

GSTD 2009/1 - Goods and services tax: is a supply by way of an in specie distribution of an asset that is applied in an enterprise carried on by a discretionary trust to a beneficiary of the trust made 'in the course or furtherance of' the trust's enterprise?

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! There is a Compendium for this document: **GSTD 2009/1EC** .

! This document has changed over time. This is a consolidated version of the ruling which was published on *31 October 2012*



Goods and Services Tax Determination

Goods and services tax: is a supply by way of an *in specie* distribution of an asset that is applied in an enterprise carried on by a discretionary trust to a beneficiary of the trust made ‘in the course or furtherance of’ the trust’s enterprise?

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. Paragraph 9-5(b) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)¹ is satisfied.
2. In this Determination *in specie* distribution means a supply of trust property other than money where the recipient is entitled to the property because the recipient is a beneficiary of the trust, and not because of any contractual relationship with the trustee. For example, an *in specie* distribution would not include a supply of property by the trustee to a beneficiary in lieu of repayment of an amount of money the beneficiary had loaned to the trustee.

¹ All legislative references are to the GST Act unless otherwise indicated.

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Explanation

3. A discretionary trust may supply an asset that is applied in an enterprise carried on² by the discretionary trust to a beneficiary of the trust as a consequence of the trustee's resolution to make an *in specie* distribution under a power contained within the relevant trust deed.

4. An issue that arises is whether the *in specie* distribution of the asset is a 'taxable supply' within the meaning of section 9-5. One of the requirements for a supply to be a taxable supply is that 'the supply is made in the course or furtherance of an enterprise that you carry on'.³

5. The phrase 'in the course or furtherance of' is not defined in the GST Act. The phrase forms part of the requirements that must be satisfied in order for a taxable supply to be identified for the purpose of establishing a liability to GST. In *Sterling Guardian Pty Ltd v. Commissioner of Taxation*,⁴ the Full Federal Court commented on the policy of the GST system as follows:

The burden of GST is progressively passed down the chain of persons who make taxable supplies as for example, in the case of goods, from manufacturer to wholesaler to retailer. At each transaction the price includes GST, which the supplier pays to the Commissioner. The acquirer gets an input tax credit for the amount of GST included in the price which he has paid and includes GST in the price he charges the next person in the chain. Finally, the ultimate consumer pays a price which includes the GST paid by the previous person in the chain (in this example, the retailer). The ultimate consumer does not get any input tax credit because he is not registered or required to be registered.⁵

6. The Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (Explanatory Memorandum) supports a broad meaning of the phrase 'in the course or furtherance of':⁶

In the course or furtherance is not defined, 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 that 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.

7. Having regard to the context in which the phrase 'in the course or furtherance of' appears and the above statement from the Explanatory Memorandum, the phrase should be given a broad meaning so as to encompass supplies made in connection with the relevant enterprise. By distinguishing an act done for the purpose or object of furthering an enterprise from an act done in the course of an enterprise, the Explanatory Memorandum illustrates that a supply may be made in connection with the relevant enterprise without the supply furthering or achieving the goals of the enterprise.

² The term 'carrying on' an enterprise is defined in section 195-1 as including doing anything in the course of the commencement or termination of the enterprise.

³ Paragraph 9-5(b). Whether the *in specie* distribution is a taxable supply or not depends on whether the other requirements of section 9-5 are satisfied. The beneficiary is an associate of the trust (see definition of 'associate' in section 195-1). As the beneficiary is an associate of the trust and the *in specie* distribution is a supply made for no consideration, the requirements of Division 72 must be considered in determining whether or not the distribution is a taxable supply.

⁴ See *Sterling Guardian Pty Limited v. Commissioner of Taxation* (2006) 149 FCR 255; 2006 ATC 4227; (2006) 62 ATR 119.

⁵ See *Sterling Guardian Pty Limited v. Commissioner of Taxation* (2006) 149 FCR 255 at 258; 2006 ATC 4227 at 4230; (2006) 62 ATR 119 at 121.

⁶ Paragraph 3.10.

8. As illustrated by the reference in the Explanatory Memorandum to a car dealer selling his or her own private car, that connection does not exist in the case of a supply of private commodities. A supply of private commodities is a supply by an entity as an ultimate consumer. By contrast, the supply of an asset that is applied in the supplier's enterprise is not a supply by the entity as ultimate consumer. It occurs at a point along the chain before the asset has reached anyone as an ultimate consumer. Nothing has previously happened to the asset to make it a 'private commodity'; it has not been previously supplied to a private consumer nor applied wholly for the supplier's private purposes.
9. The application of an asset in an enterprise establishes the necessary connection between the supply of the asset and the relevant enterprise. The fact that the supply in question was made by way of an *in specie* distribution rather than by sale does not alter the analysis. Entities can dispose of assets in a number of ways. The method of itself is not relevant to whether the supply is in the course or furtherance of the enterprise.
10. It is not relevant to consider the use or intended use of the asset by the recipient of the supply or any other party who later receives it (although this will of course affect whether those entities are entitled to an input tax credit for their acquisition of the asset). That a supply is made for the private purposes of the recipient cannot affect whether the supply is made in the course or furtherance of the supplier's enterprise. The burden of GST would never fall on anyone if the fact that a supply was made for the private purposes of the recipient prevented the supply from being made in the course or furtherance of the supplier's enterprise. Such an outcome would be contrary to the purpose of the GST system to impose a tax on final private consumption.
11. Also, the GST Act does not require that the asset must be applied primarily or principally in carrying on the enterprise for the supply of the asset to be in the course or furtherance of an enterprise. Accordingly, a connection between the supply of the asset and the enterprise carried on by an entity exists even if, at the time of the supply, the asset is applied in carrying on the enterprise to a minor or secondary extent.
12. However, a supply that has no discernible relationship and hence no connection, with an entity's enterprise cannot be a taxable supply even if the asset is applied by the entity in carrying on an enterprise. The Commissioner considers that it will be an exceptional circumstance for a supply of an asset that is applied in the supplier's enterprise not to have a connection with the enterprise. One example of this circumstance has been identified and is discussed at paragraph 42 of Goods and Services Tax Ruling GSTR 2003/6 Goods and services tax: transfers of enterprise assets as a result of property distributions under the *Family Law Act 1975* or in similar circumstances. In most circumstances, however, the application of an asset in an enterprise will establish the necessary connection between the supply of the asset and the relevant enterprise.
13. Therefore, except in those limited circumstances, a supply by way of an *in specie* distribution of an asset that is applied in the enterprise carried on by the discretionary trust is a supply made in the course or furtherance of that enterprise.

Example 1 – an in specie distribution of an asset applied wholly in the course or furtherance of an enterprise carried on by a discretionary trust

14. *Tony is the trustee of the Tony Family Discretionary Trust (TFDT). TFDT is carrying on an enterprise of selling hardware supplies. The enterprise is operated from a commercial property owned by TFDT. Later, Tony resolves to distribute, in specie, the commercial property to Steven who is one of the beneficiaries of TFDT. The in specie distribution was not made in respect of the employment of either Steven or a person to whom Steven is an associate. There are, therefore, no fringe benefits tax implications resulting from the supply.*

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15. The in specie distribution of the commercial property by TFDT is connected to the enterprise carried on by TFDT because the commercial property was applied in the enterprise it carries on. The in specie distribution is therefore a supply made in the course or furtherance of an enterprise for the purposes of paragraph 9-5(b).

Example 2 – an in specie distribution of an asset applied less than wholly in the course or furtherance of an enterprise carried on by a discretionary trust

16. Michelle is the trustee of Michelle Family Discretionary Trust (MFDT). MFDT is carrying on an enterprise supplying architectural services. A car is acquired on 1 July 2006 by MFDT and applied 20% for a creditable purpose and 80% for the private use of selected beneficiaries of the trust. The car forms part of the assets of MFDT's enterprise. Later, Michelle resolves to distribute, in specie, the car to Bob who is one of the beneficiaries of MFDT. The in specie distribution of the car is a supply made by MFDT. The in specie distribution was not made in respect of the employment of either Bob or a person to whom Bob is an associate. There are, therefore, no fringe benefits tax implications resulting from the supply.

17. The in specie distribution of the car by MFDT is connected to the enterprise carried on by MFDT because the car was applied in the enterprise it carries on. The fact that, in this particular case, the asset was only applied 20% for a creditable purpose does not prevent the supply of the car having the necessary connection to the enterprise carried on by MFDT. The in specie distribution is therefore a supply made in the course or furtherance of an enterprise for the purposes of paragraph 9-5(b).⁷

Example 3 – an in specie distribution of an asset that is not applied in the course or furtherance of an enterprise carried on by a discretionary trust

18. Jack is the trustee of Jack Family Discretionary Trust (JFDT). JFDT is carrying on an enterprise of selling furniture. JFDT also owns a boat that it makes available to selected beneficiaries of the trust. The boat does not form part of the assets of JFDT's enterprise as it is not applied in the enterprise to any extent. Later, Jack resolves to distribute, in specie, the boat to Phil who is one of the beneficiaries of JFDT. The in specie distribution of the boat is a supply made by JFDT. The in specie distribution was not made in respect of the employment of either Phil or a person to whom Phil is an associate. There are, therefore, no fringe benefits tax implications resulting from the supply.

19. The supply of the boat by JFDT does not have the necessary connection to the enterprise carried on by JFDT because the boat was not applied in the enterprise it carries on. The in specie distribution is therefore not a supply made in the course or furtherance of an enterprise for the purposes of paragraph 9-5(b).

⁷ The in specie distribution may give rise to a decreasing adjustment for MFDT under Division 129 in respect of its acquisition of the car if an adjustment period applies. For further information on Division 129 see Goods and Services Tax Ruling GSTR 2000/24 Goods and services tax: Division 129 – making adjustments for changes in extent of creditable purpose.

Date of effect

20. 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).

Commissioner of Taxation

8 April 2009

Previous draft:

GSTD 2008/D2

Related Rulings/Determinations:

TR 2006/10; GSTR 2000/24; GSTR 2003/6

Subject references:

- discretionary trusts
- distributions in specie
- GST enterprise
- GST supplies & acquisitions
- taxable supply

Legislative references:

- ANTS(GST) Act 1999
- ANTS(GST) Act 1999 9-5

- ANTS(GST) Act 1999 9-5(b)

- ANTS(GST) Act 1999 Div 72
- ANTS(GST) Act 1999 Div 129
- ANTS(GST) Act 1999 195-1
- Family Law Act 1975
- TAA 1953 Sch 1 Div 358

Case references:

- Case N43 (1991) 13 NZTC 3361
- Sterling Guardian Pty Limited v. Commissioner of Taxation (2006) 149 FCR 255; 2006 ATC 4227; (2006) 62 ATR 119

Other references:

- Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998

ATO references

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Goods and Services Tax ~~ Miscellaneous rules ~~ associates

Goods and Services Tax ~~ Rules for entity types ~~ trusts