


GSTD 2017/D1 - Goods and services tax: what is excluded from being second-hand goods by paragraph (b) of the definition of that term in Division 195 of the A New Tax System (Goods and Services Tax) Act 1999?

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Draft Goods and Services Tax Determination

Goods and services tax: what is excluded from being ***second-hand goods*** by paragraph (b) of the definition of that term in Division 195 of the *A New Tax System (Goods and Services Tax) Act 1999*?

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Ruling

1. Paragraph (b) of the definition of 'second-hand goods' in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)¹ must be read as excluding goods to the extent that they consist of gold, silver, platinum or any other substance which, if it were of the required fineness, **and in an investment form**, would be precious metal. In other words, paragraph (b) excludes goods to the extent that they consist of gold, silver, platinum etcetera, regardless of the form or fineness of the relevant metal.
2. To the extent that goods consist of a substance which would be precious metal if of the required fineness and in an investment form, the acquisition of those goods by a second-hand dealer from an unregistered entity is not a creditable acquisition under Division 66.
3. However, paragraph (b) of the definition must also be read having regard to its context. This includes the context in which the expression 'precious metal' is used in the GST law, which is trading in metals as such by professional traders and dealers. If something is not usually traded at a price determined by reference to the prevailing spot

¹ All legislative references in this draft Determination are to the GST Act unless otherwise indicated.

price of its metal content, it is not being traded for its metal value only. Therefore, it does not have the character of the relevant metal. It has another character.²

4. Therefore, where a dealer buys and sells second-hand goods from an unregistered person, and the value³ of the goods is substantially greater than the intrinsic value of any constituent gold, silver, platinum etcetera, (for example, in a piece of electronic equipment, a prestige brand gold watch or a collector's edition proof coin), then the goods in question should properly be characterised as consisting of the value-added product, rather than the constituent metal. Such goods are not excluded from the definition of second-hand goods.

5. In some instances, a second-hand dealer may acquire items for a price determined in part by reference to the prevailing spot price of the constituent metal, and in part by reference to the intrinsic value of another component (for example, a precious stone in an item of gold jewellery). In such cases, the dealer will need to apportion the consideration paid for the goods between that part of the goods which qualifies as second-hand goods, and that part which is excluded by virtue of paragraph (b), in order to properly calculate their input tax credit entitlement

6. Where apportionment is required, it must be undertaken as a matter of practical commonsense. The basis chosen must be reasonable and supportable in the particular circumstances. An entity should keep records that explain the basis used to apportion the consideration.⁴

Example 1

7. *Ahmed's Jewellers (Ahmed) acquires a gold bar that does not carry an internationally recognised hallmark guaranteeing its fineness and quality from an unregistered person. The gold bar is of 99.99 percent fineness and originally carried such a hallmark. The unregistered person removed the hallmark from the gold bar by melting, so the bar is no longer in an investment form when Ahmed acquires it. Ahmed pays a price determined by applying a percentage discount to the prevailing spot price of the gold content of the bar.*

8. *The gold bar is not 'precious metal' as defined in the GST Act.⁵ However, Ahmed is not able to claim an input tax credit for the acquisition of the gold bar, as the gold is excluded from being second-hand goods by paragraph (b) of the definition.*

Example 2

9. *John is a pawnbroker registered for GST. He buys a small gold bar from an unregistered person. Testing shows that the bar is about 85% gold. John calculates the intrinsic value of the gold in the bar using a widely available gold melt value calculator, which reflects daily market prices. John buys the gold bar, intending to re-sell it at a small profit.*

² See paragraph 12 of Goods and Services Tax Ruling GSTR 2003/10 *Goods and Services Tax: What is 'precious metal' for the purposes of GST?*

³ Subsection 9-75(1).

⁴ This is consistent with other situations where apportionment is necessary. See Goods and Services Tax Ruling GSTR 2006/3 *Goods and services tax: determining the extent of creditable purpose for providers of financial supplies* and Goods and Services Tax Ruling GSTR 2006/4 *Goods and services tax: determining the extent of creditable purpose for claiming input tax credits and for making adjustments for changes in extent of creditable purpose* for further examples.

⁵ Section 195-1.

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10. *The value of this acquisition lies very largely in the gold content. Although the gold bar is not ‘precious metal’ as defined, paragraph (b) of the definition of second-hand goods excludes the gold bar from being second-hand goods, to the extent that it is comprised of gold. If the remaining components of the gold bar have any real value⁶, John needs to apportion the consideration he paid for the gold bar between the value of the gold component and the value of the remaining components in order to properly calculate his input tax credit entitlement.⁷*

Example 3

11. *Steve’s second-hand goods shop buys some valuable numismatic coins from a private collector. The coins are comprised of one ounce of gold of 99.99% fineness. Steve purchases the coins at a price which reflects their value as a collector’s item, and which substantially exceeds the spot price of the total amount of gold contained in the coins. Steve intends to re-sell the coins later at a profit.*

12. *Numismatic coins are not traded for their metal value only and therefore they do not have the character of the metal gold, silver or platinum. They have the character of coins made from those metals.⁸ Therefore, they are not excluded from being second-hand goods. Steve is entitled to treat the coins wholly as second-hand goods for the purpose of calculating an input tax credit under Division 66. Apportionment of the consideration will not be required.*

Example 4

13. *Gwen’s second-hand goods shop buys a prestige brand gold watch from a non-registered person. The watch contains 18 carat gold and a number of diamonds. Gwen later sells the watch to a customer for a profit.*

14. *Gwen needs to consider whether the watch is excluded from being second-hand goods by paragraph (b) of the definition.*

15. *The price that Gwen pays for the watch reflects the fact that most of the value of the watch lies in the precision engineering and prestige associated with the particular brand, and, to a lesser extent, the diamond content. The amount of gold in the watch is actually quite small, and the intrinsic value of the gold is only a small percentage of the total value of the acquisition. The goods can be properly characterised as consisting of a single item, a watch, which can be treated wholly as second-hand goods and therefore a creditable acquisition if the other requirements of Division 66 are met. Apportionment of the consideration will not be required.*

Example 5

16. *Naila’s pawn broking business buys an item of antique jewellery from a non-registered person. The jewellery consists of 18 carat gold and a number of precious stones. The price Naila pays reflects in considerable part the rarity and desirability of the item as an antique, rather than being worked out in reference to the prevailing spot price of*

⁶ The amount of the remaining components, which might be base metals such as copper, may have little real value.

⁷ The amount of input tax credits is also governed by section 66-10.

⁸ See paragraph 13 of GSTR 2003/10.

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the gold or the intrinsic value of the precious stones . Naila later sells the jewellery to a customer for a profit.

17. *The goods can be properly characterised as consisting of a single item, a piece of antique jewellery, which can be treated wholly as second-hand goods and therefore a creditable acquisition if the other requirements of Division 66 are met.*

Example 6

18. *Jenny's Gold Shop (Jenny) offers a service of buying unwanted gold and silver jewellery from private individuals. When a customer brings jewellery into the shop, Jenny tests the jewellery on the premises and pays around 80% of the prevailing spot price of the gold or silver contained in the jewellery. Jenny on-sells the gold and silver to another registered gold dealer at a modest mark-up.*

19. *Jenny cannot claim an input tax credit in relation to the gold or silver jewellery acquired from private individuals because this is excluded from being second-hand goods for the purposes of Division 66.*

20. *If an item of gold or silver jewellery contained a precious stone, then Jenny may claim an input tax credit based on the value of the stone. Jenny would need to apportion the consideration received for the jewellery between the value of the gold or silver and the value of the stone, in order to determine the amount of the input tax credit available.*

Date of effect

21. When the final Determination is issued, it is proposed to apply from the start of the first tax period commencing after its date of issue, unless the Commissioner considers that taxpayers have been involved in fraud, evasion, tax avoidance schemes (whether or not a declaration has been made under section 165-40), or any other artificial or contrived arrangements involving the manipulation of the form or fineness of gold, silver, platinum etcetera. In such cases, the Determination will apply to tax periods both before and after its date of issue.

22. In any case, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

22 February 2017

Appendix 1 – Explanation

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

Background

23. Division 66 contains special rules that allow entities to claim input tax credits for second-hand goods acquired for the purposes of sale or exchange (but not for manufacture) in the ordinary course of their business, even though the supply of the goods to them was not a taxable supply. Broadly, this rule avoids cascading of GST, or GST being charged on GST, by allowing a credit for any GST embedded in the price of second-hand goods that GST-registered entities acquire from unregistered entities.⁹

24. Certain things are excluded from being second-hand goods, and so from Division 66, by the definition of second-hand goods in section 195-1. The definition (relevantly) states:

second-hand goods does not include:

- (a) * precious metal; or
- (b) goods to the extent that they consist of gold, silver, platinum, or any other substance which, if it were of the required fineness, would be precious metal.¹⁰

25. **Precious metal** is itself defined in section 195-1 to mean:

- (a) gold (in an investment form) of at least 99.5% fineness; or
- (b) silver (in an investment form) of at least 99.9% fineness; or
- (c) platinum (in an investment form) of at least 99% fineness; or
- (d) any other substance (in an investment form) specified in the regulations of a particular fineness specified in the regulations.

26. The exclusion of precious metal by paragraph (a) of the definition of second-hand goods is not in doubt. However, the scope and meaning of paragraph (b) in the definition of second-hand goods is more problematic. This Determination considers two issues which are relevant to deciding what is excluded from being second-hand goods by paragraph (b) of the definition.

Issue one – whether paragraph (b) of the second-hand goods definition only applies to exclude metal ‘in an investment form’

27. A view has arisen that the exclusion in paragraph (b) only applies to gold, silver etcetera that would, but for being of less than the requisite fineness, be precious metal (that is, only metal in an investment form is excluded from being second-hand goods).

⁹ Division 66 contains a number of qualifications governing the entitlement to an input tax credit in these circumstances.

¹⁰ Subsection 3-5(1) provides that, once a defined term has been identified by an asterisk, later occurrences of the term in the same subsection are not usually asterisked. Hence the expression ‘precious metal’ in paragraph (b) takes the meaning given by section 195-1.

28. The Commissioner takes the view¹¹ that for gold, silver or platinum to be in an investment form for the purposes of the GST Act, it must be in a form that:

- is capable of being traded on the international bullion market, that is, it must be a bar, wafer or coin
- bears a mark or characteristic accepted as identifying and guaranteeing its fineness and quality, and
- is usually traded at a price that is determined by reference to the spot price of the metal it contains.

29. However, if paragraph (b) of the second-hand goods definition requires the metal in question to be 'in an investment form' to be excluded from the definition of second-hand goods, then the paragraph has no practical operation. This is because metal that is not of the required fineness can never be in investment form, and so could never be 'precious metal' even when it is assumed to have the required fineness.

30. The acceptable forms of a bar, wafer or coin, capable of being traded on the international bullion market, would not form 'part of' other goods. In addition, if in an investment form, a bar, wafer or coin would bear a mark identifying and guaranteeing that it was of the requisite fineness and quality. In effect, the bar, wafer or coin would already be precious metal and paragraph (b) would be redundant.

Purpose of second-hand goods definition

31. The purpose of the definition of second-hand goods becomes apparent from the legislative history. The GST Act as originally enacted defined 'precious metal' as being gold, silver etcetera, **in any form**, having the requisite fineness.

32. Therefore, the definition of second-hand goods meant that input tax credits were not allowed under Division 66 for gold, silver etcetera in any form or fineness. It is apparent that the policy was to exclude from second-hand goods, not only precious metals, but also other goods to the extent that they contained gold, silver etcetera, being the raw material of precious metal, as it were.

33. Before the GST law took effect, the 'precious metal' definition was amended¹² to substitute 'in an investment form' for the original wording 'in any form'. However, paragraphs (a) and (b) of the definition of second-hand goods were not amended.

Proper construction of second-hand goods definition

34. The Commissioner takes the view that paragraph (b) of the second-hand goods definition must be read as if the words 'and in an investment form' had been inserted after 'fineness.' Without adding these words of remediation, paragraph (b) is left as having no

¹¹ GSTR 2003/10 at paragraph 29.

¹² See section 3 and items 145 and 146 of Schedule 1 of the *A New Tax System (Indirect Tax and Consequential Amendments) Act (No.2) 1999*. The GST Act originally sought to define 'precious metal' as being gold, silver etc., in the requisite fineness, taking any form. Unless GST-free, supplies of precious metal under this definition, were to have been input taxed. To be GST-free the recipient of the supply still needed to be a 'dealer in precious metal' but also needed to acquire the precious metal 'for investment purposes' (an undefined term). The amending Act introduced the requirement that precious metal be in an 'investment form', made the GST-free treatment conditional on a 'refiner of precious metal' refining the metal, and removed the requirement that dealers acquire the metal for 'investment purposes'.

operation – something which is ‘productive of absurdity’.¹³ This cannot have been intended on any view of the law. It cannot reasonably be supposed that Parliament intended to make redundant an existing provision which originally had an application consonant with its verified statutory purpose. Further, it is to be presumed that all words and provisions are to have meaning and effect.¹⁴

35. The approach of ‘adding words’ in this way may be supported by reference to the decision of the High Court of Australia in *Taylor v. Owners Strata Plan No 11564* [2014] HCA 9 (*Taylor*). In this case, the High Court observed at [37] that it was consistent with the avoidance of rigid rules that the ‘adding words’ principles could apply equally to situations where the operation of a provision was expanded, as opposed to being read down.

36. *Taylor* at [22] to [25] also discusses four conditions (derived from earlier cases) that must be met before it may be possible to add words to a provision in the manner suggested. The first condition is that there must be ‘identification of the precise purpose’ of the provision in question. The second condition is that the drafter and Parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose. The third condition is that the reader must be able to identify the words that the parliament would have included had attention been drawn to the oversight. The fourth condition is that the statutory modification adopted ‘must be consistent with the wording otherwise adopted by the draftsman’.

37. The Commissioner takes the view that each of these conditions can be satisfied in this instance.

- The precise purpose of the exclusions in paragraph (a) and (b) of the second-hand goods definition is made clear by consideration of the legislative context and the legislative history.
- It is also clear that paragraph (b) of the ‘second-hand goods’ definition achieved its intended statutory purpose when enacted, but was deprived of operation when the ‘precious metals’ definition was amended without any corresponding amendment to paragraph (b).
- The third condition, that you must be able to identify what the legislature would have enacted, is met by adding the words ‘and in an investment form’ after ‘fineness’.¹⁵
- The fourth condition is also met because mirroring the scheme and form of the ‘precious metal’ definition within paragraph (b) is consistent with the wording otherwise adopted.

38. The High Court in *Taylor* at [38] to [40] has also indicated that a number of other things need to be considered when seeking to apply the principles. Their Honours stated at [38]:

The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills ‘gaps disclosed in legislation’ or makes an insertion which is ‘too big, or too much at variance with the language in fact used by the legislature’.

¹³ *Cooper Brookes (Wollongong) Pty Ltd v. FCT* (1981) 147 CLR 297 (at 321).

¹⁴ *Commonwealth v. Baume* (1905) 2 CLR 405 (at 414), *Plaintiff M70 v. Minister* [2011] HCA 32 (at [97]).

¹⁵ Words to this effect could equally be added **before** the reference to ‘fineness’. It makes no difference.

39. The Commissioner takes the view that the problem with paragraph (b) can reasonably be seen as resulting from a drafting error, the correction of which is mechanistic and naturally consequential.

40. In the Commissioner's view, adding words to the provision as proposed does not involve filling of a legislative gap, given that paragraph (b) will miscarry totally without remediation. Nor is the proposal too big or too far-reaching. It merely involves a construction of the provision in accordance with conventional principles of statutory interpretation.

Issue two – approach to characterising the goods in question

41. Generally, the use of the expression 'to the extent that' in the context of input tax credit availability in the GST legislation contemplates the apportionment of acquisitions between multiple uses, as well as exclusive allocation to specific uses.

42. The use of the expression 'to the extent that' in paragraph (b) of the definition of second-hand goods clearly suggests that certain goods may qualify as second-hand goods to some extent only. To that extent, an acquisition of such goods made by a dealer from an unregistered person may be a creditable acquisition where the other requirements of Division 66 are met.

43. This in turn suggests that a second-hand dealer may need to consider whether, and to what extent, goods can be characterised as consisting of gold, silver etcetera, for the purposes of paragraph (b) of the definition.

44. Characterising goods in this context requires a practical and commonsense approach. Such an approach may be informed by consideration of the context in which the term 'precious metal' appears in the GST law.

45. The context in which the expression 'precious metal' is used in the GST law is that of trading in metals as such by professional traders and dealers.¹⁶ If something is not usually traded at a price determined by reference to the prevailing spot price of its metal content, it is not being traded for its metal value only. Therefore, it does not have the character of the relevant metal. It has another character.

46. Therefore, if the second-hand goods essentially comprise of a value added product, where the value of the goods derives in substantial part from factors other than the intrinsic value of any constituent metals, then the goods should be characterised as consisting of the value-added product rather than the constituent metal for the purposes of paragraph (b) of the definition. In such cases, the goods may qualify as second-hand goods in their entirety and subject to paragraph 49 of this draft Determination, apportionment of the consideration is not required.

47. Such an approach is readily appreciated when the goods acquired by a second-hand dealer contain only small amounts of a metal. For example, many electronic goods contain minute amounts of gold, silver or platinum.

48. However, the goods in question may consist largely of a metal, but be traded by reference to factors other than the value of the constituent metal. For example, numismatic coins are usually traded at prices largely determined by their rarity, condition and beauty. They are not usually traded at a price largely determined by reference to the prevailing spot price for the relevant metal. This indicates that they are not traded for their metal

¹⁶ See paragraph 17 of GSTR 2003/10.

value only and therefore they do not have the character of the metal gold, silver or platinum.¹⁷ Therefore, they are not excluded from being second-hand goods.

49. Where the goods in question consist largely of gold, silver or platinum, and the price paid by the dealer is determined largely by reference to the value of their metal content, then such goods may be said to be traded for their metal value and therefore they 'consist of' gold, silver etcetera, within the meaning of paragraph (b) of the second-hand goods definition.

50. This still leaves the words 'to the extent that' in paragraph (b) of the definition having some work to do. In some instances, a second-hand dealer may acquire items for a price determined in part by reference to the prevailing spot price of the constituent metal, and in part by reference to the value of another component (for example, a precious stone in an item of gold jewellery). In such cases, the dealer may need to apportion the consideration paid for the goods between that part of the goods which qualifies as second-hand goods, and that part which is excluded by virtue of paragraph (b), in order to properly calculate their input tax credit entitlement. Example 6 at paragraph 20 of this draft Determination illustrates such a scenario.

¹⁷ See paragraph 13 of GSTR 2003/10.

Appendix 2 – Your comments

51. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

52. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

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References

Previous draft:

Not previously issued as a draft

- ANTS (Indirect Tax and Consequential Amendments) Act (No. 2) 1999 Sch 1 146

Related Rulings/Determinations:

GSTR 2003/10; GSTR 2006/3;
GSTR 2006/4

Case relied on:

- Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation (1981) 147 CLR 297; (1981) 55 ALJR 434; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 81 ATC 4292; [1981] HCA 26
- Commonwealth v. Baume (1905) 2 CLR 405
- Plaintiff M70 v. Minister [2011] HCA 32; (2011) 122 ALD 237; (2011) 280 ALR 18; (2011) 85 ALJR 891; [2011] ALMD 4855; [2011] ALMD 4856; [2011] ALMD 4857; (2011) 244 CLR 144
- Taylor v. Owners - Strata Plan No 11564 [2014] HCA 9; (2014) 306 ALR 547; [2014] ALMD 2863; [2014] ALMD 3094; [2014] ALMD 3139; [2014] Aust Torts Reports 82-168; (2014) 253 CLR 531

Legislative references:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 3-5(1)
- ANTS(GST)A 1999 9-75(1)
- ANTS(GST)A 1999 Div 66
- ANTS(GST)A 1999 66-10
- ANTS(GST)A 1999 165-40
- ANTS(GST)A 1999 195-1
- ANTS (Indirect Tax and Consequential Amendments) Act (No. 2) 1999
- ANTS (Indirect Tax and Consequential Amendments) Act (No. 2) 1999 Sch 1 item 145

ATO references

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