GSTR 2003/D5 - Goods and Services Tax: tax law partnerships

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Draft Goods and Services Tax Ruling
Goods and Services Tax: tax law partnerships

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Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners, as it is not a ruling or advice in terms of section 37 of the ***Taxation Administration Act 1953****. When officially released it will be a public ruling for the purposes of section 37 and may be relied upon by any entity to which it applies.*

What this Ruling is about

1. This Ruling explains how the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) applies to transactions involving tax law partnerships.[1]

2. In particular, this Ruling explains:

- what is a tax law partnership;
- when is a tax law partnership formed[2] and the GST consequences of its formation;
- the GST consequences of transactions between a tax law partnership and its partners;
- the supply of a going concern by a tax law partnership; and
- the circumstances in which a tax law partnership is terminated and the GST consequences of its termination.[3]

3. This Ruling does not apply to a general law partnership.[4]

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[1] See paragraph 10 for what we mean by a tax law partnership.
[2] We use the term 'formed', even though a tax law partnership is not, strictly speaking, 'formed' by the partners. A more detailed discussion of the 'formation' of a tax law partnership commences at paragraph 48.
[3] We use the word 'termination' to describe the cessation of a tax law partnership. This is in contrast to a general law partnership which we describe as being dissolved. The distinction is drawn because dissolution has a specific meaning when applied to general law partnerships.
[4] See paragraph 9 for what we mean by a general law partnership.

4. Unless otherwise stated, all legislative references in this Ruling are to the GST Act, and all references to the regulations are to the A New Tax System (Goods and Services Tax) Regulations 1999 (the GST regulations).

Date of effect

5. This draft Ruling represents the preliminary, though considered, view of the Australian Taxation Office. This draft may not be relied on by 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.

6. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* (the TAA) and may be relied upon, after it is issued, by any entity to which 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.

7. 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

8. A partnership is defined in section 195-1 of the GST Act by reference to the definition of a partnership in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997). That definition states that a partnership is:

> An association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly, but does not include a company.

9. The first limb of the definition refers to 'an association of persons carrying on business as partners'. This reflects the general law definition of a partnership, which is 'the relation which subsists between persons carrying on a business in common with a view of

profit'.[5] We refer to this type of partnership as a general law partnership.

10. The second limb of the definition includes as a partnership an association of persons 'in receipt of ordinary income or statutory income jointly'. We refer to this type of partnership as a tax law partnership.

11. Tax law partnerships exist only for tax purposes. General law does not recognize tax law partnerships. At general law, joint tenancy, tenancies in common, joint property or part ownership does not create a partnership in respect of anything that is so held. Neither does the sharing of any profits from the use of such property result in a partnership. The joint receipt of income from investments without carrying on business is outside the definition of a partnership under general law.[6]

12. In *FC of T v. McDonald* (*McDonald),*[7] Beaumont J said:

> In my opinion, no partnership under the general law subsisted between the respondent and his wife. Their relationship was one of co-ownership, and even if they were deemed to be partners by reason of sec. 6(1) of the Act, this circumstance is immaterial for our purposes. As has been noted, their notional 'partnership' will carry with it the consequence that they are to be treated as a 'partnership' for some purposes.[8]

13. In *Tikva Investments Pty. Ltd. v. FC of T (Tikva),*[9] Stephen J expressed similar sentiments:

> Whether or not the members of the syndicate were partners at general law it is clear that they were, together, an association of persons in receipt of income jointly; apparently some small sums by way of rental were received by the syndicate throughout its life and in the year of income in question this source of income was vastly augmented by receipt of a part of the proceeds of sale of the property. All these amounts were received, if not as income of a partnership at general law, then as income from property which the syndicate members owned as tenants-in-common. Accordingly the

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[5] The general law definition is set out in the partnership act of each State and Territory as follows: subsection 7(1) WA, subsection 5 (1) Qld, subsection 5(1) Vic, subsection 1(1) SA, subsection 1(1) NSW, subsection 6(1) ACT, subsection 6(1) Tas, subsection 5(1) NT.

[6] See the partnership acts of each State and Territory as follows: section 8 WA, section 6 Qld, section 6 Vic, section 2 SA, section 2 NSW, section 7 ACT, section 7 Tas, section 6 NT.

[7] (1987) 15 FCR 172; 87 ATC 4541; (1987) 18 ATR 957.

[8] (1987) 15 FCR 172 at page 183; 87 ATC 4541 at page 4550; (1987) 18 ATR 957 at pages 967 to 968.

[9] (1972) 128 CLR 158; 72 ATC 4231; (1972) 3 ATR 458.

members of the syndicate were, for the purposes of the Act, a partnership. [10]

14. The fact that a tax law partnership is not recognised at general law means that the way the GST Act applies to transactions between a tax law partnership and its partners[11] is not affected by general law concepts of a partnership.

15. The GST Act, in extending the meaning of 'partnership' to include tax law partnerships is intended to apply to supplies and acquisitions between partners of a tax law partnership and the partnership in a manner consistent with the treatment of supplies and acquisitions between partners and a general law partnership.

16. Against this background, we have taken an approach that promotes the purpose or object of the GST Act to produce the most sensible result having regard to that purpose or object.[12] Where relevant, the positions taken in this Ruling are consistent with the manner in which the GST Act applies to transactions involving a general law partnership.

17. Most tax law partnerships arise because property[13] is acquired or used to derive income jointly. Consequently, this Ruling focuses on tax law partnerships involving co-ownership of property.

18. In this Ruling, unless otherwise stated:

- a reference to the joint receipt of income or receipt of income jointly is a reference to the receipt of either ordinary income or statutory income jointly;
- a reference to a partnership is a reference to a tax law partnership as described in paragraph 10;
- a reference to a registered partnership is a reference to a tax law partnership that is either registered or required to be registered for GST purposes. Similarly, a reference to an unregistered partnership is a reference to a tax law partnership that is neither registered nor required to be registered;
- a reference to 'an activity' is a reference to an activity or activities that does not amount to carrying on a business;
- all supplies and acquisitions are connected with Australia;

[10] (1972) 128 CLR 158 at pages 164 to 165; 72 ATC 4231 at page 4236; (1972) 3 ATR 458 at page 462.
[11] See paragraphs 35 to 41 for a discussion on whether entities in a tax law partnership can be regarded as partners for GST purposes.
[12] Section 15AA of the *Acts Interpretation Act 1901*.
[13] Usually in relation to co-ownership of real property.

- it is assumed that a supply or acquisition of property or an interest in property is not a supply or acquisition of residential premises that is input taxed;
- a reference to an interest in property is a reference to the legal and beneficial interest in the property; and
- it is assumed that the election to apply the margin scheme to supplies of real property is not made.

Ruling with explanation

What is a tax law partnership?

19. A tax law partnership, as described in the second limb of the definition of a partnership, is 'an association of persons … in receipt of ordinary income or statutory income jointly, but does not include a company'.

20. For a tax law partnership to exist, there must be 'an association of persons' that is in 'receipt of income' jointly. Where the 'receipt of income' is from the 'association of persons' carrying on a business, that association of persons will be a general law partnership and not a tax law partnership.

Association of persons

21. The reference in the GST Act definition of a partnership to an 'association of persons' requires some link, connection, or existence of mutual or common purpose between the persons.

22. The term 'association' is not defined in the GST Act and therefore takes its ordinary meaning of 'connection or combination' with a common purpose or a body of persons associated together for a common purpose.[14]

23. For the purposes of the second limb of the definition of a partnership, co-owners of a property are an association of persons.

24. In an income tax context, Australian courts have accepted that a tax law partnership exists as a consequence of joint ownership, whether as joint tenants or as tenants in common, coupled with the joint receipt of income.

25. In *Tikva*,[15] Stephen J, in relation to the reference to a 'partner' in section 92 of the *Income Tax Assessment Act 1936* (ITAA 1936), commented:

[14] The Macquarie Dictionary 3rd edition.
[15] (1972) 128 CLR 158; 72 ATC 4231; (1972) 3 ATR 458.

> No doubt the reference to a 'partner' in sec. 92 is to be understood as referring to one of the persons associated together in the manner specified in the definition of 'partnership'. [16]

26. In *McDonald*,[17] Beaumont J reached the conclusion that where co-owners, who might not be partners under the general law, receive income jointly, they are treated as partners for the purposes of the ITAA 1936. In reaching that conclusion, his Honour said:

> In the present case, the respondent and his wife were joint tenants, legally and beneficially, of the subject premises. They were in receipt of income jointly from the lettings. By reason of the extended partnership definition, they were deemed to be 'partners' for the purposes of the statute. [18]

27. In *Yeung & Anor v. FC of T* (*Yeung*),[19] Davies J took the view that:

> It is sufficient for the existence of a partnership as defined in sec. 6(1) of the Act that the properties were owned by the six members of the family as tenants-in-common, that the leases were in the names of the six and, therefore that the rents were derived by the six.[20]

Receipt of income

28. A tax law partnership exists only if the association of persons is 'in receipt of income jointly'. To be in receipt of income jointly, it is not necessary to have actually received the income.

29. We consider that, for the purposes of the second limb of the definition of partnership in the GST Act, the requirement that there be 'receipt of income' jointly is met if an activity being carried on, or intended to be carried on by an association of persons will result in the receipt of income jointly.

30. This view is supported by the High Court decision in *Falstein v. Official Receiver (Falstein)*[21] and by comments made by Davies J in *Yeung*.

31. In *Falstein,* a barrister was held to be 'in receipt of income' in the course of his practice, even though he had not received, and had no legal right to sue for, any fees. We acknowledge that the decision in *Falstein* was reached in the context of the application of a provision of the *Bankruptcy Act 1924-1959*. However, we consider that the

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[16] (1972) 128 CLR 158 at page 164; 72 ATC 4231 at page 4236; (1972) 3 ATR 458 at page 462.
[17] (1987) 15 FCR 172; 87 ATC 4541; (1987) 18 ATR 957.
[18] (1987) 15 FCR 172 at page 182; 87 ATC 4541 at page 4550; (1987) 18 ATR 957 at page 967.
[19] 88 ATC 4193; (1988) 19 ATR 1006.
[20] 88 ATC 4193 at page 4200; (1988) 19 ATR 1006 at page 1013.
[21] (1962) 108 CLR 523.

Court's views in relation to the meaning to be attributed to the term 'in receipt of' are relevant in determining whether and from what time a tax law partnership exists.

32. In *Yeung*, Davies J, in relation to a submission that section 6(1) of the ITAA 1936 definition of partnership did not apply to the facts of the case because some members of the family (the children of the family) did not personally receive any of the income and were therefore not in receipt of income jointly, stated:

> However, the leases were in the children's names as well as in the names of the parents. Each receipt of the rents under those leases was a receipt, on behalf of all the co-owners. The rents were received, for the purposes of the definition in sec. 6(1), by all members of the family jointly.[22]

Tax law partnership as an entity

33. The definition of 'entity' includes a partnership.[23] The moment a tax law partnership exists, it is an entity for GST purposes. The GST Act treats the partnership as an entity separate from its partners.[24]

34. As an entity, a tax law partnership can make supplies and acquisitions in its own right, and has all the rights and obligations under the GST Act that apply to entities generally. For example, a tax law partnership may register for GST, is liable for GST on taxable supplies that it makes,[25] and is entitled to input tax credits for creditable acquisitions that it makes.[26]

Is an entity in a tax law partnership a 'partner' for GST purposes?

35. We consider that an entity that is in a tax law partnership is a partner for the purposes of the GST Act. That entity can make supplies, acquisitions and importations as a partner.

36. Some doubt has been expressed as to whether an entity in a tax law partnership can be regarded as a 'partner' for GST purposes. In particular, it has been suggested that the phrase 'as a partner' in

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[22] 88 ATC 4193 at page 4200; (1988) 19 ATR 1006 at page 1013.
[23] Paragraph 184-1(1)(e).
[24] See, also the note to subsection 184-1(1), which states: The term "entity" is used in a number of different but related senses. It covers all kinds of legal persons. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does.
[25] However, under section 50 of the TAA, the obligations on a partnership are imposed on each partner, and the partners are jointly and severally liable to pay GST.
[26] Section 11-20.

subsection 184-5(1) is limited in its application to a partner in a general law partnership.

37. The view that an entity in a tax law partnership is a partner is supported by a number of judicial decisions. For example, in *McDonald*,[27] Beaumont J said:

> It is true that, for the purposes of the Act, 'persons in receipt of income jointly' as well as persons carrying on business as partners, are deemed to be 'partners' (see the definition in sec. 6(1)). Thus, if co-owners, who might not be partners under the general law, receive income jointly, they are treated as 'partners' for the purposes of the Act.[28]

38. We consider that his Honour's comments apply equally to the definition of a partnership in section 195-1 of the GST Act.

39. In *Tikva*,[29] Stephen J reached the conclusion that, by virtue of the taxpayer attaining the status of a member of an association of persons either carrying on business as partners or in receipt of income jointly, it became a partner within the meaning of section 92 of the ITAA 1936.

40. Broadly, the GST law has adopted the income tax concept of a tax law partnership and, in this context 'partners', as a means for dealing with the GST obligations and entitlements arising from the common situation of co-ownership of property and the joint receipt of income from that property. [30]

41. Although we take support for our views from these judicial decisions, it is in the context of providing a workable partnership entity concept for GST that allows for parallel GST treatment between tax law partnerships and general law partnerships.

Supplies and acquisitions as partners

42. Subsection 184-5(1) provides that:

> For the avoidance of doubt, a supply, acquisition or importation made by or on behalf of a partner of a partnership in his or her capacity as a partner:
>
> (a) is taken to be a supply, acquisition or importation made by the partnership; and

[27] (1987) 15 FCR 172; 87 ATC 4541; (1987) 18 ATR 957.
[28] (1987) 15 FCR 172 at page 182; 87 ATC 4541 at pages 4549 to 4550; (1987) 18 ATR 957 at page 967.
[29] (1972) 128 CLR 158; 72 ATC 4231; (1972) 3 ATR 458.
[30] See paragraph 25. Also, paragraph 89 for comments made by Fitzgerald J in *FC of T v. Walsh (P.J. and B.J.)* 83 ATC 4415; *Federal Commissioner of Taxation v. Trustees of the Lisa Marie Walsh Trust* (1983) 14 ATR 399.

(b) is not taken to be a supply, acquisition or importation made by that partner or any other partner of the partnership.

43. We consider that this provision applies to entities that are partners in a tax law partnership as well as to entities that are partners in a general law partnership.

44. Whether a partner makes a supply or acquisition in their capacity as a partner is a question of fact determined on the facts and circumstances of each case. Factors that may indicate that a supply is made by a partner in their capacity as a partner include:

- the consideration for the supply is paid to a common fund, or to all the partners;
- the supply is of a type typically made in the type of enterprise carried on by the partnership;
- the invoice or tax invoice shows all the names of the partners as supplier;
- all the partners agree to the supply being made; and
- any agreement under which the supply is made is in the names of all the partners.

45. Factors that may indicate that an acquisition is made by a partner in their capacity as a partner include:

- the thing acquired is used in the enterprise of the partnership;
- the acquisition is made with the consent of all the partners; and
- all the partners contribute to the cost of the acquisition.

Carrying on an enterprise

46. There will be GST consequences for the tax law partnership if the activity from which income is or will be received jointly, amounts to carrying on an enterprise.[31] Carrying on an enterprise includes doing anything in the course of the commencement or termination of an enterprise.[32]

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[31] The meaning of enterprise is set out in section 9-20. See Goods and Services Tax Determination GSTD 2000/8: Goods and Services Tax: what is an 'enterprise' for the purposes of *A New Tax System (Goods and Services Tax) Act 1999*? Does MT 2000/1 have equal application to the meaning of 'enterprise' for GST purposes?

[32] Section 195-1.

47. For GST purposes, it is the partnership entity which carries on the enterprise of the partnership, rather than the partners. However, a partner may carry on a separate enterprise in their own right.

Formation of a tax law partnership

Time of association approach

48. For GST purposes, a tax law partnership comes into existence when an association of persons carries on an activity from which income is or will be received jointly. We refer to this as the 'time of association' approach.

49. The practical effect of the time of association approach is that the partnership may be entitled to input tax credits for creditable acquisitions made in commencing its enterprise. For example, the partnership may be entitled to claim input tax credits on the acquisition of the property from which income will be received jointly.

Time of receipt of income approach

50. It has been suggested that a tax law partnership is not formed until an association of persons is in actual receipt of income jointly, for example, when property is leased and the association of persons commences to actually receive income. We refer to this as the 'time of receipt of income' approach.

51. Under this approach, the acquisition of property or an interest in the property is at a time before the tax law partnership exists. The acquisition is by the co-owners in their own right and not as partners in a tax law partnership.

52. In our view, the practical effect of the 'time of receipt of income' approach would be to exclude something that is acquired for the purpose of and in carrying on an enterprise from being considered as an acquisition by the entity that carries on the relevant enterprise. The acquisition of property or interests in property would be by the co-owners in their own right, but the actual enterprise that results in the receipt of income jointly is carried on by the partnership.

53. Having regard to the above, we do not consider it appropriate to confine the time of formation of a tax law partnership to the time of actual receipt of income jointly. Such an approach would be inconsistent with a fundamental purpose or object of the GST regime,[33] the broad meaning of 'carrying on an enterprise' in section

[33] The property is acquired for the purpose of carrying on an enterprise and is used for that purpose and not for 'private consumption'. The GST is effectively a tax

195-1 and the manner in which the GST Act operates in relation to supplies and acquisitions made upon the formation of a general law partnership.

Practical application of the time of association approach

54. The practical application of the time of association approach depends on the facts and circumstances of each case. Circumstances in which a tax law partnership may be formed include:

- two or more entities jointly acquire property with the intention of carrying on an activity from which income will be received jointly;
- co-owners of property agree to convert their property for an income producing purpose and intend to carry on an activity from which income will be received jointly; and
- an entity (new co-owner) purchases an interest in a property from a co-owner (outgoing co-owner) and the new co-owner and the other co-owners together intend to carry on an activity from which income will be received jointly.

Joint acquisition of property

55. Two or more entities (co-owners) may enter into an agreement with a vendor to purchase, either as joint tenants or tenants in common, a property with the intention of carrying on an activity in relation to that property from which income will be received jointly. In this situation, the association of persons is formed when the co-owners enter into the agreement to purchase the property. As income from the activity will be received jointly, a tax law partnership is formed when the co-owners enter into the agreement.

Example 1: When is a tax law partnership formed?

56. *Raymond and Julie, who are not individually registered for GST, purchase an industrial shed with the sole purpose of renting it out.*

57. *Their activities do not amount to carrying on business at general law as partners. However, as their leasing activity is an enterprise that results in receipt of rental income jointly, they are partners in a tax law partnership that may register for GST.*

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on final private consumption in Australia. (Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, Chapter 1.

58. *For GST purposes, the partnership comes into existence when Raymond and Julie enter into the agreement to purchase the industrial shed. The acquisition of the shed is an activity done in the course of the commencement of their leasing enterprise.*

GST consequences

59. The tax law partnership commences to carry on an enterprise from the time of its formation. It may be registered for GST effective from the date of its agreement. Registration is discussed at paragraphs 93 to 95. The acquisitions of the income producing property and any conveyancing services are made by the partnership in the course of the commencement of its enterprise. As such, they are creditable acquisitions if the requirements of section 11-5 are met.

60. In a situation where the same co-owners purchase another income producing property there is no new partnership. The same association of persons is in receipt of income jointly.

Example 2: Creditable acquisitions by a tax law partnership in commencing its enterprise

61. *Shauna and George jointly acquire a commercial property with the intention of leasing it out for a nightclub business. They acquire the conveyancing services of Settle It and Associates Solicitors (Settle It) to make the acquisition. The supply of the property to them is a taxable supply. Shauna and George are in a tax law partnership from the time they enter into the agreement to buy the property.*

62. *As leasing is an enterprise under section 9-20, the partnership applies for GST registration and is registered effective from the date of the agreement.*

63. *The acquisitions of the property and the services of Settle It are made by Shauna and George as partners and are acquisitions made by the partnership. As the partnership is registered and the acquisitions are made in carrying on its leasing enterprise, they are creditable acquisitions made by the partnership. The partnership is entitled to input tax credits for the acquisitions.*

Conversion of an existing property to an income producing purpose

64. The joint acquisition of property is not the only basis on which a tax law partnership is formed.

65. An existing co-owned property may be converted from a private or non-incoming producing use to an income producing use, for example, the conversion of an existing residence to a suite of offices for leasing.

66. In this situation, we accept that the tax law partnership is formed when the property is applied or converted by the co-owners, acting in concert, for an income producing purpose. The co-owners must have the intention to carry on an activity from which income will be received jointly. The question of when property is applied or converted for an income producing purpose is determined having regard to the facts and circumstances of each case. Factors that may be considered include:

- the time when an application is made by the co-owners to the local council for rezoning of real property from residential to commercial;
- the time when premises are placed with a real estate agent to manage as a leased property;
- the time when the property is first made available for the income producing purpose; or
- refurbishment work is commenced to convert premises to make them suitable for the intended income producing activity, for example, work to convert residential premises into a suite of offices for leasing.

GST consequences

67. In this situation, the tax law partnership commences to carry on an enterprise from the time when the property is applied or converted for the income producing purpose. It may be registered for GST effective from this time. We consider that anything acquired to convert the property for the income producing purpose is an acquisition made by the partnership in the course of the commencement of its enterprise. As such, it is a creditable acquisition if the requirements of section 11-5 are met.

Example 3: A tax law partnership formed after acquisition of property

68. *Stephen and Joy own a house that they live in. The area is zoned commercial. Stephen and Joy decide to move out of the house and convert it into a suite of offices for leasing. Once they move out, they apply to the local council for approval to convert the property into offices.*

69. *For GST purposes, a tax law partnership is formed when Stephen and Joy apply to the local council for approval.*

70. *Once the approval is given, Stephen and Joy obtain the services of an architect and a builder to carry out the conversion work. They also obtain the services of a local real estate agency to manage the leasing of the property. The supply of these services is a taxable supply. Upon completion, the offices are leased to a firm of accountants.*

71. *As leasing is an enterprise under section 9-20, the partnership applies for GST registration and is registered effective from the date when the application is made to the council.*

72. *The acquisition of the services of the architect, builder and the real estate agency are acquisitions made by the partnership. As the partnership is registered, and the acquisitions are made in carrying on its leasing enterprise, they are creditable acquisitions made by the partnership. The partnership is entitled to input tax credits for the acquisitions*.

Acquisition of an interest in property by a new co-owner

73. An existing co-owner may sell their interest in property to a new co-owner. If the new co-owner continues the enterprise with the other co-owners and they receive income jointly, this will give rise to a new tax law partnership. The time at which the new partnership is formed will depend on whether the acquisition of the property is by the co-owner in their own right, or by the co-owner in the capacity as a partner in the partnership.

74. Whether the acquisition of an interest in the property is an acquisition by the partnership or the new co-owner in their own right, and the time of formation of the new partnership are questions of fact, determined having regard to the facts and circumstances of each case.

Acquisition by the partnership

75. An acquisition by the partner in the capacity as a partner will be an acquisition by the partnership. The factors that can be taken into account in determining whether the acquisition is by the partnership include:

- whether the new co-owner acquired the interest with the consent and agreement of the other co-owners; and
- whether the other co-owners and the new co-owner agree on leasing and management arrangements in relation to the property before the acquisition of the interest in the property.

76. The presence of these factors would be indicative of an acquisition by a co-owner as a partner, and therefore by the partnership. In this situation, we accept that the new partnership is formed at the time when the new co-owner enters into the agreement to buy the interest in the property. In this case, the partnership and not the new co-owner may claim the input tax credits on the acquisition.

GST consequences

77. The tax law partnership commences to carry on an enterprise from the time of its formation. It may also be registered for GST effective from the date of the agreement. We consider that the acquisition of the interest in the property by the new co-owner is in their capacity as a partner in the tax law partnership. The acquisitions of the interest and any conveyancing services are acquisitions made by the partnership in the course of the commencement of its enterprise. As such, they are creditable acquisitions if the requirements of section 11-5 are met.

Acquisition by the co-owner, but not as a partner

78. In other cases, the acquisition by a new co-owner of their interest in property may be without any involvement of the other co-owners. That is, the new co-owner does not obtain the consent or agreement of the other co-owners, nor is there any discussion with them in relation to the activity intended to be carried on.

79. In these cases, the acquisition of the interest in the property by the new co-owner is in their own capacity, and not in their capacity as a partner in the tax law partnership. This means that a tax law partnership is formed when the co-owners (new and remaining) together carry on the activity from which income will be received jointly. In some cases, the activity commences to be carried on from the time of the acquisition of the interest in the property.

GST consequences

80. The tax law partnership carries on an enterprise from the time of the commencement of the activity from which the co-owners will receive income jointly. It may also be registered for GST effective from this date.

81. The acquisitions of the interest in the property and any conveyancing services are made by the co-owner in their own right, and may be made in carrying on a separate enterprise. These are creditable acquisitions if the requirements of section 11-5 are met. If the new co-owner is unregistered, the acquisitions do not give rise to any entitlement to input tax credits.

Example 4: Acquisition by a co-owner in an individual capacity.

82. *Meryl acquires an interest in a theatre from Jan. Jan owned the theatre with Nick as tenants in common. Nick and Jan were in a tax law partnership as they received income jointly by leasing the theatre. The supply of the interest by Jan is a taxable supply.*

83. *Meryl also carries on a leasing enterprise and is registered for GST. She does not have any contact with Nick prior to the acquisition of Jan's interest in the property. Meryl acquires the interest as part of her own enterprise. Upon acquisition of her interest, Meryl continues to lease the theatre jointly with Nick.*

84. *Meryl's acquisition of Jan's interest in the property is made in the course or furtherance of the enterprise she carries on in her own right. It is not an acquisition by her as a partner in the partnership of Meryl and Nick. Meryl is entitled to the input tax credits on the acquisition of her interest in the property.*

85. *Meryl forms a new tax law partnership with Nick when they commence to carry on the leasing enterprise together. This will be after she acquires her interest in the property.*

Does a tax law partnership have capital or assets?

86. We consider that, for GST purposes, a tax law partnership can have assets and liabilities. Things that are acquired by partners in a tax law partnership as partners are acquisitions of the partnership. Those things can become assets of the partnership.

87. We further consider that, for GST purposes, a tax law partnership does not have partners' capital accounts, nor do the partners contribute capital to a tax law partnership. Neither does a tax law partnership create and supply interests in the partnership. Partners in a tax law partnership do not hold interests in the partnership. A supply of a financial interest under item 10(d) of subregulation 40-5.09(3), therefore, does not arise.

88. The only interest that a partner in a tax law partnership has is an interest in the property, coupled with a right to a share of the net income or losses in accordance with that interest.

89. Our view that a tax law partnership can have partnership assets is supported by comments made by Fitzgerald J in *FC of T v. Walsh (P.J. and B.J.) (Walsh)*.[34] In that case, his Honour in his comments in relation to whether or not there was a partnership under the second

[34] 83 ATC 4415; also *Federal Commissioner of Taxation v. Trustees of the Lisa Marie Walsh Trust* (1983) 14 ATR 399.

limb of the definition of a partnership in subsection 6(1) of the ITAA 1936, said:

> The other basis upon which the Commissioner contended that, for income tax purposes, a partnership existed between Syncarpia and the other two companies was that they were in receipt of income jointly.
>
> …The only income which might have been received jointly by Syncarpia and its co-venturers for present purposes is the profit arising from the sale: sec.26(a) and 26AAA of the Act.
>
> The only asset of any such partnership was again the land. Again the partners held the legal title to the land as tenants in common. There is nothing in the Act of which I am aware which attributes to such a notional partnership for income tax purposes any of the consequences of a true partnership under the general law. Each of the partners accordingly also held the beneficial title to its interest in the land as tenants in common.
>
> …The partnership, or at least the partners, sold the land. The partners paid off their joint debts and were left with the profit.[35]

90. In an Administrative Appeals Tribunal (AAT) case, *Case 12/95*; *AAT Case 10,079*,[36] the tribunal said:

> …the deeming provisions are required by their nature to be construed strictly and only for the purpose for which they are resorted to and it is improper to extend by implication the express application of such a statutory fiction. This fiction does not, in our opinion, cloak an arrangement of the kind now being contemplated with the additional refinements of partnership assets and liabilities and partners' capital accounts. On that basis the tribunal finds that there are no partnership assets or liabilities nor are there capital accounts capable of being accessed by the applicant or his spouse. What remains is a relationship of co-ownership as joint tenants which is more accurately described as an investment rather than as partners in a business operation. For these reasons the tribunal concludes that the argument of the bank loan being used to replace portion of the capital accounts of the partners is not available to the applicant.[37]

91. We agree with the Tribunal's view that a tax law partnership does not have partners' capital accounts. However, in relation to the question of whether or not a tax law partnership can have partnership assets, we note that no reference was made by the AAT in its decision of the full Federal Court's decision in *Walsh* in relation to the question of whether a tax law partnership could have partnership assets. With due respect to the AAT in *Case 12/95*; *AAT Case 10,079*, we consider

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[35] 83 ATC 4415 at pages 4435 to 4436; (1983) 14 ATR 399 at page 422.
[36] 95 ATC 175; AAT Case 10,079 (1995); 30 ATR 1169. See also comments made by Fitzgerald J in *FC of T v. Walsh (P.J. and B.J.)* 83 ATC 4415 at pages 4435 to 4436.
[37] 95 ATC 175 at page 181; (1995) 30 ATR 1169 at page 1175.

that the comments made by Fitzgerald J in *Walsh* express the better view that a tax law partnership can have partnership assets.

92. Our view that a tax law partnership can have partnership assets is a logical extension of the view that a tax law partnership, as an entity for GST purposes, can make acquisitions and supplies. Our view provides a practical and sensible approach to the application of the GST Act to tax law partnerships, having regard to the rules of statutory interpretation.

Registration

93. If the activity carried on by a tax law partnership is an enterprise as defined in section 9-20,[38] the partnership may register for GST. It is required to register if it meets the registration turnover threshold.[39] The registration turnover threshold is $50,000 (or a higher amount as specified in the GST regulations).[40]

94. A partnership may be registered from a particular date.[41] A partnership that undertakes activities in the commencement of its enterprise can be registered for GST. In the event that the partnership's activities do not proceed beyond the commencement stage, there is a cessation of the enterprise. This may occur, for example, where:

- the contract to purchase the asset is not settled; or
- the property is diverted to some non-income producing use.

95. Where cessation of the enterprise occurs, the partnership needs to apply for the cancellation of its registration.[42] Cancellation of registration is explained more fully at paragraph 156.

Operation of a tax law partnership

96. Once a tax law partnership is registered, it may make creditable acquisitions if the requirements of section 11-5 are met.

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[38] Under paragraph 9-20(2)(c) an enterprise does not include activities done by a partnership (all or most of the members of which are individuals) without a reasonable expectation of profit or gain.

[39] Section 23-5.

[40] Section 23-15. The registration turnover threshold for non-profit bodies is $100,000 or a higher amount as specified in the GST regulations – subsection 23-15(2). Also see GSTR 2001/7: meaning of annual turnover, including the effect of section 188-25 on projected annual turnover. Note that the value of input taxed supplies is not included in the calculation of current or projected annual turnover.

[41] Subsection 23-10(2).

[42] Section 25-50.

The partnership is entitled to input tax credits for its creditable acquisitions. The partnership may also make supplies that are taxable, GST-free or input taxed.

Example 5: Creditable acquisition by a tax law partnership

97. *Following from example 2: Shauna and George jointly purchase some air conditioning units for installation in the property. They also acquire the services of Freeze It Enterprises Ltd. (Freeze It) to do the installations. The supplies of the air conditioning units and the installation services of Freeze It are taxable supplies.*

98. *The acquisitions are creditable acquisitions made by the partnership as:*

(a) they are acquired in carrying on the partnership's enterprise, and are for a creditable purpose;

(b) the supplies to the partnership are taxable supplies;

(c) the partnership provides consideration for the supplies; and

(d) the partnership is registered.

99. *The partnership is entitled to input tax credits for the acquisitions.*

Example 6: Taxable supply by a tax law partnership

100. *Following from Example 5: The partnership of Shauna and George lease the building to Kurt and Rodney who fit out the building and operate it as a nightclub. The partnership makes a taxable supply to Kurt and Rodney and is liable for GST on the supply.*

Supplies by a partner to a tax law partnership

101. A partner may make a supply in their own right to the tax law partnership. The supply will be a taxable supply provided it meets the requirements of section 9-5.

Example 7: taxable supply by a partner to a tax law partnership

102. *Alistair and Abigail jointly purchase a commercial property that is leased. They register their tax law partnership for GST purposes from the date on which they enter into the agreement to buy the property.*

103. *Alistair carries on his own enterprise as a solicitor and is registered for GST. Alistair does the conveyancing for the acquisition of the property in the course of carrying on his enterprise and charges the partnership. He does not make the supply in his capacity as a partner of the partnership.*

104. *Alistair makes a taxable supply to the partnership as the requirements of section 9-5 are met.*

105. *The acquisition of the conveyancing services is a creditable acquisition by the partnership. The partnership is entitled to the input tax credits for the acquisition.*

Supplies by a tax law partnership to a partner

106. During its operation, a tax law partnership may make supplies to a partner that are taxable, GST-free or input taxed. The supply is a taxable supply if it satisfies the requirements of section 9-5. Where a partnership makes a supply to a partner or their associates in the course or furtherance of its enterprise, without consideration or for inadequate consideration, Division 72 may apply.

Example 8: Taxable supply by a tax law partnership to a partner

107. *Edward and Claudia are partners in a tax law partnership as co-owners of leased industrial sheds. The partnership is registered for GST.*

108. *Edward is also registered for GST as a sole trader. He uses one of the sheds for storing his inventory and pays rent to the partnership at the market rate.*

109. *The partnership makes a taxable supply of the use of the shed to Edward and is liable for GST. Edward makes a creditable acquisition and is entitled to an input tax credit.*

The application of Division 72

110. Division 72 ensures that supplies to, and acquisitions from, associates without consideration are brought within the GST system, and that supplies to associates for inadequate consideration are properly valued for GST purposes.[43] As a partnership and its partners are associates under the GST Act,[44] Division 72 may apply to supplies between a partnership and its partners.

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[43] See section 72-1.

[44] 'Associate' is defined in section 195-1 of the GST Act by reference to section 318 of the ITAA 1936. The definition is very wide and includes other partners of the partnership, spouses and children of any partner, certain other relatives and their

111. Subdivision 72-A may apply to a supply made between a partnership and its partners where the supply is without consideration.[45] The effect of this subdivision is that such a supply is not stopped from being a taxable supply where the recipient of the supply either is not registered or required to be registered, or acquires the thing supplied otherwise than solely for a creditable purpose.[46]

112. Subdivision 72-C may apply to a supply made between a partnership and its partners where the consideration for the supply is inadequate.[47] The subdivision does not apply if the recipient is both registered and makes the acquisition solely for a creditable purpose.

113. Where Division 72 applies to a supply that is made without consideration or for inadequate consideration, the value of the supply is its GST exclusive market value.[48]

Example 9: Supplies without consideration - creditable purpose.

114. *Charlotte and Giles own a shop that is leased. They are in a tax law partnership because of their joint receipt of income. The partnership is registered for GST. Giles, who carries on his own enterprise as a carpet retailer, is also registered for GST.*

115. *Giles supplies new carpets for the shop, but does not charge the partnership. The supply by Giles is a normal incident of the enterprise that he carries on and is a supply in the course or furtherance of his own enterprise.*

116. *The supply by Giles would be a taxable supply to the partnership under section 9-5 except that there is no consideration. However, subdivision 72-A does not apply because the supply is both to a registered entity and solely for a creditable purpose.*

Example 10: Supplies without consideration – no creditable purpose.

117. *From Example 9, the shop that Charlotte and Giles own also has a cellar that the lessee does not want. The partnership allows Giles, a model train enthusiast, to use the cellar for three months to conduct his hobby. The GST exclusive market value for the supply of the cellar is $1,000 for the three month period.*

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spouses, companies that are controlled by a partner or associates and, if the company is also a partner, any associates of the company.

[45] Supplies from unregistered partners will never be taxable supplies by the partner or creditable acquisitions by the partnership. Division 72, therefore, cannot apply to supplies by unregistered entities.

[46] Section 72-5.

[47] Inadequate consideration is consideration that is less than the GST inclusive market value, see subsection 72-70(1).

[48] Sections 72-10 and 72-70.

118. *The supply of the use of the cellar is a supply that is made in the course or furtherance of the enterprise that the partnership carries on and would be a taxable supply by the partnership except that it is without consideration. Although Giles is registered, the use of the cellar is not a creditable acquisition by Giles. Subdivision 72-A applies to bring the supply within the GST system*

119. *As the GST exclusive market value of the supply to Giles is $1,000, the partnership is liable for GST of $100.*

Acquisition by a tax law partnership partly for a creditable purpose

120. If a tax law partnership acquires goods or services that have an intended use that is partly for private or domestic purposes and partly in carrying on the partnership's enterprise, the acquisition is partly for a creditable purpose. The partnership needs to apportion its claim for an input tax credit under section 11-30 to the extent that the acquisition is for a creditable purpose.

Changes in creditable purpose

121. A supply by a partnership to a partner is an application by the partnership of a thing it acquired. Section 129-55 sets out the meaning of 'apply' as follows:

> Apply, 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.

122. Where a tax law partnership allows a partner to use a thing for a private or domestic purpose that it acquired in carrying on its enterprise, the partnership applies the thing within the meaning of section 129-55.

123. As the application is of a private or domestic nature, there is a change in the extent of creditable purpose for the acquisition by the partnership. The partnership may need to make an adjustment under either Division 129 or, if the thing acquired was goods, Division 130.

Division 129

124. Division 129 applies where there is a change in the extent of creditable purpose for an acquisition. The change occurs where the actual application of the thing acquired is greater or less than its intended application for a creditable purpose. If the actual application for a creditable purpose is less than its intended application, the

partnership may have an increasing adjustment for the adjustment period[49] for the acquisition. If the actual application for a creditable purpose is greater than its intended application, the partnership may have a decreasing adjustment for the adjustment period for the acquisition.

Example 11: Acquisition partly for a creditable purpose

125. *Sharon and Leonardo, as joint owners of commercial premises that are fully leased, are partners in a tax law partnership. In their capacities as partners of the partnership, they jointly buy a computer for $2,200, partly to record rent receipts and expenses in relation to the premises and partly for private use. They estimate that the private use will be 40%.*

126. *The acquisition of the computer is by the partnership and is partly for a creditable purpose. The partnership needs to apportion its claim for an input tax credit between the creditable purpose and the private purpose.*

127. *The partnership will be entitled to claim 60% of the input tax credits available, i.e. $120 (60% of $200) as this is the extent to which it is acquired for a creditable purpose. The private use of the partnership remains outside the GST system.*

Example 12: Adjustment for partly creditable purpose

128. *Following from Example 11: Sharon and Leonardo subsequently realise that the use of the computer for private purposes is not 40% but 70%.*

129. *The partnership has an increasing adjustment under Division 129 to reflect the resultant change in creditable purpose from 60% to 30% in the first adjustment period. The amount of the adjustment is $60 ((60%-30%) of $200).*

Division 130

130. Division 130 is limited in its application to acquisitions of goods, and to changes in extent of creditable purpose from solely for a creditable purpose to solely for a private or domestic purpose. Where the partnership acquired goods for a solely creditable purpose, but subsequently applies these goods solely to a private or domestic use, the partnership has an increasing adjustment under Division 130. Division 130 does not apply if the partnership previously had an adjustment under Division 129 for the acquisition or importation.

[49] Section 129-20 defines adjustment periods for acquisitions and importations.

131. For the purposes of Division 130, it is the private or domestic use by the partnership that is relevant. We consider that when goods are removed by a partnership for private consumption by a partner, there is an application solely to private or domestic use by the partnership. The application to a private or domestic use by a partnership under Division 130 does not involve a supply made in the course or furtherance of the partnership's enterprise.[50]

Example 13: Adjustment for goods applied solely to private or domestic use

132. Kate and Joni are in a GST registered tax law partnership. They jointly own office premises that they lease out. Some of the offices are leased on a furnished basis. Kate and Joni jointly decide to replace some of the furniture in these offices and purchase new furniture for this purpose. The furniture is held in storage until it can be moved to the offices.

133. As the furniture is acquired solely for a creditable purpose, the partnership claims input tax credits for the acquisitions. Prior to any of the new furniture being moved to the offices, the partnership allows Kate to take some of it for use in her home.

134. In doing this, the partnership has applied the furniture solely to a private or domestic use. The partnership has an increasing adjustment equal to the amount of the input tax credits to which it was entitled on the acquisition of the furniture.

Reimbursements

135. A partner making an acquisition in relation to the enterprise of a tax law partnership ordinarily makes it in the capacity as partner. However, partners may incur expenses that are directly related to their activities as partners of the partnership but not actually incurred in their capacities as partners. An example is a partner making calls from a private telephone to a lease manager of leased properties.

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[50] For further discussion on the operation of Division 130, see GSTD 2003/2: are there GST consequences when a partner in a partnership takes goods held as trading stock for private or domestic use?; and GSTR 2003/6: transfers of enterprise assets as a result of property distributions under the *Family Law Act 1975* or in similar circumstances. Note also the operation of section 17 of *A New Tax System (Goods and Services Tax Transition) Act 1999* in respect of assessable goods held for the purposes of sale or exchange (trading stock) on hand at 1 July 2000.

136. When the partnership reimburses the partner for the expense, under Division 111, the reimbursement is treated as consideration for an acquisition that the partnership makes from the partner.[51] This Division allows registered entities to claim input tax credits on certain acquisitions made by their employees, agents, officers or partners where such expenses are reimbursed. A registered partnership is entitled to an input tax credit if the requirements of Division 111 are met.

137. One of the requirements of this Division is that the supply to the partner must be a taxable supply.[52] The partner needs to provide the partnership with the tax invoice it obtained for the supply, as the partnership may claim an input tax credit if it holds this tax invoice.[53]

138. Where a partner makes an acquisition and is acting in the capacity as a partner of the partnership, the acquisition is taken to be by the partnership.[54] The question of reimbursements in this instance does not arise (see subsection 111-5(3A)).

Can a tax law partnership make a supply of a going concern?

139. We consider that a tax law partnership can make a supply of a going concern.[55] Under subsection 38-325(2), a partnership supplies a going concern if the supply is made under an arrangement where:

- the partnership supplies to the recipient all of the things necessary for the continued operation of an enterprise; and
- the partnership carries on or will carry on the enterprise until the day of the supply.

140. The supply of a going concern is GST-free if the requirements of subsection 38-325(1) are met. Those requirements are:

- the supply is for consideration; and
- the recipient of the supply is registered or required to be registered; and
- the supplier and the recipient have agreed in writing that the supply is of a going concern.

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[51] Section 111-5.
[52] Paragraph 111-5(3)(b)
[53] Section 111-15.
[54] Subsection 184-5(1).
[55] See paragraphs 190-194 of GSTR 2002/5, GST: When is a supply of a going concern GST-free.

141. A supply by a tax law partnership of a property that is leased may be the supply of all things necessary for the continued operation of the enterprise. This coupled with the fact that the partnership carries on the enterprise until the day of the supply results in a supply of a going concern.[56] We consider that a tax law partnership can make a supply of leased property that is a supply of a going concern only if:

- the partners originally acquired their interests in the property in their capacities as partners of the partnership; and
- the supply is made under a single contract between all the partners and the purchaser.

142. A tax law partnership may make the supply of a going concern to another partnership comprising some of the same partners as the partnership making the supply.[57]

143. Where a supply is GST-free as a going concern, no input tax credits are available to the purchaser.

144. Where a tax law partnership or a co-owner supplies an interest in the property, but not all the interests in the property, either to a new partnership or to another entity in their own right, there is no supply of a going concern. In these situations, the partnership or the co-owner is not supplying to the recipient all of the things that are necessary for the continued operation of the leasing enterprise.

Example 14: Supply of a going concern that is GST-free

145. *The trustees of the Melinda Family Trust and the Karen Family Trust acquire an office building. They lease the offices in the building to a number of tenants. The two family trusts are in a tax law partnership that is registered for GST purposes. The partnership claims an input tax credit on the acquisition of the building.*

146. *After a year, the partners agree to jointly sell the building to Office Buildings Enterprises Ltd, a company that carries on an enterprise of property development and leasing. It is registered for GST purposes. The partners and Office Buildings Enterprises Ltd agree that the sale is a supply of a going concern by the partnership.*

147. *The partnership makes the supply of the building with the leases in place. As the partnership is able to supply all things necessary for the continued operation of the leasing enterprise and the partners and the purchaser agree in writing that the supply is a going*

[56] Subsection 38-325(2).
[57] See paragraph 194 of GSTR 2002/5, GST: When is a supply of a going concern GST-free, which discusses the sale by a sole trader to a partnership of which he is a member.

concern, the sale of the office building is a supply of a going concern by the partnership.

148. *As all the requirements of section 38-325 are satisfied, the supply is GST-free as the supply of a going concern.*

Termination of a tax law partnership

149. A tax law partnership terminates[58] when the association of persons is no longer in receipt of income jointly. Circumstances that may lead to the termination of a tax law partnership include:

- The partners selling the income producing property;
- The partners ceasing to use their property for income producing purposes; and
- A change of persons comprising the association of persons in receipt of income jointly.

Sale of the income producing property

150. Where the property that is the source of the income received jointly is sold, the enterprise carried on by the partnership ceases. The partnership terminates when there is no longer receipt of income jointly by an association of persons.

Partners ceasing to use their property for income producing purposes

151. Partners in a tax law partnership may decide that, while retaining the property that has been the source of the income they received jointly, they will no longer use it for that purpose. The cessation of this activity ends the enterprise the partnership carries on. The partnership terminates when there is no longer receipt of income jointly by an association of persons.

Change in the association of persons

152. A tax law partnership is also terminated when there is a change of persons comprising the association of persons in receipt of income jointly. Where one or more of the co-owners of the income producing property dispose of their interest in that property, this will constitute a change in the association of persons.

[58] See footnote 3 regarding the use of the word, 'termination'.

153. Where the other partners continue the enterprise together with any 'incoming' co-owner, a new tax law partnership comes into existence. We do not consider that a tax law partnership can be treated as continuing in these circumstances. As such, the new tax law partnership will need to apply for new Australian Business Number (ABN) and GST registration.

154. This is different from the treatment for general law partnerships. The reason for the different treatment is that we do not consider that the requirements that must be satisfied for a general law partnership to be treated as a continuing partnership are satisfied by tax law partnerships. In particular:

- there is no express or implied continuity clause in any partnership agreement; and
- the fundamental nature of the tax law partnership that is formed by the joint ownership of property means that it has to cease on any change to the joint ownership arrangements.

GST consequences of termination

155. A tax law partnership that is registered for GST at termination needs to apply for cancellation of registration, and may have an increasing adjustment under Division 138, to cancel particular input tax credits. The GST consequences of supplies and acquisitions made on termination of a tax law partnership are explained in paragraphs 159 to 181**.**

Cancellation of Registration

156. A registered tax law partnership that is no longer carrying on any enterprise must apply to the Commissioner in the approved form for cancellation of the registration. The application needs to be made within 21 days after the day on which the partnership ceased to be carrying on any enterprise.[59]

Division 138

157. A tax law partnership that has its registration cancelled may still have acquisitions and importations for which entitlements to input tax credits have arisen. Division 138 provides for an increasing adjustment to cancel those input tax credits.[60]

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[59] Subsection 25-50.
[60] Section 138-1.

158. The partnership will have an increasing adjustment if its GST registration is cancelled and, immediately before the cancellation of registration takes effect, the assets of the partnership include anything in respect of which the partnership was, or is, entitled to an input tax credit.[61]

Supplies and acquisitions upon termination

Supplies by the partnership

159. A tax law partnership can make a supply of property or an interest in property. This will only be the case where the partnership is taken to have acquired the property or the interest in the property.[62]

Supply of all the interests in the property

160. Where the co-owners agree to sell their respective interests in the property at the same time and under the same agreement, we consider that the sale is a supply by the co-owners as partners and a supply by the partnership. The supply is a taxable supply if the requirements of section 9-5 are satisfied.

Example 15: Supply by the partnership

161. *The trustees of the Brendan Family Trust and the Alexis Family Trust, as tenants in common, own an industrial property which they jointly lease out. They are in a tax law partnership as they receive income jointly from a leasing enterprise. The partnership is registered for GST, and claimed the input tax credit on the acquisition of the property.*

162. *Subsequently, the two trustees jointly agree to sell the property. As the acquisition of the property was by the partnership, and the sale is by the two trustees jointly, the sale is a supply of the property by the partnership, in the course of the enterprise that it carries on. As the requirements of section 9-5 are met, the supply is a taxable supply.*

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[61] Subsection 138-5(1). This is subject to subsection 138-5(3).

[62] This would be the case where the acquisition is by the partners or a partner in their capacity as a partner in the partnership.

Supply of an interest in the property

163. In other circumstances, one (or more, but not all) co-owner (the outgoing co-owner) may sell their interest in the property in circumstances that give rise to a supply of that interest in their capacity as a partner of a tax law partnership. In these circumstances, the sale of the interest is a supply by the partnership. Factors that may point to a supply by a co-owner in their capacity as a partner include whether:

- the sale is with the agreement of the other co-owners;
- the co-owners agree that the sale of the interest is a supply by the outgoing co-owner as a partner; and
- the outgoing co-owner continues to be involved in the management of the whole property until beneficial and legal interest in the interest in the property passes to the new co-owner.

164. No one factor is conclusive evidence of a sale or disposal by a co-owner as giving rise to a supply by them in their capacity as a partner, nor the absence of any one factor an indication of a sale or disposal by a co-owner in their own right. What is required is an evaluation of all the facts and circumstances of each case, taking as a guide the factors mentioned in the previous paragraph**.**

165. Where the sale of property or an interest in the property is taken to be a supply by a tax law partnership, we consider that the supply is in the course of the enterprise that the partnership carries on.[63] As carrying on an enterprise is defined to include anything done in the course of the termination of the enterprise, the sale of property or an interest in the property can be a supply made in the course of the enterprise that a tax law partnership carries on. The supply will be a taxable supply if the requirements of section 9-5 are met.

166. The courts have accepted that a tax law partnership may acquire or sell property. In *Walsh*[64] Fitzgerald J recognised, at least for tax purposes, the possibility of a disposal of the land by the partnership in his comment:

> The partnership, or at least the partners, sold the land. The partners paid off their joint debts, and were left with the profit. That profit was income of the partnership by virtue of subsec 26(a) of the Act…[65]

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[63] See *Case K55* 10 NZTC 453, per Bathgate DJ: If capital assets are used in the carrying on of a taxable activity the sale of those assets, or some of them, can readily be in the course or furtherance of that activity.
[64] 83 ATC 4415; (1983) 14 ATR 399.
[65] 83 ATC 4415 at page 4436; (1983) 14 ATR 399 at page 422.

167. We consider that his Honour's comments and his reference to 'at least' the partners selling the land support our view that there can be supplies (and acquisitions) of property or interests in property by a tax law partnership. Any doubt in relation to acquisitions or supplies by co-owners as partners constituting an acquisition or supply by the partnership is removed by subsection 184-5(1).[66]

Supply of property by the co-owners and not the partnership

168. Where the acquisition of property or interests in property is by co-owners in their own capacities, any subsequent supply of that property or interests in the property is by the co-owners and not the partnership.

Example 16: Supply of interests in property by partners in their own right

169. *Simon and Jackie, as joint tenants, own a home that they live in. Simon and Jackie convert the house into offices and lease it on an annual basis to a firm of accountants.*

170. *Simon and Jackie are in a tax law partnership as they receive rental income jointly. This tax law partnership exists from the time that Simon and Jackie commence the conversion work with the intention of leasing out the premises as offices. Simon and Jackie register the partnership for GST.*

171. *At the end of the lease, the accounting firm makes an offer that Simon and Jackie accept, to buy the premises. As the partnership of Simon and Jackie is not taken to have acquired the property for GST purposes, the sale of the premises to the accounting firm is not a supply by the partnership. When Simon and Jackie sell it, they do so in their individual capacities as joint tenants.*

172. *As Simon and Jackie are, individually, not carrying on an enterprise and are not registered for GST, the supply is not a taxable supply.*

Consequences for remaining partners

Where an interest is sold to a new co-owner

173. Where a co-owner sells an interest in the property to a new co-owner, there is no supply of the other interests in the property. The remaining co-owners continue to hold their interest in the property. As there is no supply or acquisition by or on behalf of the remaining co-owners as partners, subsection 184-5(1) has no operation.

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[66] See paragraph 42 for a discussion on subsection 184-5(1).

174. The remaining co-owners continue to hold their interests in the property and may become partners in a new tax law partnership. This does not involve a supply of those interests in the property.

175. However, as the old tax law partnership is terminated when the interest of a co-owner in property is sold, the partnership's registration is cancelled. Paragraphs 156 to 158 set out the consequences of the cancellation of the partnership's registration.

Where an interest is sold to an existing co-owner

176. Where a co-owner sells their interest to one or more of the other co-owners, the GST consequences depend on whether the acquisition is made by the co-owner in their own right or as a partner in a tax law partnership. This is discussed in paragraphs 73 to 85.

Example 17: Supply of interest in property by a tax law partnership

177. *Nick and Jan, as tenants in common, acquire a theatre, which they lease. As they receive income jointly from this enterprise, they are in a tax law partnership. The partnership is registered for GST. The acquisition of the theatre was by the partnership and was a creditable acquisition.*

178. *Jan sells her individual interest in the theatre to Meryl. Both Nick and Jan agree that the sale is by the partnership.*

179. *The supply of Jan's interest in the theatre is a supply by the existing partnership of Jan and Nick to Meryl. This supply is a taxable supply.*

180. *The partnership of Jan and Nick is terminated when Jan sells her interest. The partnership needs to apply for cancellation of its registration.*

181. *The partnership of Nick and Jan does not make a supply of Nick's interest in the property. Nick continues to hold his interest in the property.*

Your comments

182. We invite you to comment on this draft Goods and Services Tax Ruling. We are allowing 6 weeks for comments before we finalise the Ruling. If you want your comments to be considered, please provide them to us within this period.

Comments by Date: 28 May 2003

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Detailed contents list

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Commissioner of Taxation
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Previous draft:

Not previously released in draft form.

Related Rulings/Determinations:

GSTR 1999/1; GSTR 2001/7;
GSTR 2002/5; GSTR 2003/6;
GSTD 2000/8; GSTD 2003/2;
MT 2000/1

Subject references:

- acquisitions
- acquisition of property
- adjustments
- apply
- associates
- association of persons
- capacity as a partner
- cancellation of registration
- carrying on an enterprise
- carrying on business
- consideration
- co-ownership
- course or furtherance
- creditable purpose
- creditable acquisition
- entity
- formation of a tax law partnership
- general law partnership
- going concerns
- GST
- GST-free
- input taxed supplies
- joint receipt of income
- operation of a tax law partnership
- partners
- partnership
- private or domestic
- receipt of income jointly
- registration
- sale of a going concern
- supplies and acquisitions
- tax law partnerships
- taxable supplies
- termination of a tax law partnership

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