GSTD 2006/6 - Goods and services tax: does MT 2006/1 have equal application to the meaning of 'entity' and 'enterprise' for the purposes of the A New Tax System (Goods and Services Tax) Act 1999?

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Goods and Services Tax Determination

Goods and services tax: does MT 2006/1 have equal application to the meaning of 'entity' and 'enterprise' for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999*?

Preamble

This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 105-60 of Schedule 1 to the ***Taxation Administration Act 1953.***

From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the ***Taxation Administration Act 1953.***

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

*[**Note:** This is a consolidated version of this document. Refer to the Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

1. Yes. Miscellaneous Taxation Ruling MT 2006/1[1] considers the meaning of the terms 'entity' and 'enterprise' for the purposes of the *A New Tax System (Australian Business Number) Act 1999* (ABN Act). The ABN Act uses the definitions of these terms that are contained in the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The principles in that Ruling apply equally to the terms 'entity' and 'enterprise' and can be relied upon for GST purposes.

2. A brief summary of some of the main principles in MT 2006/1 follows.

[1] Miscellaneous Taxation Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number. It replaced MT 2000/1.

Definitions of 'entity' and 'enterprise'

3. The term 'entity' is defined in section 184-1 of the GST Act.[2] The term 'enterprise' is defined in section 9-20 of the GST Act. Unless otherwise stated, all legislative references in this Determination are to the GST Act.

What is an entity?

4. 'Entity' means any of the following:

(a) an individual;

(b) a body corporate;

(c) a corporation sole;

(d) a body politic;

(e) a partnership;

(f) any other unincorporated association or body of persons;

(g) a trust; or

(h) a superannuation fund.

5. 'Entity' is defined in section 184-1; previously, there was also a definition of the term 'entity' in section 37 of the ABN Act, which was repealed by the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006*.[3] A similar definition of 'entity' can be found in section 960-100 of the *Income Tax Assessment Act 1997* (ITAA 1997). It is intended that the term entity has a common meaning across the ABN, GST and income tax Acts. However, the particular definition of 'entity' still needs to be considered in the context of the Act in which it is found. Also note for ABN and GST purposes a defined part of an entity may be taken to be an entity in itself.[4]

What is an enterprise?

6. An enterprise is defined as an activity or series of activities done in a certain manner or by certain entities. The activities covered include those done in the form of a business or an adventure or concern in the nature of trade, leasing on a regular or continuous basis, activities done by charitable or religious institutions, superannuation funds, and activities done by the Commonwealth, a State, a Territory, or local government.

7. It should be noted that there is a difference between the way in which the GST and ABN Acts treat superannuation funds. Although superannuation funds have a common definition for GST and ABN purposes, there is a difference in the treatment when considering if they carry on an enterprise for GST purposes. This difference is that although all superannuation funds are entitled to an ABN (as entities taken to be carrying on an enterprise under section 5 of the ABN Act) broadly, for GST purposes, it is only a complying superannuation fund's activities that are taken to be an enterprise (paragraph 9-20(1)(da)). Other superannuation funds not meeting the requirements of

[2] There are special rules about government entities in Division 149 and about non-profit sub-entities in Division 63.
[3] For a full discussion of the meaning of entity see paragraphs 26 to 91 of MT 2006/1.
[4] See sections 5 and 41 of the ABN Act and Divisions 63 and 149 of the GST Act.

paragraph 9-20(1)(da) fall for consideration under the more general terms of the remainder of subsection 9-20(1).[5]

8. There are certain activities that are excluded from the 'enterprise' definition. These exclusions include activities done as an employee, as a private recreational pursuit or hobby, or by individuals or partnerships (all or most of the members of which are individuals) without a reasonable expectation of profit or gain. Paragraph 18 of this Determination has details of these and other exclusions as mentioned in subsection 9-20(2).

9. 'Enterprise' is defined in section 9-20; previously there was also a definition of the term 'enterprise' in section 38 of the ABN Act, which was repealed by the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006*.

An activity or series of activities[6]

10. Essentially, this is any act or series of acts that an entity does. The meaning of the term 'activity or series of activities' for an entity can range from a single act or undertaking, to groups of related activities, to the entire operations of the entity.[7]

In the form of a business[8]

11. An enterprise includes an activity, or series of activities, done in the form of a business. The phrase 'in the form of a business' is broad and has as its foundation the longstanding concept of a business. The wider phrase has not been considered by Australian courts.[9] The definition clearly includes a business and the use of the phrase 'in the form of' indicates a wider meaning than the word 'business' on its own. This occurs in the case of non-profit entities. In such instances we consider that not all of the main features of a business such as a capacity to earn and distribute profits need to be present before an activity has the form of a business.

12. The definition of 'business' in section 195-1 is the same as that used in subsection 6(1) of the *Income Tax Assessment Act 1936* and in section 995-1 of the ITAA 1997. It follows that the meaning of 'business' should be interpreted in a similar way. As such, it is appropriate to refer to Taxation Ruling TR 97/11 which considers the meaning of 'business'.[10]

In the form of an adventure or concern in the nature of trade[11]

13. An adventure or concern in the nature of trade includes a commercial activity that does not amount to a business but which has the characteristics of a business deal. However, the sale of the family home, a private car or other private assets is not, without other factors being present, an adventure or concern in the nature of trade.

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[5] See also paragraphs 98 to 101 of MT 2006/1.
[6] Subsection 9-20(1).
[7] See paragraphs 153 to 169 of MT 2006/1.
[8] Paragraph 9-20(1)(a).
[9] See AAT case *Body Corporate Villa Edgewater Cts 23092 v. FC of T* 2004 ATC 2056; 55 ATR 1162. *Toyama Pty Ltd v. Landmark Building Developments Pty Ltd* 2006 ATC 4160; [2006] NSWSC 83 involved civil litigation (regarding the proper exercise of a trustee's duty of care). The Commissioner of Taxation was not a party to the matter. While some reference was made to GSTD 2000/8, this was incidental to the ratio of the decision.
[10] See paragraphs 170 to 232 of MT 2006/1.
[11] Paragraph 9-20(1)(b).

14. As a matter of statutory interpretation the phrase 'in the form of an adventure or concern in the nature of trade' is wider than 'an adventure or concern in the nature of trade'. However, the underlying concept of an adventure or concern in the nature of trade does not logically lend itself, in any meaningful way, to being broadened. In a practical sense, an activity is either an adventure or concern in the nature of trade or it is not.[12]

When is an enterprise being carried on?

15. The term 'carrying on' is defined in section 195-1 and ensures that activities done in the course of commencement or termination of an enterprise are included in determining whether the activities of the entity amount to an enterprise.

16. An identical definition of 'carrying on' an enterprise can be found in section 41 of the ABN Act and section 995-1 of the ITAA 1997.

17. It follows from this definition that activities done by an entity that are part of a process of beginning or bringing into existence an enterprise are activities in carrying on an enterprise.[13]

Exclusions to the definition of enterprise[14]

18. There are specific statutory exclusions to the definition of enterprise. Excluded are activities done:

- by a person:
  - as an employee;
  - as a company director;
  - as an office holder; or
  - under a labour hire arrangement or as specified by regulation;[15]
- as a private recreational pursuit or hobby;
- by an individual (other than a trustee of a charitable fund or of a fund covered by item 2 of the table in section 30-15 of the ITAA 1997 or of a fund that would be covered by that item if it had an ABN), or a partnership (all or most of the members of which are individuals) without a reasonable expectation of profit or gain; or
- as a member of a local governing body established by or under a State Law or Territory law (except a local governing body to which subsection 12-45(3) in Schedule 1 to the *Taxation Administration Act 1953*.[16]

[12] See paragraphs 233 to 302 of MT 2006/1.
[13] See paragraphs 120 to 148 of MT 2006/1.
[14] Subsection 9-20(2).
[15] However there is an exception to this exclusion, where a person's activities or series of activities is done supplying services as the holder of an office, that the person has accepted in the course of or in the connection with an activity or series of activities of a kind mentioned in subsection 9-20(1).
[16] See paragraphs 329 to 408 of MT 2006/1.

Date of Effect

19. This Determination applies [to tax periods commencing] both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

20. [Omitted.]

Commissioner of Taxation
13 December 2006

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 2006/10; MT 2006/1

Previous Rulings/Determinations:

GSTD 2000/8; MT 2000/1

Subject references:

- activity or series of activities
- adventure or concern in the nature of trade
- business
- carrying on an enterprise
- commencement of an enterprise
- employee
- enterprise
- entity
- in the form of
- private recreational pursuit or hobby

Legislative references:

- ANTS(GST)A 1999 9-20
- ANTS(GST)A 1999 9-20(1)
- ANTS(GST)A 1999 9-20(1)(a)
- ANTS(GST)A 1999 9-20(1)(b)
- ANTS(GST)A 1999 9-20(1)(da)
- ANTS(GST)A 1999 9-20(2)
- ANTS(GST)A 1999 Div 63
- ANTS(GST)A 1999 Div 149
- ANTS(GST)A 1999 184-1
- ANTS(GST)A 1999 195-1
- ANTS(ABN)A 1999 5
- ANTS(ABN)A 1999 37
- ANTS(ABN)A 1999 38
- ANTS(ABN)A 1999 41
- ITAA 1936 6(1)
- ITAA 1997 30-15
- ITAA 1997 960-100
- ITAA 1997 995-1
- TAA 1953 Sch 1 12-45(3)
- TAA 1953 Sch 1 Div 358
- Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006

Case references:

- Body Corporate Villa Edgewater Cts 23092 v. FC of T 2004 ATC 2056; 55 ATR 1162
- Toyama Pty Ltd v. Landmark Building Developments Pty Ltd 2006 ATC 4160; [2006] NSWSC 83

ATO references

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