GSTR 2002/D9 - Goods and services tax: transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances

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Generated on: 2 June 2026, 07:49:49 PM

Draft Goods and Services Tax Ruling

Goods and services tax: transfers of enterprise assets as a result of property distributions under the ***Family Law Act 1975*** or in similar circumstances

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Preamble

This document is a draft for industry, professional and community comment. As such, it represents the preliminary, though considered, views of the Australian Taxation Office. This draft may not be relied on by taxation officers, taxpayers and practitioners. When the final Ruling is officially released it will be a public ruling for the purposes of section 37 of the ***Taxation Administration Act 1953*** *and may be relied upon by any person to whom it applies.*

What this Ruling is about

1. This Ruling explains the GST consequences of a transfer of an **enterprise asset** to a **spouse** as a result of a matrimonial property distribution ('**MPD**') under the *Family Law Act 1975* ('FLA'). The Ruling discusses whether the transfer is a taxable supply under section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act'). This Ruling deals with the transfer of enterprise assets and **private assets** of either or both spouses and **related entities** they control.

2. This Ruling also applies to property distributions between spouses that are not made under the FLA following the marriage breakdown.

3. The Ruling also applies to property distributions between de facto or same sex couples made upon their personal relationship breakdown.

4. The Ruling also discusses whether an adjustment arises from the supply of an enterprise asset following a marriage or other relationship breakdown. In particular Divisions 129 and 130 of the GST Act are discussed. The Ruling includes reasonable methods that you may use to determine actual application when calculating the extent of creditable purpose for Division 129.

5. The GST Act does not apply to private assets. Property distributions that do not involve enterprise assets fall outside the GST

Act. Transfers of assets between spouses not registered or required to be registered for GST have no GST consequences.

6. Certain terms used in this Ruling are defined or explained in the Background section of the Ruling. These terms when first mentioned elsewhere in the Ruling appear in **bold** type.

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

Date of effect

8. This draft Ruling represents the preliminary, though considered, view of the Australian Taxation Office. This draft may not be relied on by taxation officers, taxpayers or practitioners. When the final Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

9. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to whom it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

10. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Background

11. For the purpose of this Ruling the following terms have the meanings indicated.

> **'Enterprise asset'** means real property, tangible and intangible personal property that is owned by either or both spouses or a related entity and used or intended to be used in an 'enterprise' of the 'entity' that is 'registered or required to be registered'. Examples of enterprise assets include trading stock, plant, office equipment, motor vehicles and real property.
>
> **'FLA orders or agreements'** are FLA court orders, FLA consent orders and binding financial agreements ('BFAs').

'Matrimonial property' is property of either or both spouses and may include property held by a related entity.

'MPD' is the abbreviation for matrimonial property distributions. MPDs involve the transfer of private and/or enterprise assets from the supplier spouse or a related entity and are made under the FLA.

'Other property distributions' are not made under the FLA and include transfers of private and enterprise assets as a result of a relationship breakdown between de facto or same sex partners. They also include transfers from a marriage breakdown where spouses come to a property agreement outside the FLA.

'Private asset' means any property that is not an enterprise asset.

'Related entity' means a company, trust or partnership, which is an 'entity' under the GST Act that is controlled by one or both spouses to a marriage. The control comes through the position that either or both spouses hold as shareholder, director, trustee or partner.

'Spouse' means current spouse, former or separated spouse and people intending to marry (prospective spouse), as appropriate to the context.

12. MPDs result from court orders[1] (including consent orders and registered arbitration awards)[2] and BFAs under the FLA. The relevant feature of MPDs for the purposes of this Ruling is the transfer of title of 'matrimonial property' to one of the spouses. Under the FLA the court may make an order altering the interests of the spouses in the matrimonial property. The order may be made as a consent order following agreement by the parties as to the distribution of the property, or it may follow from contested proceedings. Rather than altering the interests, an FLA order or agreement may cause an enterprise asset owned by a **related entity** to be transferred to the other spouse. This is because of the degree of control, of either or both of the spouses, capable of being exercised over the related entity. Such an order will normally have words to the effect that the controlling spouse uses his or her best endeavours to cause the related entity to transfer the asset to the other spouse.

[1] Orders of the Family Court, Federal Magistrates Court, State Magistrates Court and Supreme Court in family law jurisdiction.
[2] Arbitration awards under sections 19D and 19E of the FLA are also known as 'arbitral awards'.

13. Parties entitled to commence proceedings under the FLA can enter into 'arbitration'. The issues in dispute are determined by the arbitrator[3] who makes an 'award'[4] known as an 'arbitral award'.

14. The FLA also provides for parties in contemplation of marriage, parties during marriage or after dissolution of a marriage to make a BFA with respect to the property or financial resources of either or both of the parties. A BFA addresses how, in the event of the 'breakdown of the marriage' all or any property or financial resources that either or both parties had before the marriage, and acquire during the marriage, is to be dealt with during the marriage and/or after dissolution of the marriage.[5] A BFA is binding on the parties without an order of the court. This Ruling applies to supplies made under a BFA as a consequence of the marriage breakdown.

15. Not all transfers between husband and wife concerning property will be made under the FLA. Upon a marriage breakdown spouses may proceed to a distribution of property outside the FLA by way of an informal agreement between themselves.

16. De facto and same sex relationships are not covered by the FLA. Parties to relationships that are not a 'marriage' under the FLA may resort to State and Territory legislation and the common law remedies, proceedings and separation agreements.[6] Partners in these relationships can also make informal agreements as to the distribution of property following the breakdown of their relationship.

Ruling with explanation

17. As a result of an **FLA order or agreement**, assets of either or both spouses or of a related entity will be transferred to one of the spouses. We have explained above the characteristics of FLA orders or agreements. We consider that for GST purposes the relevant feature of FLA orders or agreements is the transfer of assets, which may involve the transfer of ownership or possession depending on the nature of the asset. In this regard we treat orders and agreements made under the FLA as the same in respect of the GST consequences.

[3] Regulation 67I of the Family Law Regulations 1984.
[4] Regulation 67P of the Family Law Regulations 1984.
[5] Sections 90B, 90C and 90D of the FLA.
[6] Part IV of each of the *Property (Relationship) Act 1984 (NSW)*, the *De Facto Relationships Act 1991 (NT)*, the *Domestic Relationships Act 1994 (ACT)*, Part IX of the *Property Law Act 1958 (VIC)*, Part II of the *De Facto Relationships Act 1996 (SA)*, Part 19 of the *Property Law Amendment Act 1999 (Qld)*, sections 264, 265, 270, 272, 274(1), 276 and Part 4 of the *De Facto Relationship Act 1999 (TAS)*. These provisions allow parties to opt out of the legislative regime of property distribution by making an agreement before, during or on termination of the de facto relationship.

As there are no specific provisions of the GST Act covering MPDs, the basic rules of the GST Act apply. Similar considerations apply to the transfer of assets following **other property distributions** arising from the agreements outlined in paragraphs 15 and 16 above.

18. While this Ruling primarily deals with enterprise assets the more common situation is the transfer of private assets between spouses who are not registered or required to be registered for GST. These transfers of private assets between spouses do not have any GST consequences. For example, if a spouse not registered or required to be registered transfers a private asset, such as the matrimonial home, to his or her spouse under an MPD there are no GST consequences.

19. Enterprise assets can be the subject of an MPD. For example, an interior design company owns two delivery vans. One van is transferred to a spouse under an MPD. The delivery vans are enterprise assets. When an enterprise asset is transferred you have to consider the GST consequences of the transfer, that is, whether the transfer is a taxable supply.

Taxable supplies

20. A supply is a taxable supply under section 9-5 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. In considering whether the supply of **matrimonial property** under an MPD is a taxable supply this Ruling only addresses paragraphs (a) and (b) of section 9-5. In this Ruling we assume that the supplies are connected with Australia and the entity is registered or required to be registered.[7]

[7] Our view of when a supply of goods, real property, or things other than goods or real property is connected with Australia under section 9-25 can be found in Goods and Services Tax Ruling GSTR 2000/31. 'Required to be registered' has the meaning given by sections 23-5, 57-20, 144-5 and 147-5 of the GST Act.

Is there a supply for consideration?

(i) Supply

22. 'Supply' is given a wide meaning in the GST Act. As the term means any form of supply whatsoever'[8], it includes the transfer of assets. The transfer of an asset between parties is a supply of that asset.[9] When an enterprise asset is transferred to a spouse under an MPD there is a supply.

Example 1: Supply of an enterprise asset

23. *Bill is a sole trader. He carries on a plumbing and draining enterprise in which he uses two vans. After Bill's marriage breakdown, Bill is ordered by the Family Court to transfer one of the vans, an enterprise asset, to his spouse. The transfer of the van is a supply for GST purposes.*

(ii) Consideration

24. As a result of an MPD a sole trader or a related entity may supply an asset to a spouse (recipient). The question arises as to whether the sole trader or related entity making the supply of the asset is receiving consideration for that supply.

25. Consideration is defined in section 195-1 to mean 'any consideration within the meaning given by section 9-15, in connection with the supply or acquisition.'[10]

26. Subsection 9-15(1) provides that a payment, or any act or forbearance is consideration for a supply if it is 'in connection with', 'in response to or for the inducement of' a supply. A payment, act or forbearance may be consideration for a supply even though it is made voluntarily, and regardless of whether it is made by persons other than the recipient of a supply.[11]

27. A payment, act or forbearance is consideration for a supply where there is a sufficient nexus between the payment, act or forbearance and the supply.[12] The test as to whether there is a sufficient nexus is an objective test.[13] Generally under an MPD there is no payment, and even where money is included as part of an MPD the payment is not made in connection with, or for the inducement of a supply. This is because the purpose of an MPD is not an exchange

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[8] Section 9-10.
[9] Paragraph 23 of Goods and Services Tax Ruling GSTR 2001/4.
[10] Paragraph 49 of Goods and Services Tax Ruling GSTR 2001/6.
[11] Subsection 9-15(2) and paragraph 11 of GSTR 2001/6.
[12] Paragraph 68 of Goods and Services Tax Ruling GSTR 2001/6 and paragraph 33 of GSTR 2002/3.
[13] Paragraph 72 of GSTR 2001/6 and paragraph 33 of GSTR 2002/3.

or barter of assets, but a re-distribution of assets in accordance with the spouses' FLA entitlements. Therefore, if there is a transfer of money it is not consideration for a supply.

Example 2: Whether there is consideration

28. *Terry and Tania are subject to an MPD. As part of the MPD Terry is required to transfer a car to Tania, and Tania is required to transfer to Terry the $30,000 balance of their joint bank account. The money is not consideration for the supply of the car.*

29. When an MPD arises out of a court order or out of court settlement, it is appropriate to apply the principles from Goods and Services Tax Ruling GSTR 2001/4[14] in relation to the supply of the asset.

30. Therefore, where an asset is received under an MPD resulting from a court order (following contested proceedings) there is no consideration in the nature of forbearance or discontinuance as it is the decision of the court rather than agreement between the parties that 'settles' the dispute.[15]

31. Due to the nature of consent orders and BFAs made pursuant to the FLA (but not court orders following contested proceedings), there may be some form of consideration present. Because of the wide definition of 'consideration' in the GST Act, there may be consideration present in the form of some forbearance or discontinuance where a sole trader supplies an asset to the recipient spouse. It is difficult to identify any consideration provided to a related entity when that entity transfers an asset to a recipient spouse under an MPD.

32. Where the asset is received under a consent order or BFA the receipt of the asset is linked to an entitlement under the FLA rather than forbearance or discontinuance. The forbearance or discontinuance of any action is merely a term or condition of the settlement.[16]

33. However, even if such forbearance or discontinuance is present we take the view that there is not a sufficient nexus between the consideration and the supply of the asset due to the nature of MPDs. The same principles apply to other property distributions which arise from informal agreements made between spouses as outlined in paragraph 15, and from the breakdown of de facto or same sex relationships as outlined in paragraph 16.

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[14] GSTR 2001/4 is about the GST consequences of court orders and out of court settlements.
[15] Paragraphs 69 and 70 of GSTR 2001/4.
[16] Paragraph 107 of GSTR 2001/4.

34. We take the view that there is no consideration with a sufficient nexus to the assets supplied by way of a property distribution. Therefore, under a property distribution resulting from a breakdown of a marriage or other relationship the supply is made for no consideration for paragraph 9-5(a) purposes.

(iii) Division 72

35. Where there is no consideration or inadequate consideration Division 72 may apply. Division 72 ensures that a supply to your associate[17] without consideration will be taxable if, except for the lack of consideration, the supply would otherwise be taxable. Division 72 also provides that supplies for inadequate consideration are properly valued. However, if the supply is not made in the course or furtherance of the enterprise it is still not a taxable supply.[18]

Is the supply made 'in the course or furtherance of an enterprise'?

36. Where an enterprise asset is transferred as a result of an MPD the issue arises as to whether the supply is made in the course or furtherance of an enterprise that you carry on. Where the supply does not meet this requirement under paragraph 9-5(b) it is not a taxable supply. The question is one of fact and degree and will depend on the circumstances of the case.

37. The Explanatory Memorandum to A New Tax System (Goods and Services Tax) Bill 1998[19] states at paragraph 3.10:

> 'In the course or furtherance' is not defined in the GST Act, but is broad enough to cover any supplies made in connection with your enterprise. An act done for the purpose or object of furthering an enterprise, or achieving its goals, is a furtherance of an enterprise although it may not always be in the course of the enterprise. 'In the course or furtherance' does not extend to the supply of private commodities, such as when a car dealer sells his or her own private car. See Case N43 (1991) 13 NZTC 3361.

38. Further, the connection between a supply and the enterprise is illustrated in *Case K55* (1988) 10 NZTC 453 where Bathgate DJ said at page 457:

> … it is a question of fact and degree as to whether a supply is in the course or furtherance of a taxable activity carried on by the person concerned. There must obviously be a discernible relationship between the supply and the activity in the form of a nexus for the supply to be in the course or furtherance of the activity.

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[17] For the definition of associate, see subsection 318(1) of the *Income Tax Assessment Act 1936*.
[18] Paragraph 9-5(b).
[19] Paragraph 3.10.

39. We consider that there is no 'discernible relationship' between the supply of an asset under an MPD and the enterprise. Our view is based on a combination of factors. The main factor is the private nature of a marriage breakdown. Other factors include the binding nature of an FLA order or agreement and the lack of commercial character in the absence of consideration.

40. Where the overriding essential character of the supply is that of something being disposed of due to the personal circumstances of the spouse, upon marriage breakdown or otherwise under the FLA, rather than business circumstances of the enterprise, that supply is not made in the course or furtherance of the enterprise.

41. Even where an enterprise asset is supplied to a spouse by a related entity under an MPD the transaction does not have a business or commercial flavour. The order or agreement, which binds the parties, comes from the FLA which primarily deals with matrimonial and private matters, such as MPDs, maintenance and custody. These orders take into account contributions made by the spouses and consider other factors such as future earning capacity and age. In addition, there is no consideration with sufficient nexus to the supply because of the nature of an MPD.

42. Similar principles apply to other property distributions following a de facto or same sex relationship breakdown, and to property distributions under informal agreements made between spouses as a result of the marriage breakdown. Therefore, we take the view that these supplies, and supplies made under an MPD, are not made in the course or furtherance of the enterprise.

43. Because the requirements in paragraph 9-5(b) are not met it is not necessary to consider Division 72 for property distributions upon marriage or relationship breakdowns. Therefore, and because paragraph 9-5(a) is also not met, there is no taxable supply. Although there is no taxable supply, the spouse, partner or related entity making the supply should consider whether there is an adjustment under Division 129 or 130 in respect of the original acquisition.

Adjustments under Divisions 129 and 130

Whether an adjustment arises following the supply of enterprise assets

44. We have previously concluded in paragraphs 34 and 42 that for section 9-5 purposes the treatment of other property distributions is similar to the treatment of MPDs. Therefore, where MPDs are referred to in the remainder of this Ruling, we consider that this Ruling applies with similar effect to other property distributions.

45. The GST Act entitles you to claim input tax credits for things used by your enterprise to the extent of your creditable purpose.[20] When the extent of your creditable purpose for an asset is changed by later events, adjustments may need to be made under Division 129 or 130.[21] Divisions 129 and 130 are concerned with adjustments arising out of a change in creditable purpose. If a thing acquired for use in an enterprise is applied for a private or domestic use there is a change in creditable purpose. The result may lead to increasing adjustments.

46. The rationale for the increasing adjustments is that when something is applied to a private or domestic purpose and removed from the GST system, it is going into final consumption.[22] As no input tax credits are available for assets outside the GST system, it follows that when an entity applies an asset to a private or domestic purpose, input tax credits previously claimed should be returned. The adjustments calculated under Divisions 129 and 130 effectively return the input tax credits. Although of limited application in MPD situations, Division 130 is discussed later.

47. However, it should be noted that as there is no entitlement to input tax credits in respect of assets acquired prior to 1 July 2000, it is unnecessary to consider adjustments under Divisions 129 or 130 for those assets.

The meaning of the word 'apply'

48. The term 'apply' is used in both Divisions 129 and 130. The ordinary meaning of the word 'apply' is 'to put to use; employ or to devote to some specific purpose'.[23] This ordinary meaning is extended by the statutory definition of 'apply' in section 129-55 of the GST Act, which, 'in relation to a thing acquired or imported, includes:

(a) supply the thing; and

(b) consume, dispose of or destroy the thing; and

(c) allow another entity to consume, dispose of or destroy the thing.'

49. The transfer of the asset under an MPD falls within the statutory definition of apply as the thing has been both disposed of and supplied. Our view is that the asset has been applied in circumstances where it is set aside and transferred to a spouse under an MPD.

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[20] Section 11-5.
[21] Background to Division 129 is outlined in GSTR 2000/15 and 24.
[22] From paragraph 6.26 of the Explanatory Memorandum to the Bill of the GST Act. Whilst this rationale was used in the EM to explain Division 138, the rationale also applies to the adjustment provisions generally.
[23] *The Macquarie Dictionary*, Third Edition.

Example 3: Applying an enterprise asset

50. *Emma and Darcy are in the process of divorcing each other. Darcy is the sole shareholder in Countryside Pty Ltd. As part of the MPD Emma is to receive a motor vehicle owned by the company. The orders require Darcy to do all things necessary to transfer the motor vehicle to her. The transfer of the motor vehicle from Countryside Pty Ltd to Emma is an application of the motor vehicle by Countryside Pty Ltd.*

Applied for private use

51. It is our view that entities can hold assets for a private use and purpose. Assets may be owned by a registered entity but not have been acquired for a creditable purpose. These assets are not used in the course or furtherance of the entity's enterprise and they are private or non-business assets. These are 'private assets' of the entity for the purposes of this Ruling. For example, a company can acquire a yacht for private or non-business purposes. Similarly, an entity can apply enterprise assets to a private use.

52. We consider that when an enterprise asset of a sole trader or related entity is transferred under an MPD there is an application of the asset of a 'private nature'.[24] The application consists of the setting aside, the taking of it out of the enterprise and the transfer or disposal of the asset. This is a total change or conversion in its application as an enterprise asset to one of a private (or non-business) nature.

Whose application

53. The application we are concerned with under Divisions 129 and 130 is the application by the entity carrying on the enterprise. This requires the entity itself to apply the asset to a private or domestic use. In a transfer of an asset under an MPD, it is the private or domestic application of the supplying spouse or related entity that is relevant. The use to which the asset is put by the recipient spouse under an MPD is not relevant for the purposes of Divisions 129 and 130.

Example 4: Private application by a related entity

54. *Jill is the sole director and shareholder of JJ Pty Ltd, a speedboat hire company. When Jake and Jill's de facto relationship ended, they entered into an agreement to distribute their assets. As*

[24] Paragraph 129-50(2)(b).

part of this agreement Jill agreed that she would arrange for the company to transfer one of its speedboats to Jake. The transfer of the speedboat by the company is a private application by the company. Jake's proposed use of the speedboat is not relevant.

Division 129

Whether there is a change in creditable purpose under Division 129

55. Division 129 may require an increasing adjustment if the private or non-business application of the asset in an MPD is different to the intended or former application of the asset by the enterprise. However, there is no adjustment necessary if the asset transfer under the MPD occurs after the end of the last adjustment period.

56. If the requirements of Division 129 are met,[25] section 129-40 provides a method statement to work out in five steps whether you have an increasing adjustment. However, in using the method statement, step 1 first requires you to work out the extent to which the asset or thing has been applied to a creditable purpose, which is the 'actual application of the thing'.[26]

Reasonable methods for calculating the actual application of the thing

57. Our view on how to ascertain the extent of creditable purpose under step 1 of the method statement in section 129-40 is contained in GSTR 2000/24.[27] It refers to both direct and indirect methods for determining the extent of creditable purpose. It states that where possible you should use a direct method to work out the extent of creditable purpose.[28] Direct methods assume ongoing applications of things (both for a creditable purpose and another purpose) over the required number of adjustment periods (which depends on the type and value of the acquisition or importation).[29]

58. However, when an application of a thing includes a disposal it is not appropriate to use a direct method to work out the extent of creditable purpose as it will not give a fair and reasonable result. It is therefore necessary to use an indirect method to work out the extent of creditable purpose under an MPD because that application involves a disposal. Because there is a disposal there is no ongoing use of the thing.

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[25] Refer to paragraph 15 in GSTR 2000/24.
[26] Subsection 129-40(1), Step 1.
[27] See paragraphs 50 to 55 in GSTR 2000/24.
[28] For examples of direct methods see paragraph 89 of Goods and Services Tax Ruling GSTR 2000/15.
[29] See section 129-20 for the number of adjustment periods.

59. The method used to work out the extent of creditable purpose must be fair and reasonable.[30] Furthermore, the choice of method should be based on its appropriateness in the circumstances, and not just because it provides a more favourable result.[31]

60. There are a number of approaches for calculating the extent of application to a creditable purpose for an asset transferred under an MPD which may lead to an adjustment. While either of the following two methods may not be the only reasonable methods, if you use the appropriate one for your circumstances the Commissioner will accept that you have correctly calculated your extent of creditable purpose.

61. The extent of your creditable purpose equates to the 'actual application of the thing' in step 1 of the method statement contained in section 129-40. You must then complete steps 2 and 3 of the method statement to work out whether you have an increasing adjustment. If you do have an increasing adjustment, you must then calculate the amount of the adjustment using the formula contained in section 129-70.

62. In each of the methods discussed below we give an example. These examples show the necessary steps to calculate your increasing adjustment once you have worked out your extent of creditable purpose. Because this application involves a disposal, the tax period in which you make this adjustment becomes your last adjustment period for that acquisition.[32]

(i) Effective life method for wasting assets

63. This method may be used to calculate the extent of creditable purpose where the asset is a depreciating or wasting asset. This method compares the use of the thing for the period of time it is held by the entity with either the useful life of the asset for accounting purposes or you may use the Commissioner's determination of the effective life of the asset under Division 40 of the *Income Tax Assessment Act 1997*.

64. The extent of creditable purpose or 'actual application of the thing'[33] using the effective life method is given by the formula:

$$\frac{\text{Period of time held}}{\text{Useful or effective life}} \times \text{Extent of creditable purpose prior to disposal}$$

[30] Paragraph 82 of GSTR 2000/15.
[31] Paragraph 85 of GSTR 2000/15.
[32] Paragraph 129-25(1)(a).
[33] This is step 1 in the method statement given in section 129-40.

Example 5: Effective life method

65. Larry and Lil are former spouses who are in partnership in a garden pot supply business. As part of a property settlement under an MPD, a partnership asset (a car) is provided to Lil. The car was purchased second-hand by the partnership on 1/7/2000 for $55,000 and at the time of acquisition it was intended that the car be used 80% for a creditable purpose and $4,000 in input tax credits was claimed. The partnership regarded 8 years as the useful life of the car for accounting purposes. The car was in fact used 80% for a creditable purpose until the partnership set aside and disposed of the car to Lil on 31/12/2002. The setting aside and disposal of the car is a private application by the partnership. At that time, the car has a GST inclusive market value of $33,000.

Using the formula above, the partnership calculates that the extent of creditable purpose ('actual application of the thing') is as follows:

$$\frac{\text{Period of time held}}{\text{Useful or effective life}} \times \text{Extent of creditable purpose prior to disposal}$$

$$= \frac{2.5 \text{ years} \times 80\%}{8 \text{ years}}$$

$$= 25\%.$$

The extent of creditable purpose (actual application of the thing) is 25% and this calculation represents step 1 of the method statement in section 129-40.

Step 2 in this example requires working out the intended application of the asset. From the facts given, we know that this is 80%.

Step 3 tells you that as the actual application of the thing is less than the intended application, there will be an increasing adjustment.

This formula states that the amount of the increasing adjustment is:

= full input tax credit[34] x (intended or former application — actual application)

= $5,000 x (80% — 25%)

= $5,000 x 55%

= $2,750.

[34] The 'full input tax credit' is the amount of the input tax credit to which you would have been entitled, had you acquired or imported the thing solely for a creditable purpose.

Therefore, the partnership's increasing adjustment under Division 129 in respect of the private application (disposal) of the car is $2,750.

(ii) Rental value method for non-wasting assets

66. When the asset held by an entity is a non-wasting asset like land, the rental value method is reasonable to reflect the extent to which the asset has been used by the enterprise for a creditable purpose. For the purposes of this method buildings or fixtures may be treated as part of the land unless those buildings or fixtures are considered plant. If they are considered plant the rental value method is not appropriate.

67. This method involves dividing the total rental value of the asset by the sum of that total rental value and the market value of the asset at the time of its disposal. This compares the value of enterprise use of the asset while held by the entity with the value of the total use of the asset. The value of the total use of the asset includes both the value of its use in the enterprise and its value as at the date of its application to a private or domestic purpose.

68. For the purposes of determining the rental value and market value you may use any reasonable method appropriate in the circumstances. For example, you may use the values in the FLA court order or agreement.

69. The extent of creditable purpose or 'actual application of the thing'[35] using this rental value method is given by the formula:

$$\frac{\text{Total Rental value}}{\text{Total Rental value + Market value at time of disposal}} \times \text{Extent of creditable purpose prior to disposal}$$

Example 6: Rental value method

70. *Barbara and Alistair operate a business in partnership. The partnership acquired land (not under the margin scheme), on 1 January 2001 at a price of $110,000. They claimed input tax credits of $10,000 on acquisition and applied the land 100% for a creditable purpose until its disposal. Following their marriage breakdown the partnership transferred the land under an MPD to Barbara on 31 December 2003. At this time the annual rental value of the land was $11,000 and its market value was $130,000.*

Step 1 The extent of creditable purpose or 'actual application of the thing' is calculated as:

[35] This is step 1 in the method statement given in section 129-40.

Total Rental value / Total Rental value + Market value at time of disposal	X	Extent of creditable purpose prior to disposal
$11,000 x 3 / *($11,000 x 3) + $130,000*	X	100%
$33,*000* / *$163,000*	X	100%

= 20.25%

The extent of creditable purpose or actual application is 20.25%.

Step 2 The intended or former application is 100%.

Step 3 The increasing adjustment equals:

full input tax credit x (intended less actual)

= $10,000 x (100% - 20.25%)

= $10,000 x 79.75%

= $7,975

Therefore, the partnership's increasing adjustment is $7,975.

Because of paragraph 129-25(1)(a) the last adjustment period for the land will be 30 June 2004.

Division 130

Whether you apply the goods to private or domestic use under Division 130

71. Division 130 is an adjustment provision that can result in an increasing adjustment of an amount equal to the input tax credits to which you were entitled upon acquisition or importation of goods. Whether you have an increasing adjustment under Division 130 depends on whether the goods were acquired or imported solely for a creditable purpose and you now apply them solely to private or domestic use. There is no adjustment under Division 130 if there has been a previous adjustment under Division 129 for the acquisition in question.[36] There is no minimum threshold for the value of the goods affected by Division 130.

[36] Subsection 130-5(3).

Meaning of the term 'apply the goods solely'

72. For Division 130 to apply, the goods must be applied *solely* to private or domestic use.[37] The scope of this Division is capable of a broad or narrow operation depending on the meaning of the word 'solely'. The meaning of the term 'apply' is discussed above at paragraphs 48 to 50.

73. We take the view that Division 130 has a narrow operation in that its application requires goods to have never been applied to business or enterprise use before being applied to private or domestic use. Only in this situation can it be said the goods have been applied solely for private and domestic use. We consider this view is preferable as it allows input tax credits to the extent of creditable purpose. This is consistent with the operation of the other adjustment provisions.

74. On this view, there is limited application of Division 130 to enterprise assets transferred under an MPD. This is because most such assets will have been used in the enterprise. Division 130 will only apply to goods that have been acquired with the intention that they be used in the enterprise but have merely been held and not actually used.

75. We are of the view that Division 130 has application not only to trading stock but also to all of the enterprise's goods including plant, building materials and office equipment provided they have never been used in the enterprise. This is because Division 130 is stated to apply to 'goods' and not only to goods that are trading stock.[38]

Example 7: Supplying goods solely to private use

76. *Sven, a sole trader, is required by an FLA court order to give to his ex-wife two unused office chairs that are sitting in the factory storeroom. The chairs were part of an order of office furniture that was acquired for a creditable purpose. However, the chairs were never used. When the chairs are set aside and given to his ex-wife, Sven will apply the chairs solely to his private use and the input tax credits previously claimed will need to be adjusted under section 130-5.*

Alternative view

77. An alternative view is that Division 130 can apply even where goods have actually been used in the enterprise solely for a creditable

[37] Paragraph 130-5(1)(c).
[38] See for example, paragraphs 130-5(1)(a) and (c).

purpose (before being applied to a private or domestic purpose). We believe the adoption of this view does not support the intention of the legislation as it will result in an adjustment of the input tax credits originally claimed where goods have been used in an enterprise for long periods. For example, a computer used in an enterprise for years and now of minimal value will have all its input tax credits clawed back if taken home and applied to private or domestic use. This effect would be in conflict with the allowance of credits on business inputs and the theme of other adjustment provisions in the Act.

Trading stock

78. In practice, it is anticipated that items of trading stock are the goods most likely to fall within the scope of Division 130. Trading stock is purchased with the intention of resale. We expect that full input tax credits would generally have been claimed because the intention of resale means the acquisition will generally be fully for a creditable purpose. However, we do not consider trading stock is 'applied' while it is sitting on the shelves or in the storeroom awaiting resale by the enterprise. Therefore, when it is set aside and removed for private consumption it is an application solely to private and domestic use to which Division 130 may apply. That is, trading stock was never applied for a creditable purpose prior to being set aside.

Example 8: Trading stock

79. *JAMP Pty Ltd a furniture retailer, transfers as a result of an MPD, a $5,500 new lounge suite from its showroom floor to the former spouse of its director and major shareholder. JAMP Pty Ltd bought the lounge suite for $5,500. While awaiting sale the lounge has not been applied to a creditable purpose. When it is removed from the showroom and given to the former spouse it is applied solely to a private use by the company. JAMP Pty Ltd has an increasing adjustment for $500 under Division 130.*

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Your comments

81. If you wish to comment on this Draft Ruling, please send your comments promptly by 17 January 2003 to:

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Commissioner of Taxation
27 November 2002

Previous Draft:
Not previously issued in draft form.

Related Rulings/Determinations:
GSTR 1999/1; GSTR 2000/15; GSTR 2000/24; GSTR 2000/31; GSTR 2001/4; GSTR 2001/6; GSTR 2002/3

Subject References:
- apply solely to private or domestic use
- associate
- adjustment
- consideration
- course or furtherance
- creditable purpose
- family law
- marriage
- de facto or same sex relationship
- GST
- matrimonial property distribution
- taxable supply

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- ANTS(GST)A99 9-15(2)
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- Case N43 (1991) 13 NZTC 3361

ATO references:
NO: 2002/007409
ISSN: 1443-51