


CR 2014/88 - Goods and services tax: bus transport in New South Wales - offers of employment and subsequent recompense payments made under Bus Service Contracts

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Class Ruling

Goods and services tax: bus transport in New South Wales – offers of employment and subsequent recompense payments made under Bus Service Contracts

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1 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this ruling relates.

Relevant provisions

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)
- section 9-10 of the GST Act, and
- section 9-15 of the GST Act.

Class of entities

3. The class of entities to which this ruling applies is Bus Service Operators (Operators) who enter into an agreement with Transport for New South Wales (TfNSW) in the following bus service contracts:

- The Sydney Metropolitan Bus Service Contract (SMBSC)
- The Metropolitan Bus System Contract (MBSC), or
- The Outer-Metropolitan Bus Service Contract (OMBSC).

(Collectively referred to in this ruling as the Bus Service Contracts.)

Qualifications

4. The Commissioner makes this ruling based on the Bus Service Contracts identified in this ruling.

5. 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 8 to 15 of this ruling.

6. 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
- this ruling may be withdrawn or modified.

Date of effect

7. This ruling applies from 1 July 2013 to 30 June 2021. The ruling continues to apply after 30 June 2021 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

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

9. TfNSW uses both a tender process and direct bid negotiations to engage Operators to provide bus services in New South Wales. The process has the following features:

- Direct bid negotiations in respect of the original MBSCs and OMBSCs
- Tenders in respect of expired MBSCs for the award of bus service contracts based on the new SMBSCs (first and second tranches)
- Direct bid negotiations with incumbent operators under the MBSCs who agreed with TfNSW to transition to the new SMBSCs, and
- Direct bid negotiations with incumbent operators under the OMBSCs who agreed with TfNSW to transition to the new OMBSCs.

10. All potential Operators are required to participate in the tender on the terms provided.

11. The terms and conditions on which any regular passenger service is carried on in New South Wales are contained in the Bus Service Contracts, entered into between an Operator and TfNSW.

12. Regulation 91 of the *Passenger Transport Regulation 2007* (NSW) provides that an Operator that is the holder of a Bus Service Contract that authorises the carrying on of a bus service 'must not contravene or fail to comply with the terms and conditions of the [Bus Service Contracts]'.

13. One of those terms relates specifically to a successful tenderer, the Successor Operator¹, being required to make offers of employment to employees of an unsuccessful incumbent operator, the Preceding Operator², on equivalent terms and conditions and to be responsible for certain employee benefits. This occurs during the 'transition period', between the Successor Operator signing the contract and commencing operation. Failure to comply may lead to immediate termination of the contract.

14. Where an employee accepts an offer of employment from the Successor Operator the Bus Services Contracts require the Preceding Operator to pay to either TfNSW, or directly to the Successor Operator if TfNSW directs, an amount (the recompense payment) which is calculated based on various entitlements accrued in respect of those employees, such as annual leave, long service leave and applicable loadings.

15. There are no separate contractual arrangements between Preceding Operators and Successor Operators.

¹ Successor Operator is defined in the Bus Service Contracts as meaning '... a Bus Operator succeeding the Operator in the operation of all or part of the Contract Bus Services after the Termination Date (but does not include an Interim Operator).'

² Preceding Operator is defined in the Bus Service Contracts as meaning '... a Bus operator preceding the Operation of all or part of the Contract Bus Services prior to the Services Commencement Date.'

Ruling

16. The Successor Operator makes a supply to TfNSW by entering into the obligation to make an offer of employment to employees of the Preceding Operator.

17. This supply is not a taxable supply as there is no consideration provided by TfNSW or any other entity for this supply.

18. The Successor Operator also supplies a service to TfNSW of making offers of employment, which is provided to the employees of the Preceding Operator, as required by the Bus Service Contract. If employees accept the offer made by the Successor Operator, under its agreement with TfNSW, the Preceding Operator will make the recompense payment.

19. The supply of services made by the Successor Operator is not a taxable supply as there is not a sufficient nexus between the supply and the recompense payment if received by the Successor Operator.

Commissioner of Taxation

22 October 2014

Appendix 1 – Explanation

❶ *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.*

20. An entity makes a taxable supply where the requirements of section 9-5 are met:

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.

21. Supply is defined broadly in the GST Act. Section 9-10 relevantly states:

- (1) A **supply** is any form of supply whatsoever.
- (2) Without limiting subsection (1), **supply** includes any of these:
 - (a) a supply of goods;
 - (b) a supply of services;
 - (c) a provision of advice or information;
 - (d) a grant, assignment or surrender of *real property;
 - (e) a creation, grant, transfer, assignment or surrender of any right;
 - (f) a *financial supply;
 - (g) an entry into, or release from, an obligation:
 - (i) to do anything; or
 - (ii) to refrain from an act; or
 - (iii) to tolerate an act or situation;
 - (h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).

22. The initial requirement for a taxable supply is that there is a supply made for consideration. Section 9-15 of the GST Act provides that a payment will be consideration for a supply if the payment is 'in connection with', 'in response to' or 'for the inducement of' a supply. This therefore requires that there is a sufficient nexus between the payment and a supply.³ The test is an objective one.

Entry into the obligation to offer employment

23. Under the Bus Service Contracts, entering into the obligation to make an offer of employment to employees of the Preceding Operator satisfies the definition of supply in section 9-10 of the GST Act.⁴ This supply is made by the Successor Operator to TfNSW.

24. This supply, however, is not a taxable supply as there is no consideration provided by TfNSW or any other entity for this supply. Further, the Successor Operator makes the supply in compliance with the terms of the Bus Service Contracts, not for payment. The only payment that may be received by the Successor Operator under the Bus Services Contracts is the recompense payment. The entry into the obligation is a stipulation of entry into the tendering process for Bus Service Contracts, and the Successor Operator will make the supply regardless of the recompense payment.

25. In any case, if a recompense payment is received by the Successor Operator, that payment is not consideration for the supply, as it is not provided 'in connection with', 'in response to' or 'for the inducement of' the supply.

Service of offering employment

26. The Successor Operator also supplies a service to TfNSW of making offers of employment⁵, which is provided to the employees of the Preceding Operator⁶, as required by the Bus Service Contract. 'Provide' is used to contrast with 'made' - it distinguishes between the contractual flow of the supply to the recipient (the entity to which the supply is made) and the actual flow of the supply to another entity (the entity to which the supply is provided).⁷

³ See, for example, paragraph 75 of GSTR 2001/4 *Goods and services tax: GST consequences of court orders and out-of-court settlements*, paragraph 50 of GSTR 2001/6 *Goods and services tax: non-monetary consideration*, and paragraphs 15 of GSTR 2012/2 *Goods and services tax: financial assistance payments*.

⁴ Subparagraph 9-10(2)(g)(i) of the GST Act.

⁵ Paragraph 9-10(2)(b) of the GST Act.

⁶ See Proposition 13 (*Proposition 13: when A has an agreement with B for B to provide a supply to C, there is a supply made by B to A (contractual flow) that B provides to C (actual flow)*) of Goods and Service Tax Ruling GSTR 2006/9 *Goods and services tax: supplies*.

⁷ Paragraph 132 of GSTR 2006/9.

27. If an employee(s) accepts the offer made by the Successor Operator, under the agreement between TfNSW and the Preceding Operator, separate and distinct contractual obligations on the Preceding Operator are triggered that require it to make the recompense payment to TfNSW, or to the Successor Operator if directed by TfNSW.

28. There are no contractual rights or obligations, particularly with respect to the payment, directly between the Successor Operator and the Preceding Operator. Therefore, even if the Preceding Operator pays the recompense amount directly to the Successor Operator, the amount is considered to have been paid by TfNSW to the Successor Operator.

29. The supply of services made by the Successor Operator is not a taxable supply as there is no nexus between the supply and the recompense payment that the Successor operator may receive. The supply is made in compliance with the terms of the Bus Services Contracts, and is not made for the payment.

30. The payment is not consideration within the meaning in the GST Act as it is not provided 'in connection with', 'in response to' or 'for the inducement of' the supply. The payment by the Preceding Operator to TfNSW is made in compliance with the terms of the Bus Services Contract with TfNSW, and lacks sufficient nexus with the supply made by the Successor Operator to TfNSW. Similarly the recompense payment that may be made by TfNSW to the Successor Operator is provided as a result of the Preceding Operator's employees accepting the offer of employment, not in relation to the Successor Operator's service of making the offer.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

- GST supply
- taxable supply

Related Rulings/Determinations:

TR 2006/10; GSTR 2001/4,
GSTR 2001/6; GSTR 2006/9,
GSTR 2012/2

Legislative references:

- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-10
- ANTS(GST)A 1999 9-15
- TAA 1953
- Copyright Act 1968
- Passenger Transport Regulation 2007 (NSW) 91

Subject references:

- goods and services tax
- GST supplies & acquisitions

ATO references

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Supplies ~~ Out of scope supplies

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