

GSTD 2021/D2 - Goods and services tax: is the supply of a burial right in respect of a public cemetery subject to GST?

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Draft Goods and Services Tax Determination

Goods and services tax: is the supply of a burial right in respect of a public cemetery subject to GST?

📌 Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Determination turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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What this draft Determination is about

1. This draft Determination¹ considers the goods and services tax (GST) consequences where an Australian government agency supplies a burial right² in respect of a public cemetery. It also considers the GST consequences of the following supplies:

- the renewal of burial rights, the recording of burial rights and the recording of the transfer of burial rights, in respect of a public cemetery.
- the supply of other goods and services in relation to a burial or cremation, including gravedigging services and memorial plaques.

¹ All further references to 'this Determination' refer to the determination as it will read when finalised. Note that this Determination will not take effect until finalised.

² References in this Determination to a 'burial right' include an 'interment right'. For further explanation, see paragraphs 25 to 29 of this Determination.

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- where a funeral director arranges for the supply of a burial right in a public cemetery and includes the fee payable for the burial right in the invoice issued to the estate of the deceased.

Ruling

2. The supply of a burial right in respect of a public cemetery is not subject to GST. To be subject to GST, a supply must be made for consideration. Division 81 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)³ and the *A New Tax System (Goods and Services Tax) Regulations 2019* (GST Regulations) exclude certain fees and charges from being consideration. One such exclusion is a fee or charge that relates to (or relates to an application for) the provision, retention, or amendment, under an Australian law, of a permission, exemption, authority or licence (however described).⁴

3. Another exclusion is a fee or charge for a supply of a regulatory nature made by an Australian government agency.⁵

4. The operators of public cemeteries are Australian government agencies and the supply of a burial right in a public cemetery is regulatory in nature. The fee charged also relates to the provision, under an Australian law, of a permission, exemption, authority or licence.

5. Certain fees and charges are expressly included as consideration under the GST Regulations.⁶ However none of the specific inclusions are applicable to a fee or charge for a burial right in a public cemetery.

6. Accordingly, a fee paid for the supply of a burial right in a public cemetery is not consideration. The supply is therefore not subject to GST.

7. A fee paid for the renewal of a burial right in respect of a public cemetery is also excluded from consideration for the same reasons and therefore no GST applies to the renewal of the burial right.

8. A supply by an Australian government agency of the recording of a burial right, or the recording of the transfer of a burial right, in respect of a public cemetery is also excluded from being consideration (and therefore not subject to GST). Subsection 81-10(5) excludes from consideration a fee or charge paid to an Australian government agency if the fee or charge relates to the agency:

- recording information
- copying information
- modifying information
- allowing access to information
- receiving information
- processing information, or
- searching for information.

³ All legislative references in this Determination are to the GST Act unless otherwise indicated.

⁴ Subsection 81-10(4) and Appendix 1 – Explanation at paragraph 32.

⁵ Paragraph 81-15.01(f) of the GST Regulations.

⁶ Section 81-10.01 of the GST Regulations.

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None of the specific inclusions in the GST Regulations are applicable to such a fee or charge.

9. The supply of other goods or services such as gravedigging, stonemasonry and plaques will be subject to GST. None of the exclusions from consideration are applicable.

10. Apportionment may be necessary if an undissected amount is charged for a burial right and taxable goods and services.⁷

11. Where a funeral director arranges for the supply of a burial right in a public cemetery, they are acting as agent for the estate of the deceased and the supply of the burial right is being made by the operator of the public cemetery to the estate. This supply is not subject to GST. It will be necessary for the funeral director to identify that part of the invoiced amount that corresponds to the fee charged by the operator of the public cemetery for the burial right and ensure that GST is not calculated on that component.

Example 1 – grant of a burial right by an Australian government agency

12. *Essandtee Public Cemetery (EPC) is an Australian government agency which operates and manages a public cemetery for the Essandtee Municipal Council.*

13. *Kerron purchases a burial right from EPC. The right is for a period of 25 years, with an option to renew for a period of up to a total of 99 years. The right allows Kerron to determine who can be buried in a specified location in the cemetery and install an approved memorial of the deceased on the site. EPC will supply and install a memorial for a separate fee. EPC will also provide a gravedigging service for a separate fee.*

14. *Under Division 81, the payment received by EPC from Kerron in return for the grant of the burial right is not the provision of consideration. The supply of the right is therefore not a taxable supply and no GST is payable by EPC.*

15. *If the initial 25-year period is renewed, the payment for the renewal will also not be the provision of consideration and the supply is not a taxable supply.*

16. *However, the supply and installation of the memorial and the supply of the gravedigging service will both be subject to GST.*

Supplies of burial rights in a public cemetery made via funeral directors

17. A supply of a burial right in a public cemetery is made by the Australian government agency that operates the cemetery. Funeral directors do not make supplies of burial rights in public cemeteries.

18. While a funeral director may facilitate the supply of the burial right by dealing with the operator of the public cemetery, the funeral director is neither acquiring a burial right nor supplying it to the estate of the deceased. The funeral director is merely acting as an agent for the estate of the deceased.

19. Accordingly, there is no GST payable on the supply of the burial right, notwithstanding the fact the fee may be included in the funeral director's invoice. The one

⁷ Goods and Services Tax Ruling GSTR 2001/8 *Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts.*

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and only supply of the burial right is being made by the Australian government agency that operates the public cemetery and that supply is not subject to GST.

20. If the funeral director charges a single undissected sum for the funeral, the amount payable will not be subject to GST to the extent to which it comprises the fee charged for the burial right by the operator of the public cemetery. If the funeral director itemises the fee for the burial right on the invoice, and applies a mark-up, the mark-up (but not the underlying burial right fee) will be subject to GST as it is effectively a fee for services charged by the funeral director.

Example 2 – supply of a burial right made via a funeral director

21. *Mary's estate engages a funeral director to arrange her funeral in a public cemetery. The funeral director facilitates the supply of the requisite burial right by the Australian government agency that operates the public cemetery. The funeral director also arranges gravedigging services, and the services of a monumental mason.*

22. *The funeral director invoices Mary's estate for the burial right, the gravedigging service and the services of the monumental mason. The funeral director also charges for the coffin, preparation of the deceased and a general service fee. Mary's estate separately arranges for a religious service to be provided by a religious institution.⁸*

23. *All of the amounts invoiced by the funeral director will be subject to GST except for the fee charged by the public cemetery operator for the burial right.*

Date of effect

24. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, 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 *Public Rulings*).

Commissioner of Taxation

26 May 2021

⁸ The supply of the funeral service will be GST-free if it is supplied by a religious institution that meets certain registration requirements under the *Australian Charities and Not-for-profits Commission Act 2012*.

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Appendix 1 – Explanation

ⓘ *This Explanation 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.*

Legislation

What is a burial right granted over public land?

25. A burial right over public land is a licence that grants to a person the right to bury or inter human remains (including cremated human remains) in a public cemetery.⁹ It makes lawful that which would otherwise not be permissible.

26. It involves the right for a deceased person's remains to be buried in a specific burial plot or other allotment in a public cemetery and for those remains to be left undisturbed for a specified period. It does not confer ownership (proprietary rights) over the physical land.

27. The disposal of human remains including burials is regulated by law and governments. Each State and Territory has its own rules and regulations governing what is permissible in the respective State or Territory. Depending on the relevant State or Territory legislation, the burial right may be exclusive or non-exclusive, perpetual or for a fixed term that can be renewed. The burial right may also be capable of assignment or transfer. Once granted, the burial right cannot generally be revoked.

28. The holder of the burial right is the person who can authorise a burial or interment of human remains (including cremated human remains), as well as the installation of any memorial on the site, such as a headstone or plaque. The holder will also have certain responsibilities in relation to the burial right, such as maintaining the site.

29. Grant of a burial right is separate to the actual act of burial, interment or cremation. Burial rights do not include supplies of goods and services relating to burial, such as excavation services. They also do not include supplies in installing a memorial on the site, such as supply and installation of gravestones, plaques or mausolea. While these may be supplied when a deceased person is buried or cremated, they are not part of the burial right.

Supply of burial rights in a public cemetery and GST

30. GST is payable on taxable supplies. Under section 9-5, a supply is taxable if it meets four requirements:

- it is made for consideration
- the supplier makes the supply in the course of an enterprise they carry on
- it is connected with the indirect tax zone, and
- the supplier is registered for GST or required to be registered.

⁹ *Cemeteries and Crematoria Act 2013 (NSW); Land Act 1994 (QLD); Burial and Cremation Act 2013 (SA); Burial and Cremation Act 2019 (TAS); Cemeteries and Crematoria Act 2003 (VIC); Cemeteries Act 1986 (WA); Cemeteries and Crematoria Act 2020 (ACT); Cemeteries Act 1952 (NT).*

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31. It follows from the first requirement in section 9-5 that if there is no consideration for a supply then the supply cannot be a taxable supply and no GST will be payable on that supply.

32. Subsection 81-10(1) excludes from consideration certain Australian fees and charges if they are covered by subsections 81-10(4) or (5). One exclusion from consideration is a fee or charge that relates to (or relates to an application for) the provision, retention or amendment, under an Australian law, of a permission, exemption, authority or licence (however described).¹⁰

33. Subsection 81-10(5) provides a further exclusion for a fee or charge paid to an Australian government agency if the fee or charge relates to the agency:

- recording information
- copying information
- modifying information
- allowing access to information
- receiving information
- processing information, or
- searching for information.

34. However, subsection 81-10(2) permits the GST Regulations to provide that certain payments of Australian fees or charges will be treated as consideration. Where a fee or charge is expressly included as consideration under the GST Regulations, the exclusions from consideration in subsection 81-10(1) will not apply and the fee or charge will be consideration.

35. One of the specific inclusions as consideration is payment for a supply of a non-regulatory nature.¹¹ A further specific inclusion is an Australian 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.¹²

36. Section 81-15 permits the GST Regulations to provide that the payment of certain Australian fees or charges will not be consideration.

37. One of the specific exclusions from consideration is a fee or charge for a supply of a regulatory nature made by an Australian government agency.¹³

38. '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.¹⁴ 'Australian government agency' means the Commonwealth, a State or Territory, or an authority of the Commonwealth or of a State or a Territory.¹⁵ The operators of public cemeteries, commonly local government or council authorities, are Australian government agencies.

¹⁰ Subsection 81-10(4).

¹¹ Paragraph 81-10.01(1)(g) of the GST Regulations.

¹² Paragraph 81-10.01(1)(h) of the GST Regulations.

¹³ Paragraph 81-15.01(f) of the GST Regulations.

¹⁴ Section 195-1.

¹⁵ Section 195-1 and subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

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39. 'Australian law' means a law of the Commonwealth, a State or a Territory. It includes Acts and regulations, by-laws, proclamations and orders made under law-making powers delegated by parliaments.¹⁶

40. The GST Regulations provide a number of tiebreaker rules where a fee or charge is both specifically included as consideration under section 81-10.01 and specifically excluded under section 81-15.01 of the GST Regulations. However, the tiebreaker tests are not relevant to burial rights because they are not specifically included as consideration in the GST Regulations.

41. The supply of a burial right in a public cemetery is considered to be the provision, under an Australian law, of a permission, exemption, authority or licence.

42. Further, a supply of a burial right in a public cemetery is considered to be a supply of a regulatory nature because the right makes lawful that which would otherwise not be permissible.

43. A supply of a burial right in a public cemetery can only be made by an Australian government agency.

44. Accordingly, a fee charged for the supply of a burial right in a public cemetery is excluded from consideration and is not subject to GST.

45. A fee or charge for the renewal of a burial right in a public cemetery will also not be consideration for the same reasons and will therefore not be subject to GST.

46. Supplies by an Australian government agency of the recording of a burial right, or the recording of the transfer of a burial right are covered by subsection 81-10(5). They are not included in the list of fees and charges that are specifically included as consideration under section 81-10.01 of the GST Regulations. Accordingly, fees or charges payable to an Australian government agency for these supplies are not consideration. It follows that these supplies are not subject to GST.

47. However, supplies of gravedigging or monumental services and plaques, headstones, etcetera, will be subject to GST as none of the exclusions from consideration in sections 81-10 and 81-15 are applicable.

¹⁶ Section 195-1 and subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

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Appendix 2 – Your comments

48. 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.

49. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au

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

Due date: 23 July 2021
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 2001/8; TR 2006/10

Legislative references:

- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 Div 81
- ANTS(GST)A 1999 81-10
- ANTS(GST)A 1999 81-10(1)
- ANTS(GST)A 1999 81-10(2)
- ANTS(GST)A 1999 81-10(4)
- ANTS(GST)A 1999 81-10(5)
- ANTS(GST)A 1999 81-15
- ANTS(GST)A 2019 195-1
- ANTS(GST)R 2019 81-10.01
- ANTS(GST)R 2019 81-10.01(g)
- ANTS(GST)R 2019 81-10.01(h)
- ANTS(GST)R 2019 81-15.01
- ANTS(GST)R 2019 81-15.01(f)
- ITAA 1997 995-1(1)
- TAA 1953
- Australian Charities and Not-for-profits Commission Act 2012
- Burial and Cremation Act 2013 (SA)
- Burial and Cremation Act 2019 (TAS)
- Cemeteries Act 1952 (NT)
- Cemeteries Act 1986 (WA)
- Cemeteries and Crematoria Act 2003 (VIC)
- Cemeteries and Crematoria Act 2013 (NSW)
- Cemeteries and Crematoria Act 2020 (ACT)
- Land Act 1994 (QLD)

ATO references

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