GSTR 2001/5W - Goods and services tax: when is a 'supply of a going concern' GST-free?

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This Ruling has been replaced by GSTR 2002/5

This document has changed over time. This is a consolidated version of the ruling which was published on *16 October 2002*

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Notice of Withdrawal

Goods and Services Tax Ruling:
Goods and services tax: when is a 'supply of a going concern' GST-free?

Goods and Services Tax Ruling GSTR 2001/5 is withdrawn with effect from today. It is replaced by GSTR 2002/5.

The main differences between the two Rulings are explained below.

Reason for Withdrawal

Following the issue of GSTR 2001/5 on 11 July 2001, substantial feedback was received from the business community and the taxation professional bodies. As a result of this feedback, GSTR 2001/5 was partially withdrawn on 5 September 2001.

As a result of further industry comment and as a part of the Australian Taxation Office's continuing review of Public Rulings to monitor their technical accuracy and practical application, we identified the need to clarify some of the issues in GSTR 2001/5. Rather than issue an Addendum, we have decided to withdraw GSTR 2001/5 and issue a new Ruling. The new Ruling, GSTR 2002/5, incorporates the changes previously made by the partial withdrawal, GSTR 2001/5PW, and explains and provides greater clarity about 'what things are necessary' for the purposes of subdivision 38-J.

Paragraphs of the new Ruling and an explanation of what has changed from GSTR 2001/5

Date of Effect - Paragraph 7

The date of effect of the new Ruling is outlined in paragraph 7. It confirms that the date of effect of the new Ruling is from its date of issue. This means that the new Ruling has effect on supplies on and from the date of its issue. Where the day of supply is prior to the issue of GSTR 2002/5, the supply will be treated in accordance with the views expressed in GSTR 2001/5.

Paragraph 19

Paragraph 19 of GSTR 2002/5 is an amalgamation of paragraphs 19 and 20 in GSTR 2001/5. The paragraphs have been amalgamated due to an error in GSTR 2001/5 that separated the first sentence from the rest of the paragraph, into a separate paragraph.

Paragraph 53

Paragraphs 47 to 53 of GSTR 2002/5 discuss what 'things' are necessary for the continued operation of an 'identified enterprise'. One of the things discussed is the supply of a licence, permit or quota. In GSTR 2001/5 at paragraph 52, the Commissioner took the view that the requirement 'the supplier supply the relevant thing' was not satisfied if the supplier chose not to supply the thing, or if it was not supplied to the recipient by the statutory authority or the third party.

Paragraph 53 of GSTR 2002/5 broadens the original view so that a supplier of a licence, permit or quota can supply the thing by either:

- transferring it; or alternatively
- by surrendering their right to it, on the basis that it be reissued to the recipient of the enterprise.

Paragraph 58

A new heading 'Supply of right to occupy premises' has been added before paragraph 58 to distinguish it from the issue ('Things that the supplier can supply') discussed in the preceding paragraphs.

Paragraphs 59-63

Paragraphs 59 to 63 contain an example of how a right to occupy premises may be supplied. The example is a slight alteration of the example in paragraphs 59 to 62 of GSTR 2001/5 to align it more closely with the view expressed in paragraph 58 and to give clarity. The original example arguably gave the impression that the view was narrower than intended.

Paragraphs 64-70

Paragraphs 64 to 70 expand on the view expressed in paragraph 63 of GSTR 2001/5 (as amended by the partial withdrawal in GSTR 2001/5PW) about when an expired lease or tenancy at will is capable of assignment or transfer. The new paragraphs are intended to provide clarity and to illustrate the differences between periodic tenancies and tenancies at will. Paragraphs 67 to 70 consist of

examples to give further guidance on the application of the principles discussed in paragraphs 64 to 66.

Paragraphs 78-79

New paragraphs 78 to 79 expand on the discussion contained in paragraphs 69 to 70 of GSTR 2001/5 about the two elements essential for the continued operation of an enterprise. The paragraphs explain the ATO view of what is a 'business, or operating structure and process'.

Paragraphs 97-99

Paragraphs 97 to 99 set out a new example to illustrate how alternative premises, not currently occupied by the supplier, may be supplied where some premises are necessary for the continued operation of an enterprise. They follow on from the example of 'particular premises' in paragraph 88 in GSTR 2001/5 (now paragraph 96 in GSTR 2002/5).

Paragraphs 105-106

Paragraphs 105 to 106 of GSTR 2002/5 explain the broader interpretation (as discussed in paragraphs 49 to 53) of how a licence, permit or other statutory authorisation may be supplied. They replace paragraph 94 in GSTR 2001/5. The broader view gives the supplier a choice of transferring the thing, or surrendering it and having it reissued to the recipient.

Paragraphs 117-118

Paragraphs 117 to 118 deal with how a franchise agreement can be supplied and replace paragraphs 105 to 107 in GSTR 2001/5. The view expressed in GSTR 2001/5 was that if the franchise agreement was capable of transfer, then it had to be transferred. This approach was seen to be too restrictive and impractical.

Discussions with the business community revealed that the franchisor rarely permits a transfer of the franchise agreement but instead requires termination of the existing agreement followed by the entry into a new agreement with the recipient of the enterprise. The broader view achieves the necessary outcome while recognising commercial practice. At paragraphs 117 to 118, the Commissioner now states that the supplier has the choice of transferring the franchise agreement or terminating it on the condition that a new franchise agreement is entered into by the franchisor and the recipient of the enterprise.

Paragraph 119-121

Paragraphs 119 to 121 of GSTR 2002/5 contain an example of how a franchise agreement may be supplied and replace paragraphs 108 to 110 in GSTR 2001/5. The example has been reworded to align it more closely with the views expressed in the preceding paragraphs.

Paragraphs 122-126

Paragraphs 122 to 126 replace paragraphs 111 to 113 in GSTR 2001/5 to reflect a change in the ATO view on staff and key personnel. GSTR 2001/5 recognised that staff are not 'things' but stated that the benefit of a contract of employment or service was a 'thing' necessary that had to be supplied. The broader view is that neither staff nor their contracts of employment have to be supplied and that key personnel are not necessary because they are not 'things' as defined in the *A New Tax System (Goods and Services Tax) Act 1999*. The new paragraphs explain that for key personnel, the transfer of their skills and knowledge is what is required. How such skills and knowledge may be supplied is also discussed.

Paragraph 134

Paragraph 134 replaces paragraph 121 of GSTR 2001/5. Additional words have been added to the original paragraph to clarify the ATO view that the supply of the leasing enterprise must occur on a later day to that of the business enterprise in order to qualify as a supply of a going concern.

Paragraphs 135-136

Paragraphs 135 to 136 contain a new example to illustrate the principle about separate supplies of parts of an existing enterprise to two or more recipients discussed in the preceding paragraphs. The example follows on from paragraph 121 in GSTR 2001/5 (now paragraph 134 in GSTR 2002/5).

Paragraphs 139-140

Paragraphs 139 to 140 contain a new example to illustrate the principle discussed in the preceding paragraphs about the supply of two separate enterprises by two suppliers to one recipient. The paragraphs follow on from paragraph 123 in GSTR 2001/5 as amended by the partial withdrawal, GSTR 2001/5PW.

Paragraph 190

Paragraphs 190 to 194 of GSTR 2002/5 deal with partnership issues for going concerns. Paragraph 190 replaces paragraph 173 in GSTR 2001/5. The last sentence of paragraph 173 has been deleted because not all partnerships automatically terminate upon a change of partners. The first three sentences of paragraph 174 in GSTR 2001/5 have been included in paragraph 190 of GSTR 2002/5.

Paragraph 193

Paragraph 193 replaces paragraph 176 of GSTR 2001/5. Two changes have been made to this paragraph, because of the deletion of the sentence in paragraph 173 of GSTR 2001/5 and to provide clarity. The first change is to the first sentence, deleting the words in the brackets '(including a partnership constituted of some of the original partners)'. The second change is to the next sentence, inserting the words 'which forms part of a larger enterprise,' after the word 'enterprise'.

Paragraph 194

Paragraph 194 discusses the situation where a sole trader/practitioner supplies part of his or her enterprise and then operates the whole enterprise via a partnership. It replaces paragraph 177 in GSTR 2001/5. In essence, the new paragraph states that the sale by a sole trader/practitioner of a part of his or her enterprise to another person is a disposal of the whole of the enterprise to a partnership, in which the supplier is a partner. This supply may be the supply of a going concern. The view previously expressed in GSTR 2001/5 was that such a supply is a financial supply.

Paragraphs 205-214

Paragraphs 205 to 214 deal with mortgagees exercising their power to dispose of a debtor's property and replace paragraphs 188 to 192 in GSTR 2001/5. The view expressed in GSTR 2001/5 was that the mortgagee would be able to sell the property without the supply attracting GST in very limited circumstances. Following consultation with insolvency practitioners, the ATO is taking a broader view.

GSTR 2002/5 states that when a mortgagee in possession disposes of a debtor's property, the supplies are to be analysed as if they were notionally made by the debtor and the creditor. This approach gives practical application to the intent of the legislation and will result in mortgagees being able to avail themselves of the benefits of subdivision 38-J. Two examples are provided to illustrate the view.

Commissioner of Taxation
16 October 2002

ATO References
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