GSTD 2011/3 - Goods and services tax: do the acquisitions of the services provided under the arrangement described in Taxpayer Alert TA 2010/1 form part of a reduced credit acquisition made by the financial supply provider under item 9 of the table in subregulation 70-5.02(2) of the A New Tax System (Goods and Services Tax) Regulations 1999?

This cover sheet is provided for information only. It does not form part of *GSTD 2011/3 - Goods and services tax: do the acquisitions of the services provided under the arrangement described in Taxpayer Alert TA 2010/1 form part of a reduced credit acquisition made by the financial supply provider under item 9 of the table in subregulation 70-5.02(2) of the A New Tax System (Goods and Services Tax) Regulations 1999?*

There is a Compendium for this document: **GSTD 2011/3EC** .

This Ruling contains references to provisions of the *A New Tax System (Goods and Services Tax) Regulations 1999,* which have been replaced by the *A New Tax System (Goods and Services Tax) Regulations 2019.* This Ruling continues to have effect in relation to the remade Regulations.

Paragraph 32 of TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed and rewritten.

A comparison table which provides the replacement provisions in the *A New Tax System (Goods and Services Tax) Regulations 2019* for regulations which are referenced in this Ruling is available.

Goods and Services Tax Determination

Goods and services tax: do the acquisitions of the services provided under the arrangement described in *Taxpayer Alert TA 2010/1* form part of a reduced credit acquisition made by the financial supply provider under item 9 of the table in subregulation 70-5.02(2) of the A New Tax System (Goods and Services Tax) Regulations 1999?

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This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of 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.

Ruling

1. The acquisition of the investment banking services referred to in the arrangement described in *Taxpayer Alert TA 2010/1* that the financial supply facilitator (FSF)[1] acquires and supplies through merely passing the services on to the financial supply provider (FSP)[2] is a reduced credit acquisition made by the FSP under item 9 of the table in subregulation 70-5.02(2) of the A New Tax System (Goods and Services Tax) Regulations 1999 (GST Regulations).[3]

2. The tax, legal and public relations advisory services referred to in the arrangement and other services that the FSF acquires from service providers and supplies through merely passing the services on to the FSP do not form part of a reduced credit acquisition by the FSP under item 9 of the table in subregulation 70-5.02(2).

Example

3. *Bengal Manufacturing Ltd (Bengal) carries on a manufacturing enterprise and is registered for GST. It identifies Siam Electronics Ltd (Siam) as a potential takeover target. Bengal establishes a subsidiary company Sumatran Pty Ltd (Sumatran) to purchase Siam shares. Sumatran is registered for GST. Sumatran is not a member of Bengal's GST group. Bengal engages an investment bank to prepare for and plan the takeover, value the target company, develop an appropriate strategy, and negotiate and arrange aspects of the transaction. Bengal engages a legal firm to provide advice on regulatory matters, to conduct legal due diligence, and to draft relevant legal documents. Bengal engages accountants to supply financial due diligence services that are required to complete the takeover.*

4. *Concurrently, Bengal and Sumatran enter into an agreement whereby Bengal undertakes to supply all the investment banking, legal, and accounting services that it acquires (and pays for) from the third party providers and which are necessary to carry out Sumatran's takeover of Siam. The fee agreed between the parties is cost recovery for the third party services plus a mark-up for Bengal organising the third party expertise that is required. Bengal makes a taxable supply of the services to Sumatran. Bengal subsequently issues a tax invoice to Sumatran in which it describes its services as 'Arranging Services' and charges the relevant fee in accordance with the agreement. While Bengal contracts directly with the third parties, it merely passes the services it acquires on to Sumatran.*

5. *Sumatran acquires the shares in Siam. This acquisition is an input taxed financial supply.*[4]

6. *The acquisition by Sumatran relates to Sumatran making the input taxed financial supply of acquiring shares in Siam for the purposes of both paragraph 11-15(2)(a) and subsection 70-5(1) of the A New Tax System (Goods and Services Tax) Act 1999 (GST Act). Sumatran exceeds the financial acquisitions threshold for the purposes of subsection 11-15(4) of the GST Act.*

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[1] The FSF is referred to in TA 2010/1 as the Interposed Associate.
[2] The FSP is referred to in TA 2010/1 as the special purpose vehicle entity.
[3] Unless otherwise indicated, all legislative references are to the GST Regulations.
[4] The acquisition of the shares is input taxed under subsection 40-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999*, by reference to subregulation 40-5.09(1) and item 10 of the table in subregulation 40-5.09(3) of the GST Regulations.

7. *Bengal is a financial supply facilitator as set out under regulation 40-5.07 as the services it supplies to Sumatran help take forward the acquisition of the shares in Siam by Sumatran.*[5]

8. *Regard must be had to the nature of the services that Bengal supplies under the agreement to determine whether Sumatran acquires 'arranging' services from Bengal for the purposes of item 9 of the table in subregulation 70-5.02(2). The investment banking services obtained by Bengal involve the preparation and planning for Sumatran to acquire the shares in Siam. These services are 'arranging' services for the purposes of item 9(e) and item 9(f); this component of the supply made to Sumatran involves the arrangement of Sumatran acquiring the shares in Siam.*

9. *Bengal does not integrate the legal and accounting services into the preparation and planning for Sumatran to acquire the shares in Siam. Rather, these services are merely passed on to Sumatran. Accordingly, the legal and accounting service components of the supply Bengal makes to Sumatran are not 'arranging' services under item 9. Sumatran may require these services in the preparation and planning of the transaction. However, the services are not accurately described as arranging services. The legal and accounting service components are not, in the circumstances described in this example, 'integral, ancillary or incidental'*[6] *to an arranging service. Each of the legal and accounting services components are significant components of the supply Bengal makes to Sumatran which need to be considered by themselves.*

10. *The acquisition by Sumatran is a mixed acquisition. The investment banking service component of the acquisition is a reduced credit acquisition of 'arrangement services' under item 9 of the table in subregulation 70-5.02(2) for which Sumatran is entitled to a reduced input tax credit (RITC). The legal and accounting components do not form part of a reduced credit acquisition under item 9.*

11. *The description 'Arranging Services' on the tax invoice issued by Bengal to Sumatran, while taken into account in the assessment of the character of the acquisitions, is not conclusive. The characterisation depends on the true nature of the services.*

Date of effect

12. This Determination applies 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
30 November 2011

[5] The dictionary to the GST Regulations defines a 'financial supply facilitator' by reference to regulation 40-5.07. See paragraphs 30 to 35 of *Goods and Services Tax Ruling GSTR 2004/1 Goods and services tax: reduced credit acquisitions* on the meaning of a 'financial supply facilitator'.

[6] See *Goods and Services Tax Ruling GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts*.

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Background

13. This Determination applies to the arrangement described in *Taxpayer Alert TA 2010/1* (TA 2010/1). That Alert describes an arrangement whereby an associate of a Financial Supply Provider[7] (FSP) (that is not a member of the same GST group) acquires from third parties all of the services necessary for the FSP to complete a company takeover. The associate then purports to make a single 'bundled' supply of 'arranging services' to the FSP for a fee calculated by reference to the costs incurred by the associate in paying the third party providers. The FSP then claims an RITC on this acquisition on the basis that it is acquiring a bundled 'arranging service' within the meaning of item 9 in the table in subregulation 70-5.02(2).

14. The arrangement has the following features:

(a) A special purpose vehicle entity (the FSP) is established for the purpose of acquiring shares in a company as part of a takeover. The FSP is registered for GST.

(b) An associate of the FSP (but not a member of the same GST group), enters into an Arranging Services Agreement (ASA) with the FSP to supply the FSP with a bundle of services which is described as 'arranging services'. These services are performed exclusively for the purposes of the FSP's takeover and include, amongst other things:

(i) tax, legal and public relations advisory services in relation to the proposed transaction; and

(ii) investment banking services involving activities to prepare for and plan the takeover, value the target company, develop an appropriate strategy, and negotiate and arrange aspects of the transaction.

(c) The associate acquires the relevant tax, legal, public relations and investment banking services from third parties and claims input tax credits on these acquisitions.[8]

(d) The associate passes on these services to the FSP (as a taxable supply), calculating its fee by reference to the costs it incurred in paying the third party service providers in accordance with the ASA. The associate describes its supply to the FSP as a single supply of 'arranging services'.

(e) The associate is a financial supply facilitator (FSF) as set out in regulation 40-5.07 as it helps take forward the securities transaction through the services it supplies to the FSP.[9]

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[7] The dictionary to the GST Regulations defines a 'financial supply provider' by reference to regulation 40-5.06.

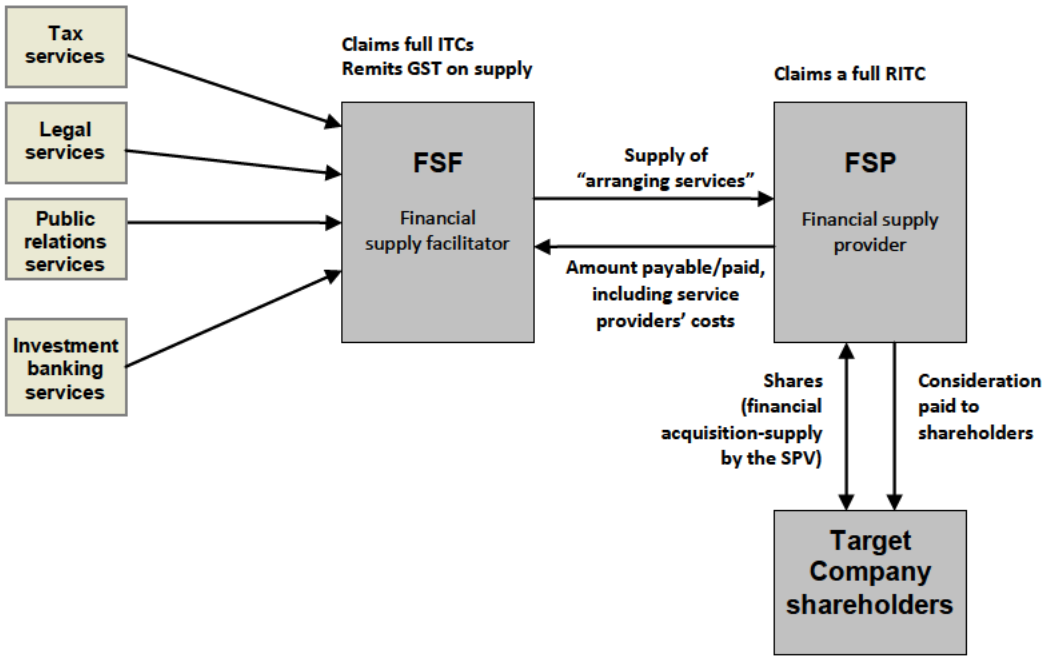
[8] As these acquisitions do not relate to supplies that would be input taxed, they have been acquired by the associate for a creditable purpose and, assuming the other elements of section 11-5 have been met, the associate is entitled to input tax credits for such acquisitions.

[9] The dictionary to the GST Regulations defines a 'financial supply facilitator' by reference to regulation 40-5.07. See paragraphs 30 to 35 of GSTR 2004/1 on the meaning of a 'financial supply facilitator'.

(f) The FSP claims an RITC for its entire acquisition of the purported 'arranging services' that it has acquired from its associate. The FSP would not have been entitled to an RITC on some of the acquisitions, such as tax, legal and public relations services, had it acquired those services directly from the service providers.

(g) The FSP makes an input-taxed financial supply when it acquires the shares from the shareholders of the target company.

(h) The basic features of this arrangement can be summarised diagrammatically as follows:



Legislative context

15. An acquisition of an interest in a security, including an interest in a share, is an input taxed financial supply under subsection 40-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), by reference to subregulation 40-5.09(1) and item 10 of the table in subregulation 40-5.09(3). Acquisitions that relate to making input taxed supplies are not made for a creditable purpose under paragraph 11-15(2)(a) of the GST Act. Accordingly, in the arrangement described in paragraph 14 of this Determination, subject to Division 70 of the GST Act, the FSP is not entitled to input tax credits for the acquisition it makes from the FSF under Division 11 of the GST Act.[10]

[10] For the purposes of this Determination, it is assumed that the FSP exceeds the financial acquisitions threshold under Division 189 of the GST Act.

16. Subsection 70-5(1) of the GST Act states that the GST Regulations may provide that acquisitions of a specified kind that relate to making financial supplies can give rise to an entitlement to an RITC. Subregulation 70-5.02(1) of the GST Regulations provides that an acquisition mentioned in subregulation 70-5.02(2) 'that relates to making financial supplies' gives rise to this entitlement. Such acquisitions are referred to as reduced credit acquisitions.[11]

17. Division 70 of the GST Regulations contains an exhaustive list of reduced credit acquisitions. Item 9 of the table in subregulation 70-5.02(2) of the GST Regulations provides for an RITC for an acquisition of the 'Arrangement, by a financial supply facilitator, of the provision, acquisition or disposal of an interest in a security…', including item 9(e) in relation to 'arranging mergers and acquisitions' and item 9(f) in relation to 'arranging takeover bids'. Acquiring the shares in the target company is a merger and acquisition activity for the purposes of item 9(e) and may follow a takeover bid for the purposes of item 9(f).

Arrangement of the acquisition of an interest in a security in the context of arranging mergers and acquisitions

18. For an acquisition to fall within item 9 of the table in subregulation 70-5.02(2), it must be the acquisition of an arranging service. Paragraphs 284 to 303 of *Goods and Services Tax Ruling GSTR 2004/1 Goods and services tax: reduced credit acquisitions* provide guidance in relation to the scope of item 9, and in particular the meaning of the term arrangement. In particular, paragraph 287 of GSTR 2004/1 states:

> 287. The term *arrangement* is not defined in the GST Act or regulations, nor does it have a specific industry meaning. Its ordinary meaning is a 'preparatory measure, previous plan, preparation or a final settlement, adjustment by agreement'. *Arrangement* under this item ***includes activities relating to the preparation for the transaction, the planning of the transaction and the settlement of the details of the transaction***. [emphasis added]

19. For a supply to be the arrangement of the provision, acquisition or disposal of a security the supply must have a sufficient connection to the arrangement of the proposed transaction to be properly described as itself constituting the 'arranging' of the transaction. A remote connection would not suffice.

20. Paragraph 289 of GSTR 2004/1 provides guidance in respect to determining whether a specific supply has a relevant connection with the preparation, planning or settlement of a transaction:

> 289. Although many activities may be undertaken as part of the preparations for, for example, the public float of a company, not all of these are the arrangement of the provision of an interest in securities. Planning by the financial supply facilitator may require that a company group restructures. However, it is the acquisition of the planning which is the arrangement service, not the activities involved in the restructure that is the reduced credit acquisition. Equally, due diligence activities, though part of the preparation for the float, are not *arranging* for the purposes of item 9(d). This is because due diligence by itself, does not have sufficient connection to the 'arrangement' of preparing or planning a float. However, where an entity provides due diligence activities, as part of its services in planning or preparing a float, then it may come within item 9(d).

[11] Subsection 70-5(1) of the GST Act and subregulation 70-5.02(2) of the GST Regulations.

21. This paragraph clarifies that not all of the things that may be acquired to undertake a securities transaction (whether that transaction ultimately proceeds or not) fall within item 9 of the table in subregulation 70-5.02(2). Due diligence activities fall within item 9 if they form part of the planning or preparing a float and are therefore properly described as part of the 'arranging' of the float. However, specialist advisory services[12] do not qualify as a supply of 'arranging services' merely because they are supplied in conjunction with a supply that does qualify as 'arranging'.

22. In characterising the things supplied and acquired under the arrangement described in TA 2010/1, the logical starting point is the ASA.[13] Under that agreement, the associate purports to make a single bundled supply of 'arranging services'. However, the characterisation of the supply/acquisition depends on the nature of the services supplied, not the name applied to them.[14]

23. Under the arrangement to which this Determination applies, the FSP acquired from the FSF investment banking services which involve the preparation, planning and settlement of the details of the transaction. This is so notwithstanding that the FSF has subcontracted these services from an investment banking services provider and passed those services onto the FSP. In preparing and planning the transaction through the investment banking services supplied to the FSP, the FSF has supplied the 'arranging services' for the FSP to acquire the shares in the target company. Accordingly, the FSP has made a reduced credit acquisition under item 9 of the table in subregulation 70-5.02(2) in respect of the investment banking services and is entitled to an RITC for that component of the acquisition.

24. The FSP also acquired from the FSF separate advice on the proposed transaction, being the tax, legal and public relations advisory services. Under the arrangement, while the FSF supplies the services it has obtained, it does not integrate the advisory services into the activities of preparing and planning the transaction. The FSF passes these advisory services onto the FSP. The advisory services are not 'integral, ancillary or incidental'[15] to an arranging service that comes within item 9; each of the advisory services is a significant component of the supply. Therefore, each of these services needs to be considered by itself.

25. The tax, legal and public relations advisory services by themselves do not have a sufficient connection to the 'arrangement' by the FSF of preparing or planning the merger and acquisition to be properly described as arranging.

26. This view is consistent with the mixed acquisition analysis referred to at paragraphs 223 to 256 of *Goods and Services Tax Ruling GSTR 2002/2 Goods and services tax: GST treatment of financial supplies and related supplies and acquisitions*. To work out whether there is a mixed acquisition, the Ruling states that the characterisation of the thing acquired must be viewed from the perspective of the acquirer and the key question is what 'in substance and reality' is acquired for the consideration paid. In this case, notwithstanding the description of all the things supplied under the ASA as arranging, the lack of integration by the FSF of the tax, legal and public relations services into the preparation, planning and settlement services indicates that the FSP has made a mixed acquisition of services from the FSF.

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[12] For convenience the term specialist advisory services is used to refer to services that if separately acquired by a financial supply provider would typically not qualify as arrangement services under Item 9. This includes but is not limited to accounting, taxation and legal services (including due diligence) and public relations services.

[13] See paragraph 222 of GSTR 2006/9.

[14] See paragraph 291 of GSTR 2004/1.

[15] See GSTR 2001/8.

27. Therefore, the tax, legal and public relations services components of the acquisition made by the FSP do not comprise a reduced credit acquisition within item 9 of the table in subregulation 70-5.02(2). The FSP is not entitled to an RITC for these components of the acquisition.

28. This outcome reflects the mere passing on, by the FSF, of the acquisitions from third party service providers. The position may be different if, on an analysis of the ASA in its context, the true position is that the FSF is engaged to, and does, provide a service of arranging a share acquisition or disposal that incorporates the tax, legal, and public relations components into the preparation, planning and settlement of the details of the transaction. In those circumstances, where the acquisitions from third parties are acquired and consumed by the FSF such that they are integrated into an arranging service, the FSP is entitled to a RITC for those components of the acquisition. Whether the acquisitions made by the FSF are integrated into an arranging service will depend upon close analysis of the terms of the agreement and the way in which it is carried out.

Anti-avoidance – Division 165

29. The Commissioner considers that the correct application of the substantive provisions of the GST Act to the arrangement described in paragraph 14 of this Determination results in the FSP being entitled to an RITC for only that part of its acquisition that would be a reduced credit acquisition of an arrangement service had it been acquired by the FSP directly from the relevant service provider/s.

30. On that basis, it is unlikely that the Commissioner would need to consider the application of the anti-avoidance provisions in Division 165 of the GST Act in the circumstances described in this Determination. However, the application of Division 165 is sensitive to the particular facts and circumstances of a case; variations upon the particular arrangement described in this Determination may warrant consideration of Division 165 of the GST Act or the common law concept of sham depending upon the particular circumstances.

31. Under Division 165 of the GST Act, the Commissioner may issue a declaration to negate an entity's GST benefit if the following elements are satisfied: one or more of the steps in the arrangement is a 'scheme' as defined in subsection 165-10(2) of the GST Act; an entity gets a GST benefit from the scheme; and it is reasonable to conclude, taking account of the matters in section 165-15 of the GST Act, that the dominant purpose or principal effect of entering into or carrying out the scheme was to obtain a GST benefit. For further guidance on the operation of Division 165 see *PS LA 2005/24 Application of General Anti-Avoidance Rules.*

32. Alternatively, if the Commissioner considers part of an arrangement to be a sham, he may disregard the sham transaction in determining the GST consequences of the arrangement. Kirby J provided the following guidance on sham in *Raftland Pty Ltd as Trustee of the Raftland Trust v. Commissioner of Taxation* (2008) 246 ALR 406 at 442:

> The key to a finding of sham is the demonstration, by evidence or available inference, of a disparity between the transaction evidenced in the documentation (and related conduct of the parties) and the reality disclosed elsewhere in the evidence. Where, for example, the evidence shows a discordance between the parties' legal rights or obligations as described in the documents and the actual intentions which those parties are shown to have had as to their legal rights and obligations, a conclusion of sham will be warranted.

References

Previous draft:

GSTD 2011/D2

Related Rulings/Determinations:

GSTR 2001/8, GSTR 2002/2, GSTR 2004/1, GSTR 2006/9, TR 2006/10

Subject references:

- creditable acquisition
- creditable purpose
- GST financial supplies
- GST input tax credits & creditable acquisitions
- GST regulations
- GST supplies & acquisitions
- incidental financial supplies
- input taxed supplies
- reduced credit acquisitions
- takeovers & mergers

Legislative references:

- ANTS (GST)A 1999 Div 11
- ANTS (GST)A 1999 11-5
- ANTS (GST)A 1999 11-15(2)(a)
- ANTS (GST)A 1999 11-15(4)
- ANTS (GST)A 1999 40-5(1)
- ANTS (GST)A 1999 Div 70
- ANTS (GST)A 1999 70-5(1)
- ANTS (GST)A 1999 Div 165
- ANTS (GST)A 1999 165-10(2)
- ANTS (GST)A 1999 165-15
- ANTS (GST)A 1999 Div 189
- ANTS (GST)R 1999 40-5.06
- ANTS (GST)R 1999 40-5.07
- ANTS (GST)R 1999 40-5.09(1)
- ANTS (GST)R 1999 40-5.09(3) table Item 10
- ANTS (GST)R 1999 Div 70
- ANTS (GST)R 1999 70-5.02(1)
- ANTS (GST)R 1999 70-5.02(2)
- ANTS (GST)R 1999 70-5.02(2) table Item 9
- ANTS (GST)R 1999 70-5.02(2) table Item 9(d)
- ANTS (GST)R 1999 70-5.02(2) table Item 9(e)
- ANTS (GST)R 1999 70-5.02(2) table Item 9(f)

Case references:

- *Raftland Pty Ltd as Trustee of the Raftland Trust v. Commissioner of Taxation* (2008) 246 ALR 406; (2008) 68 ATR 170; 2008 ATC 20-029; (2008) 238 CLR 516

Other references:

- Practice Statement PS LA 2005/24
- Taxpayer Alert TA 2010/1

ATO references

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