GSTD 2000/D4 - Goods and Services Tax: are outgoings payable by a tenant under a commercial property lease part of the consideration for the supply of the premises?

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This document has been finalised.

Draft Goods and Services Tax Determination

Goods and Services Tax: are outgoings payable by a tenant under a commercial property lease part of the consideration for the supply of the premises?

Preamble

Draft Goods and Services Taxation Determinations (DGSTDs) present the preliminary, though considered, views of the Australian Taxation Office. DGSTDs should not be relied on; only final Goods and Services Taxation Determinations represent authoritative statements by the Australian Taxation Office.

1. If a single supply is made under a commercial property lease, the consideration for the supply made by a landlord includes amounts which are paid by the tenant under the terms of the lease:

- to the landlord for amounts for which the landlord is liable; or
- directly to a third party where the payment is in satisfaction of the landlord's liability.[1]

2. If the supply of the premises is a taxable supply, GST is payable on the value of the supply which includes the value of the outgoing. This is the case regardless of whether the outgoing, when incurred by the landlord, was a taxable supply to the landlord. A supply under a lease may be GST-free under the transitional arrangements.[2] In this case the outgoings payable by the tenant will form part of the consideration for a GST-free supply.

3. Whether a single supply or multiple supplies are made under a lease depends on the terms of the individual agreement. Generally, the supply under a commercial property lease is a single supply of real property[3] for the purposes of the GST legislation. Where this is the case, the payment of the landlord's outgoings is not consideration for a separate supply.

4. However, there may be services referred to as outgoings which are provided to the tenant in addition to the premises and which can be separated from the supply of the premises. For example, if the landlord makes a supply of office services such as typing and photocopying and makes a

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[1] Section 9-15 *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act') and *The Trustee, Executors and Agency Company New Zealand Ltd & Ors v. C of IR* (1997) 18 NZTC 13,076.

[2] Section 13 *A New Tax System (Goods and Services Tax Transition) Act 1999* ('Transition Act')

[3] 'Real property' is defined as including 'a licence to occupy land or any other contractual right exercisable over or in relation to land' – section 195-1 GST Act.

discrete charge for this supply based on the tenant's actual usage, this is a supply which is separate from the supply of the premises.

5. If a single supply is made under the lease we do not consider that the payment of outgoings by the tenant is a payment for a supply that has the same character as the supply made by a third party to the landlord. The payment is made by the tenant for the supply by the landlord of the premises and not for the particular supply made to the landlord to which the outgoings relates. This has implications where the supply made to the landlord is not subject to GST (e.g., because of Division 81 of the GST Act) or is a GST-free supply (e.g., because of Division 38-I of the GST Act).

6. Payment by the landlord of local council rates, land tax or water charges may not be subject to GST because of the operation of Division 81. If the tenant is required under the terms of the lease to reimburse the landlord's expenditure on an 'Australian tax, fee or charge'[4] listed in the determination made by the Treasurer under subsection 81-5(2) of the GST Act, this is not the 'payment of [an] Australian tax, fee or charge' by the tenant.

7. If the tenant makes payment directly tot he entity levying the tax, fee or charge, this payment will be consideration for the supply of the premises. This is because the payment by the tenant is not payment for a supply that the entity levying the tax, fee or charge makes to the tenant. Therefore Division 81 does not apply to the consideration for the supply by a landlord under a lease and the payment of the tax, fee or charge by the tenant forms part of the consideration for the supply.

8. Supplies of water and sewerage services to the landlord may be GST-free.[5] Where the supply under the lease to the tenant involves an incidental provision of water this will not be a supply of water for the purposes of the GST Act. Unless the lease agreement specifies that the landlord will make a separate supply of water to the tenant, any contribution by the tenant to the landlord's expenditure on water will not be consideration for a GST-free supply of water. Where a single supply is made, the amount payable by the tenant to the landlord in respect of water or sewerage will be subject to GST if the supply of the premises is a taxable supply.

9. In the following examples all parties are registered for GST. Unless otherwise stated the landlord is making a taxable supply.

Example 1 – more than one supply is made under the lease

10. Rick leases a shop in a shopping centre to Elizabeth. Under the lease Elizabeth agrees to pay a percentage of the outgoings Rick incurs in operating and maintaining the centre which includes the electricity used in lighting the common area and air conditioning the centre. The lease also provides for Elizabeth to pay Rick for electricity that she uses in her shop. This electricity is a metered supply and the amount payable is based on Elizabeth's actual use of electricity.

11. The amount Elizabeth pays for electricity used in the common area of the centre is part of the consideration for the supply of the premises. However, the electricity supplied to Elizabeth's shop is a separate supply from the supply of the premises. Elizabeth can choose the amount she uses and the consideration is based on her actual usage. Whether the supply of the premises and the supply of electricity are taxable or GST-free will depend on whether section 13 of the Transition Act applies to the agreement that identifies each supply.

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[4] 'Australian tax, fee or charge' is defined in section 195-1 GST Act

[5] Subdivision 38-I GST Act.

Example 2 – lease allows GST to be recovered from tenant

12. On 1 July 2000 Kathleen leases commercial premises to Bob. The consideration under the lease agreement consists of $1,000 base rent per month plus Kathleen's expenses relating to the cleaning and maintenance of the exterior of the premises. Under the agreement Kathleen can recoup from Bob any GST payable by her in relation to the lease.

13. Kathleen pays a contractor $220 for cleaning and maintenance work during July. This includes $20 GST. She claims an input tax credit for the $20. Kathleen invoices Bob for rent of $1,320. This amount is made up of $1,000 base rent, $200 outgoings and $120 GST.

Example 3 - lease does not allow GST to be recovered from tenant but supply is taxable

14. On 1 August 1999 Liz leases commercial premises to Tom. The lease does not allow Liz to recover GST payable by her in relation to the lease. As at 1 July 2000 the consideration under the lease agreement consists of $1,000 base rent per month plus Liz's expenses relating to the maintenance of the common areas of the premises.

15. Liz pays a contractor $220 for the maintenance work during July. This includes $20 GST. She claims an input tax credit for the $20. Liz invoices Tom for rent of $1,220. This amount is made up of $1,000 base rent, $220 outgoings. The lease allows Liz to recover the amount of the outgoing. Liz is able to pass on the gross amount of the outgoing. In this case even though Liz cannot increase the amount charged under the lease because of GST, the price is inclusive of GST and she is liable for GST of $110.91 (1/11 of $1,220).

Example 4 - the supply under the lease is GST-free under section 13 Transition Act

16. On 1 July 1998 Tracey makes a written agreement to lease part of a commercial premises for a period of five years to Grant. The agreement satisfies subsection 13(1) of the Transition Act and does not contain a review opportunity.[6] As at 1 July 2000 the consideration payable under the lease agreement consists of $1,000 base rent per month plus Tracey's expenses for the cleaning, security and electricity relating to the common areas of the premises. Each of these expenses includes GST.

17. Grant's share of the cleaning, security and electricity outgoings for July is $220. The cleaning, security and power for the common areas of the premises are not separate supplies to the supply of the premises. Tracey is considered to be making a single supply. As section 13 of the Transition Act applies to the agreement the supply is GST-free. She is entitled to an input tax credit in relation to the cleaning, security and electricity, of which $20 relates to Grant's lease. Tracey invoices Grant for rent of $1,200. This amount is made up of $1,000 base rent and $200 outgoings.[7]

Example 5 - the outgoing is not subject to GST - Division 81 GST Act

18. On 1 July 2000 Annette leases commercial premises to Matthew. The consideration under the lease agreement consists of $1,000 base rent per month plus Annette's expenses for the rates in respect of the property. Under the agreement Annette can recoup from Matthew any GST payable by her in relation to the lease.

19. Annette pays the local authority $220 for rates for July. The rates are 'a tax, fee or charge' specified in the Division 81 Determination made by the Treasurer. Therefore the payment of the rates is not consideration and the local authority does not make a taxable supply to Annette. She is

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[6] For the definition of 'review opportunity' see subsection 13(5) Transition Act and Goods and Services Tax Ruling GSTR 2000/16.

[7] As another issue Tracey could be in breach of the Australian Competition and Consumer Commission (ACCC) guidelines on price exploitation if she passed on the total cost of the outgoings rather than the net cost.

not entitled to an input tax credit in relation to the rates. Annette invoices Matthew for rent of $1,342. This amount is made up of $1,000 base rent, $220 outgoings and $122 GST.

Example 6 - the outgoing is paid directly to the landlord's supplier

20. Assume the same facts as Example 5 except that the lease provides that Matthew is to pay directly to the local authority the rates for which Annette is liable. The amount of GST payable by Annette is the same as Example 5.

21. Division 81 does not exclude the payment by Matthew to the local authority from being consideration for the supply under the lease. The tax invoice Annette gives to Matthew will show a total consideration of $1,342.

Example 7 - the outgoing is GST-free under Subdivision 38-I

22. On 1 July 2000 Vanessa leases a shop to John. The consideration under the lease agreement consists of $1,000 base rent per month plus Vanessa's expenses relating to the water supplied to the property. The consideration under the lease includes GST payable in relation to the lease.

23. Vanessa pays the local authority $220 for water for July. The supply of water to Vanessa is GST-free under Subdivision 38-I of the GST Act. She is not entitled to an input tax credit in relation to the acquisition of water. Vanessa invoices John for rent of $1,342. This amount is made up of $1,000 base rent, $220 outgoings and $122 GST.

Your comments

24. We invite you to comment on this Draft Goods and Services Tax Determination. We are allowing 3 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

Comments by Date: **26 July 2000**

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Commissioner of Taxation
5 July 2000

Previously released:
Not previously released in draft form

Subject references:
- agreements spanning 1 July 2000
- goods & services tax
- GST consideration
- GST free
- GST supply
- GST transitional issues
- lease & hire expenses
- lease & hire income

- special transitional rules
- taxable supply
- taxation determinations

Legislative references:
- ANTS(GST)A99 9-10
- ANTS(GST)A99 9-15
- ANTS(GST)A99 Subdiv 38-I
- ANTS(GST)A99 Div 81
- ANTS(GST)A99 81-5(2)
- ANTS(GSTT)A99 13
- ANTS(GSTT)A99 13(5)

ATO references:
NO
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