 20 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then this Ruling:

- has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- may be withdrawn or modified.

Date of effect

9. This Ruling applies from 1 July 2013 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

10. The following description of the scheme is based on information provided by the applicant.

11. Council is registered for goods and services tax (GST).

12. By force of section 220 of the *Local Government Act NSW 1993* (LG Act), Council is a body politic of the State of NSW with perpetual succession and the legal capacity and powers of an individual, both in and outside the State.

13. Council is empowered under the LG Act to:

- provide goods, services and facilities and to carry out activities, appropriate to the current and future needs of local communities and of the wider public;
- maintain responsibility for administering the regulatory systems under the LG Act; and
- manage, improve and develop the resources of their local government areas.

14. Council levies charges for waste management services (WMS) under sections 496, 501 and 502 of the LG Act.[1] Additionally, under subsection 608(1) of the LG Act, Council may charge and recover a fee for any service it provides.

15. Under section 496 of the LG Act, Council **must** make and levy charges for domestic WMS.

16. The term 'domestic waste management services' is defined in the Dictionary in the LG Act as:

> 'domestic waste management services' means services comprising the periodic collection of domestic waste from individual parcels of rateable land and services that are associated with those services.

17. Under subsection 496(2), section 502 or subsection 608(1) of the LG Act, Council **may** levy charges for domestic WMS according to the actual use of the service. These situations include where:

- the ratepayer requests an additional waste 'pick up';

[1] Details of these sections are contained in Appendix 2.

- Council agrees to provide a WMS to non-rateable land, such as, Crown land, school, church manse or police residence; or
- Council agrees to provide a WMS to properties outside their normal service area (sometimes called scavenging area).

18. Council may provide WMS for non domestic customers, for example, shops, factories and office buildings. In some areas the private sector is competing with Council for the provision of these services. Council charges for WMS to non domestic customers are made under either section 501, 502 or subsection 608(1) of the LG Act.

19. Once the ratepayer has requested a WMS and Council has decided to provide and charge for this service, then the ratepayer is liable to pay the charge under section 561 of the LG Act. Any debt is then subject to enforcement procedures by law.

20. Council may also provide other services in relation to waste. These are:

- WMS provided within the grounds of apartment block complexes;
- the supply, exchange or removal of bins or crates used in connection with the kerbside collection of waste;
- a one off fee for changing a smaller kerbside bin to a larger one or vice versa;
- removing a kerbside bin from a council's footpath (after a period of 48 hours since waste collection) and placement of that bin within the relevant property;
- the occasional kerbside 'council clean up' for larger items, such as, whitegoods, furniture and mattresses that are not normally taken in the regular weekly or fortnightly WMS;
- WMS to a collection point where a group of rural landowners take their domestic waste to a common area for pick up;
- an application and renewal fee for listing on a council's approved list of private waste removal companies in relation to construction and demolition waste. The provider receives a discounted rate to a waste disposal site when on the approved list; and
- fees and charges in relation to waste disposal sites, garbage tips and refuse transfer stations. These include:
  - general, recycling and green waste;
  - rural waste facility access cards; and

- issuing of new or replacement keys to waste disposal sites.

Ruling

21. This Ruling addresses the GST treatment of the supply of WMS by Council on or after 1 July 2013.

22. Under section 81-15 and by virtue of regulation 81-15.01 of the GST Regulations, certain fees and charges are exempt[2] from GST except where paragraph 81-10.01(1)(h) of the GST Regulations also applies to those fees and charges (see first dot point of paragraph 26 of this Class Ruling). These include fees and charges for supplies of:

- the kerbside collection of waste[3] or the supply, exchange or removal of bins or crates used in connection with the kerbside collection of waste, and
- a regulatory nature made by an Australian government agency.[4]

23. Unless paragraph 81-10.01(1)(h) of the GST Regulations also applies, the following are examples of supplies of the kerbside collection of waste (domestic or non-domestic) that are exempt from GST due to paragraph 81-15.01(1)(a) of the GST Regulations:

- where a base fee for kerbside waste service availability is charged;
- additional 'pick ups' of kerbside waste;
- kerbside waste collection provided to properties outside the normal service area;
- WMS to a collection point where a group of rural landowners take their domestic waste to a common area, that is not a waste disposal facility, for pick up;
- the supply, exchange or removal of bins or crates used in connection with the kerbside collection of waste;
- changing a smaller kerbside bin to a larger one or vice versa;
- removal of waste from a house on Crown land, school, church manse or police residence;

[2] In this Ruling, if a fee or charge is not consideration for a supply and is not subject to GST, it is referred to as being 'exempt'.
[3] 'Waste' includes green waste and recyclables under subregulation 81-15.01(2) of the GST Regulations.
[4] Further explanation is provided in Appendix 1.

- removing a kerbside bin from Council footpath (after a period of 48 hours since waste collection) and placement of that bin within the relevant property; and
- the occasional kerbside 'Council clean up' for larger items, such as, whitegoods, furniture and mattresses that are not normally taken with the regular weekly or fortnightly WMS.

24. An example of a supply that is exempt from GST because it is of a regulatory nature is where the respective fee or charge is for an application or renewal for listing on Council's approved list of private waste removal companies in relation to construction and demolition waste.

25. The following are examples of supplies that are not exempt under Division 81 but are taxable supplies where the requirements of section 9-5 are met:

- WMS that Council provides in a competitive market, or that may be provided by duly accredited or authorised private sector suppliers (regardless of whether the WMS are compulsory or not); and
- fees and charges in relation to waste disposal sites, garbage tips and refuse transfer stations. These include:
  - general, recycling and green waste;
  - rural waste facility access cards; and
  - issuing of new or replacement keys to waste disposal sites.

Commissioner of Taxation
13 March 2013

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

26. Subsection 7-1(1) provides that GST is payable on taxable supplies. As such, Council is liable to pay the GST payable on any taxable supply it makes. Section 9-5 states:

> **9-5 Taxable supplies**
>
> You make a **taxable supply** if:
>
> (a) you make the supply for *consideration; and
>
> (b) the supply is made in the course or furtherance of an *enterprise that you carry on; and
>
> (c) the supply is *connected with Australia; and
>
> (d) you are *registered, or *required to be registered.
>
> However, the supply is not a *taxable supply to the extent that it is *GST-free or *input taxed.
>
> (* Asterisked terms are defined in the Dictionary in section 195-1)

27. As Council is registered for GST and provides WMS in carrying on its enterprise in Australia, the issue that arises under section 9-5 is whether such services are supplies for consideration.

28. Section 9-39 provides special rules in relation to making taxable supplies. In particular, item 8 in the table in section 9-39 provides that where there is a payment of taxes, fees and charges the special rules in Division 81 may apply.

Division 81

29. Section 81-5 considers the effect of the payment of a tax. It states:

> **81-5 Effect of payment of tax**
>
> *Australian tax not consideration*
>
> (1) A payment, or the discharging of a liability to make a payment, is not the provision of *consideration to the extent the payment is an *Australian tax.
>
> *Regulations may provide for exceptions*
>
> (2) However, a payment you make, or a discharging of your liability to make a payment, is treated as the provision of *consideration to the extent the payment is an *Australian tax that is, or is of a kind, prescribed by the regulations.
>
> (3) For the purposes of subsection (2), the *consideration is taken to be provided to the entity to which the tax is payable, for a supply that the entity makes to you.

30. The term 'Australian tax' is defined in section 195-1 as:

> **Australian tax** means a tax (however described) imposed under an *Australian law.

31. 'Tax' is not defined in the GST Act. However, the following is the usual description of a tax, as cited in the High Court case of *Roy Morgan Research Pty Ltd v. Federal Commissioner of Taxation* (2011) 244 CLR 97; [2011] HCA 35; 2011 ATC 20-282; (2011) 80 ATR 1 (Roy Morgan), as per Latham CJ in *Matthews v. Chicory Marketing Board* (Vict) (1938) 60 CLR 263.

> …..a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered …

32. The above description includes the words 'not a payment for services rendered'. It was discussed in *Air Caledonie International v. Commonwealth* (1988) 165 CLR 462 that in order to be classified as a fee for service rather than a tax, the fee or charge must be exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment.

33. The relevant sections of the LGA, namely sections 496, 501, 502 and subsection 608(1) use the words 'levying', 'charges', 'services', 'service to that land' and 'fee' in relation to WMS. A payment to Council of a charge for a WMS is for an identified service provided. For this reason, we do not consider a payment, or the discharging of a liability to make payment, for a WMS to be a tax.

34. In contrast, a payment of ordinary rates satisfies the definition of a 'tax' as it is not for services rendered to the ratepayer. The activities of council of maintaining roads and parks, and the infrastructure of the council area are of benefit to anyone living in or visiting the council area, i.e. to the world at large.

Fees and Charges

35. Sections 81-10 and 81-15 consider the effect of certain fees and charges and state:

> **81-10 Effect of payment of certain fees and charges**
>
> *Certain fees and charges not consideration*
>
> (1) A payment, or the discharging of a liability to make a payment, is not the provision of *consideration to the extent the payment is an *Australian fee or charge that is of a kind covered by subsection (4) or (5).
>
> *Prescribed fees and charges treated as consideration*
>
> (2) However, a payment you make, or a discharging of your liability to make a payment, is treated as the provision of consideration to the extent the payment is an *Australian fee or charge that is, or is of a kind, prescribed by the regulations.

(3) For the purposes of subsection (2), the consideration is taken to be provided to the entity to which the fee or charge is payable, for a supply that the entity makes to you.

Fees or charges paid for permissions etc.

(4) This subsection covers a fee or charge if the fee or charge:

(a) relates to; or

(b) relates to an application for;

the provision, retention, or amendment, under an *Australian law, of a permission, exemption, authority or licence (however described).

Fees or charges relating to information and record-keeping etc.

(1) This subsection covers a fee or charge paid to an *Australian government agency if the fee or charge relates to the agency doing any of the following:

(a) recording information;

(b) copying information;

(c) modifying information;

(d) allowing access to information;

(e) receiving information;

(f) processing information;

(g) searching for information.

81-15 Other fees and charges that do not constitute consideration

The regulations may provide that the payment of a prescribed *Australian fee or charge, or of an Australian fee or charge of a prescribed kind, or the discharging of a liability to make such a payment, is not the provision of *consideration.

36. The term 'Australian fee or charge' is defined in section 195-1 as:

Australian fee or charge means a fee or charge (however described), other than an Australian tax, imposed under an *Australian law and payable to an *Australian government agency.

37. The term 'Australian law' is defined in section 995-1 of the ITAA 1997 and relevantly includes a State law. It includes acts and law making powers which are delegated by parliaments, such as regulations, by-laws, proclamations and orders made under Acts. Therefore, the LG Act is an Australian law.

38. The term 'Australian government agency' is defined in section 995-1 of the ITAA 1997 and means:

- the Commonwealth, a State or Territory; or
- an authority of the Commonwealth or of a State or a Territory.

39. For the purposes of this Ruling it is accepted that Council comes within the definition of Australian government agency.

Fees and charges that constitute consideration

40. Paragraph 81-10.01(1)(d) of the GST Regulations provides that a fee for the use of a waste disposal facility is prescribed for section 81-10 and constitutes consideration.

41. Additionally paragraph 81-10.01(1)(h) of the GST Regulations provides that a fee or charge for a supply by an Australian government agency, where the supply may also be made by a supplier that is not an Australian government agency is prescribed for section 81-10 and constitutes consideration.

42. The explanatory statement to the *A New Tax System (Goods and Services Tax) Amendment Regulation 2012* (No.2) (ES) states the following in relation to paragraph 81-10.01(1)(h) of the GST Regulations:

> This paragraph ensures that the regulatory activities of government made in competition with the private sector are subject to GST where the other requirements of section 9-5 of the Act are satisfied.
>
> Fees and charges in this category are not excluded from being consideration for a taxable supply. This is consistent with the National Competition and Consumer Policy guidelines and ensures that a government entity is not given a competitive advantage over a private sector supplier making the same type of supply.
>
> This covers situations in which government agencies have authorised private agencies to perform activities that form part of a regulatory process, for example, certification activities which are required for a regulatory process to be followed. Where government agencies, as well as government certifiers, have authorised private certifiers to perform certification activities these fees and charges will continue to be consideration for a supply that is subject to GST. This ensures competitive neutrality between supplies made by government and non-government agencies.
>
> This paragraph applies only where a government agency is providing a supply in a competitive market, or where private suppliers have been accredited or authorised to make a supply over which the agency would otherwise have a monopoly.
>
> This paragraph does not cover supplies of information that are regulatory in nature and can only be supplied by government agencies, notwithstanding that the public may obtain such information through a private sector supplier acting as a conduit for the information from the government agency. The supply is only a taxable supply where the private sector entity charges for the supply in its own right.

Fees and charges that do not constitute consideration

43. Regulation 81-15.01 of the GST Regulations sets out those fees and charges that are prescribed for section 81-15 and which do **not** constitute consideration. One of these is the kerbside collection of waste or the supply, exchange or removal of bins or crates used in connection with kerbside collection of waste. Waste includes green waste and recyclables.

44. The ES states the following in relation to fees and charges for the kerbside collection of waste:

> Fees and charges for kerbside collection of waste
>
> *Item [4] – paragraph 81-15.01(1)(a) and subregulation 81-15.01(2)*
>
> This paragraph and subregulation ensure that fees and charges for the kerbside collection of waste are not treated as the provision of consideration, and therefore do not give rise to a taxable supply under Division 81.
>
> Kerbside waste collection fees are often, but not always, covered by general council rates. It is intended that all fees and charges for kerbside collection of waste are not consideration for a supply, so that these services are exempt from GST. This is regardless of whether the fees paid in relation to the service are compulsory or optional as kerbside collection of waste is a basic activity of local government.
>
> Kerbside collection includes a regular waste collection service conducted by an Australian government agency where, for practical reasons, the waste must be collected from inside the property boundary of the ratepayer, such as a waste service for residents of a high-rise residential complex. However, additional waste collection undertaken by a commercial entity is not considered to be kerbside collection even though it may be collected from the kerbside in some circumstances.
>
> Examples of Australian fees and charges that will fall within this paragraph include, but are not limited to:
>
> - Fees for kerbside collection of green waste as part of the normal kerbside waste collection stream;
> - Fees for supply, exchange or removal of bins or crates used in connection with kerbside waste, including recyclables; and
> - Fees for removal of waste from high rise residential apartments where residents have paid for this on their rates notice.

45. Another fee or charge that is prescribed for section 81-15 by virtue of regulation 81-15.01 of the GST Regulations is a fee or charge for a supply of a regulatory nature made by an Australian government agency.

Fees and charges covered by both regulations 81-10.01 and 81-15.01 of the GST Regulations

46. If a fee or charge is covered by both regulations 81-10.01 and 81-15.01 of the GST Regulations, regulation 81-15.02 of the GST Regulations determines which regulation would prevail. For example, fees or charges for the kerbside collection of waste or for the supply, exchange or removal of bins or crates used in connection with the kerbside collection of waste are covered by both paragraph 81-15.01(1)(a) and paragraph 81-10.01(1)(h) of the GST Regulations if those things may also be supplied by a private sector supplier other than Council. In such a situation, subregulation 81-15.02(2) of the GST Regulations provides that paragraph 81-10.01(1)(h) of the GST Regulations would prevail and the fee or charge would constitute consideration.

Appendix 2 – Legislative references

47. Sections 496, 501, 502, 560 and subsection 608(1) of the LG Act state:

> **496 Making and levying of annual charges for domestic waste management services**
>
> (1) A council must make and levy an annual charge for the provision of domestic waste management services for each parcel of rateable land for which the service is available.
>
> (2) A council may make an annual charge for the provision of a domestic waste management service for a parcel of land that is exempt from rating if:
>
> (a) the service is available for that land, and
>
> (b) the owner of that land requests or agrees to the provision of the service to that land, and
>
> (c) the amount of the annual charge is limited to recovering the cost of providing the service to that land.
>
> **501 For what services can a council impose an annual charge?**
>
> (1) A council may make an annual charge for any of the following services provided, or proposed to be provided, on an annual basis by the council:
>
> - water supply services
> - sewerage services
> - drainage services
> - waste management services (other than domestic waste management services)
> - any services prescribed by the regulations.
>
> (2) A council may make a single charge for two or more such services.
>
> (3) An annual charge may be levied on each parcel of rateable land for which the service is provided or proposed to be provided.
>
> **502 Charges for actual use**
>
> A council may make a charge for a service referred to in section 496 or 501 according to the actual use of the service.
>
> **561 Who is liable to pay charges?**
>
> The person liable to pay a charge is:
>
> (a) the person who, if the charge were a rate and if the land on which the charge is levied were rateable in respect of that rate, would be liable under section 560 to pay the rate, or

(b) the Crown in respect of land owned by the Crown, not being land held under a lease for private purposes.

608 Council fees for services

(1) A council may charge and recover an approved fee for any service it provides, other than a service provided, or proposed to be provided, on an annual basis for which it is authorised or required to make an annual charge under section 496 or 501.

Appendix 3 – Detailed contents list

48. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- Goods and services tax
- Government entities
- Government related entities
- Local Government
- GST consideration
- GST payment of taxes
- GST regulations

Legislative references:

- ANTS (GST)A 1999 7-1(1)
- ANTS (GST)A 1999 9-5
- ANTS (GST)A 1999 9-39
- ANTS (GST)A 1999 Div 81
- ANTS (GST)A 1999 81-5
- ANTS (GST)A 1999 81-10
- ANTS (GST)A 1999 81-15
- ANTS (GST)A 1999 195-1
- ANTS(GST)R 1999 81-10.01(1)
- ANTS(GST)R 1999 81-10.01(1)(d)
- ANTS(GST)R 1999 81-10.01(1)(h)
- ANTS(GST)R 1999 81-15.01
- ANTS(GST)R 1999 81-15.01(1)(a)
- ANTS(GST)R 1999 81-15.01(1)(f)
- ANTS(GST)R 1999 81-15.01(2)
- ANTS(GST)R 1999 81-15.02(2)
- ITAA 1997 995-1
- LG (NSW)A 1993 220
- LG (NSW)A 1993 496
- LG (NSW)A 1993 501
- LG (NSW)A 1993 502
- LG (NSW)A 1993 560
- LG (NSW)A 1993 608(1)
- TAA 1953
- Copyright Act 1968

Case references:

- *Roy Morgan Research Pty Ltd v. Federal Commissioner of Taxation* (2011) 244 CLR 97; [2011] HCA 35; 2011 ATC 20-282; (2011) 80 ATR 1
- *Matthews v. Chicory Marketing Board (Vict)* (1938) 60 CLR 263
- *Air Caledonie International v. Commonwealth* (1988) 165 CLR 462

Other references:

- Explanatory Statement to ANTS(GST) Amendment Regulation 2012 (No.2)(ES)

ATO references

NO: 1-3YG5KLD
ISSN: 1445-2014
ATOlaw topic: Goods and Services Tax ~~ Government ~~ taxes, fees and charges