GSTR 2002/5 - Goods and services tax: when is a 'supply of a going concern' GST-free?

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Generated on: 24 November 2026, 09:27:58 PM

Goods and Services Tax Ruling

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

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Preamble

This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 37 of the ***Taxation Administration Act 1953*** *and 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 (ato.gov.au/law) to check its currency and to view the details of all changes.]*

What this Ruling is about

1. This Ruling explains what is a 'supply of a going concern' for the purposes of Subdivision 38-J of the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act'). It also explains when the 'supply of a going concern' is GST-free for the purposes of the Subdivision.

2. This Ruling is intended to provide guidance on the application of the going concern provisions. It does not discuss the application of the provisions to specific industries. However, the examples used in the Ruling do illustrate the application of relevant principles to particular factual circumstances relating to some industries.

3. This Ruling confirms that the going concern provisions are to be considered from the perspective of the supplier.

4. This Ruling does not consider the supply of farm land under Subdivision 38-O of the GST Act.

5. Although Divisions 129 and 135 are mentioned in the Background section, this Ruling does not discuss adjustments under these provisions.

6. All legislative references in this Ruling are to the GST Act, unless otherwise stated.

Date of effect

7. This Ruling applies [to tax periods commencing] both before and after its date of issue. However, this Ruling 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 Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Background

8. Subdivision 38-J provides that, if certain conditions are satisfied, the 'supply of a going concern' is GST-free. This means that, in the case of a supply which would otherwise be a taxable supply, or an input taxed supply, the supply is GST-free if it is supplied under an arrangement for the 'supply of a going concern'.

9. The term 'supply of a going concern' is a statutory term which is defined for the purposes of Subdivision 38-J in subsection 38-325(2):

> (2) A ***supply of a going concern*** is a supply under an arrangement under which:
>
> (a) the supplier supplies to the *recipient all of the things that are necessary for the continued operation of an *enterprise; and
>
> (b) the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as part of a larger enterprise carried on by the supplier).[1]

10. The ordinary meaning of the term 'going concern', which is often used in reference to the activity of a business, does not necessarily correspond to the statutory definition. The elements of the statutory definition are discussed in detail in this Ruling.

11. The application of Subdivision 38-J means that the recipient does not have to obtain additional funds to cover the GST that would otherwise be included in the price of a going concern if the Subdivision did not apply.[2]

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[1] Asterisks refer to definitions in section 195-1 of the GST Act.
[2] Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

12. Subsection 38-325(1) provides:

> (1) The *supply of a going concern is ***GST-free*** if:
>
> (a) the supply is for *consideration; and
>
> (b) the *recipient is *registered or *required to be registered; and
>
> (c) the supplier and the recipient have agreed in writing that the supply is of a going concern.

13. A recipient of a 'supply of a going concern' that intends to make supplies which are neither taxable nor GST-free may be required by section 135-5 to make an initial increasing adjustment.

14. The recipient of a 'supply of a going concern' is required to make a further increasing or decreasing adjustment under section 135-10 where the proportion of the supplies made through the enterprise which are neither taxable nor GST-free has changed from the proportion of intended supplies. Section 135-10 requires that, in these circumstances, an increasing or decreasing adjustment is to be made using the method contained in Division 129.

Ruling with explanations

What is a 'supply of a going concern'?

15. The statutory term 'supply of a going concern' is defined in subsection 38-325(2). Pursuant to the statutory definition of supply in section 9-10, there may be more than one supply made under an arrangement. However, in accordance with the definition of a 'supply of a going concern' in subsection 38-325(2), a 'supply of a going concern' is the aggregate of all of the supplies made under an arrangement which satisfies the conditions in paragraphs 38-325(2)(a) and (b).

16. There will be one 'supply of a going concern' when the relevant supply/supplies necessary for the continued operation of an enterprise are made under an arrangement which satisfies paragraphs 38-325(2)(a) and (b). However, in some cases, there may be more than one 'supply of a going concern' under one arrangement where all of the things necessary to operate separate parts of a larger enterprise are supplied under the arrangement, and those separate parts of the larger enterprise are operating and capable of continuing to operate separately and independently.[2A]

17. An arrangement satisfies paragraph 38-325(2)(a) where each of the following elements is present:

- the supplier supplies to the recipient;
- all of the things that are necessary for the continued operation;
- of an enterprise.

[2A] See paragraphs 31 and 131 of this Ruling.

18. Paragraph 38-325(2)(b) of the definition also requires two additional elements to be present:

- the supplier carries on, or will carry on, the enterprise (whether or not as part of a larger enterprise);
- until the day of the supply.

18A. The meaning of the term 'going concern' for the purposes of subdivision 38-J was considered in the Administrative Appeals Tribunal (the Tribunal) decision of *Debonne Holdings Pty Ltd* v *Commissioner of Taxation*[2B] (*Debonne*).

18B. *Debonne* involved the sale of a hotel business pursuant to two interdependent contracts. One contract was a 'business contract' for the sale of the business assets and the other was a 'land contract' for the sale of the land on which the hotel stood. The 'business contract' expressly stated that the sale of the business was the sale of a 'going concern'. The contract for the sale of the land was silent on the question of 'going concern' and provided that the purchase price included any GST liability for which the vendor might be liable.

18C. In *Debonne*, the Tribunal found that the parties had agreed, pursuant to subsection 38-325(1),[2C] that the whole subject of the sale, which comprised both the land and business, was the sale of a 'going concern', and concluded that the totality of that sale was a GST-free supply of a going concern.[2D] The Tribunal reached this conclusion, notwithstanding that the business and the land were conveyed pursuant to separate contracts and the 'land contract' was silent on the issue of 'going concern'.

18D. In reaching the decision, referred to in paragraph 18C of this Ruling, the Tribunal relied on the fact that the 'business contract' expressly used the term 'going concern' with the meaning it has for the purposes of the GST Act. Although the term 'going concern' is not defined in the GST Act, the Tribunal considered that the relevant 'going concern' for the purposes of the GST Act was the whole subject matter of the sale, being the business together with the land.[2E] The Tribunal also stated that had the parties' agreement been limited to the extent of the 'business contract' it would have been ineffective for the purposes of section 38-325 because the 'business contract' alone did not amount to, or give rise to, a supply of a going concern.[2F]

[2B] [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154.
[2C] Paragraph 38-325(1)(c) provides that a supply of a 'going concern' is GST-free if, amongst other things, the supplier and recipient have agreed in writing that the supply is of a 'going concern'. See also paragraphs 178 to 185 of this Ruling.
[2D] [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154 at paragraphs 24 and 26.
[2E] [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154 at paragraph 26.
[2F] [2006] AATA 886; 2006 ATC 2467; (2006) 64 ATR 1154 at paragraph 27.

18E. Paragraph 5.108 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (the Explanatory Memorandum) refers to the supply of enterprises as 'going concerns' being GST-free under subdivision 38-J. This reference to a supply of 'enterprises' as 'going concerns' is consistent with the Tribunal's finding in *Debonne* that it was the total subject matter of the sale, comprising the separate contracts for the sale of the land and the business, that was the relevant 'going concern' for the purposes of the GST Act.

18F. On the basis of the Tribunal's decision in *Debonne* and the Explanatory Memorandum referred to in paragraph 18E of this Ruling, we consider that the phrase 'supply of a going concern' in subsection 38-325(2) is a reference to the sum of all of the things necessary for the continued operation of an enterprise.

18G. Paragraph 9-10(2)(h) contemplates that two or more things listed in paragraphs 9-10(2)(a) to 9-10(2)(g) can be a single supply. This lends contextual support to the view that a number of things supplied under an arrangement that satisfies the requirements of subsection 38-325(2) can be characterised as one 'supply of a going concern'.

18H. Furthermore, it was open to the legislature to aggregate what would be a number of separate supplies, in accordance with the definition of supply under section 9-10, into the concept of one 'supply of a going concern' for the purpose of making the aggregate of those supplies GST-free in the context of the sale of an operating business or other enterprise. The use of the definite article in subsection 38-325(1) and the expression 'supply of a going concern' as the defined term also support this view. It is unlikely that the drafter would have adopted the expression 'going concern', which has a well-known ordinary meaning referring to an operating business in its entirety, to encompass, for example, a single asset of an enterprise.

Alternative View

18I. An alternative view to that set out in paragraph 18F of this Ruling, is that individual items supplied under an arrangement, whereby everything necessary for the continued operation of an enterprise is conveyed to a purchaser, may each be a 'supply of a going concern' for the purposes of subsection 38-325(2). Applying this view to the facts in *Debonne*, the land and the hotel business, which were conveyed under separate contracts, would each be an individual 'supply of a going concern' pursuant to subsection 38-325(2) and the parties could have opted to agree, under subsection 38-325(1), that only one of those supplies was GST-free.

18J. However for the reasons set out in paragraphs 18A to 18H of this Ruling, the Commissioner considers that it is the supply of everything necessary for the continued operation of an enterprise which constitutes a 'supply of a going concern' pursuant to subsection 38-325(2).

What is a 'supply under an arrangement'?

19. A supply is defined in section 9-10. The term 'supply under an arrangement' includes a supply under a single contract or supplies under multiple contracts which comprise a single arrangement. However, the things supplied under the arrangement must relate to the same enterprise, that is, the enterprise referred to in paragraphs 38-325(2)(a) and (b) (the 'identified enterprise').

20. The supplier and the recipient may identify the arrangement and the supplies under the arrangement, which in aggregate, may comprise the 'supply of a going concern', in the written agreement which is required under paragraph 38-325(1)(c) or in any other written agreement that relates to the arrangement entered into on or prior to the day of the supply. (Refer to paragraphs 178 to 185 for more details). However, an arrangement between a supplier and a recipient is characterised not merely by the description which both parties give to the arrangement, but by objectively examining all of the transactions entered into and the circumstances in which the transactions are made.[2G]

What is the 'enterprise' referred to in paragraphs 38-325(2)(a) and (b)?

21. Paragraphs 38-325(2)(a) and (b) require the conditions to be satisfied in relation to an 'identified enterprise'.

22. The term 'enterprise'[3] is defined in section 9-20 as an activity, or series of activities, done:

- in the form of a business; or
- in the form of an adventure or concern in the nature of trade; or
- on a regular or continuous basis, in the form of a lease, licence, or other grant of an interest in property; or
- by the trustee of a fund that is covered by, or by an authority or institution that is covered by, Subdivision 30-B of the *Income Tax Assessment Act 1997* and to which deductible gifts can be made; or
- by a trustee of a complying superannuation fund or, if there is no trustee of the fund, by a person who manages the fund; or
- by a charitable institution or by a trustee of a charitable fund; or
- by a religious institution; or

[2G] In *Aurora Developments Pty Ltd v. Commissioner of Taxation* (2011) 192 FCR 519 at 571; [2011] FCA 232 at [241] (*Aurora Developments*) the Court, in determining the proper construction of a contract for the sale of a residential development site, had regard to the text of the contract, the surrounding circumstances known to the parties and the purpose and object of the transaction. Ultimately it was held to be a sale of land on particular terms that was not a supply of a going concern.

[3] Refer to Goods and Services Tax Determination GSTD 2006/6 and Miscellaneous Taxation Ruling MT 2006/1 for discussion on the meaning of the term 'enterprise'.

- by the Commonwealth, a State or a Territory, or by a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

23. The meaning of the term 'enterprise' is wider than the meaning of the term 'business'. For example, the activity of leasing can be the subject of the 'supply of a going concern'.

Example 1: fully tenanted building

24. *DiggerCo owns a small retail shopping complex that has been fully tenanted for many years. For the purposes of the definition of 'enterprise' in section 9-20, DiggerCo is carrying on an enterprise of leasing because it carries on leasing activities on a regular or continuous basis*.

25. Where the thing supplied is merely an asset used in an activity that is carried on as an enterprise, the supply of that asset is not the 'supply of a going concern'.

Example 2: supply of an asset which is not an enterprise in its own right

26. *InsuranceCo is an entity that owns the building from which it operates its insurance business. InsuranceCo enters into a contract to sell the building to Landlord Unit Trust and agrees to enter into an agreement to lease the building back from the trust. Whilst InsuranceCo carries on an enterprise of conducting an insurance business from the premises, InsuranceCo does not at any time conduct an enterprise of leasing the premises*.

27. *InsuranceCo did not (and could not) conduct an enterprise of leasing to itself prior to the day of the supply and merely supplied Landlord Unit Trust with an asset used by InsuranceCo in the conduct of its enterprise. Although the recipient commenced to carry on an enterprise of leasing after the day of the supply, the supply of the premises cannot be the 'supply of a going concern' because no enterprise of leasing had been operated by the supplier*.

28. *That is, InsuranceCo could not satisfy the requirement that an enterprise be carried on to the day of the supply because there was no enterprise of leasing previously carried on by the supplier, (InsuranceCo). Further, InsuranceCo cannot supply all of the things that are necessary for the continued operation of an enterprise that was not carried on prior to the day of the supply*.

29. Subsection 38-325(2) requires the identification of an enterprise that is being carried on by the supplier (the 'identified enterprise'). This is the enterprise for which the supplier must supply all of the things that are necessary for its continued operation. Also, the supplier must carry on this enterprise until the day of the supply, whether or not as part of a larger enterprise.

29A. These conclusions are consistent with the comments and findings of Justice Greenwood in *Aurora Developments*[3A] (which concerned the question of whether the supply of a particular residential development site was the supply of a going concern). In particular, Justice Greenwood stated that subsection 38-325(2):

> …can only operate in circumstances where an 'enterprise' has been identified comprised of particular activities (or a particular activity). An enterprise has content not just an objective.
>
> …
>
> Until the content of the enterprise is isolated, it is not possible to say whether all of the things necessary for its continued operation have been supplied. Section 38-325(2)(a) calls for the identification of an enterprise the subject of the supply and s 38-325(b) calls for the supplier to carry on *that* enterprise until the day of the supply.[3B]

29B. Justice Greenwood concluded that the sale by Aurora Developments Pty Ltd (Aurora) was not a supply of a going concern. His Honour found that the earthworks Aurora had undertaken to perform, and the other obligations (such as the removal of existing construction works) it had assumed, in order to sell the land, were neither:

- an adaptation of the residential development 'project enterprise' that Aurora had begun to carry on in relation to the land;[3C] nor
- an independent enterprise of conducting earthworks on the land.[3D]

29C. Rather, such activities represented Aurora's continuing withdrawal from the development of the land[3E] and were:

> …undertaken as essential elements of the sale of the land once the project enterprise came to an end and the seller elected to make an out and out disposition of its lands.[3F]

29D. Justice Greenwood found that the disposal of the land 'fell within the business undertaking of Aurora'[3G] and was a taxable supply under section 9-5.[3H]

30. Where the enterprise identified for the purpose of subsection 38-325(2) forms part of a larger enterprise, a supply is a 'supply of a going concern' when all of the things necessary to continue the operation of that part of the enterprise as an independent enterprise are supplied.

[3A] *Aurora Developments Pty Ltd v. Commissioner of Taxation* (2011) 192 FCR 519; [2011] FCA 232
[3B] *Aurora Developments* (2011) 192 FCR 519 at 572-3; [2011] FCA 232 at [253-4].
[3C] *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [263].
[3D] *Aurora Developments* (2011) 192 FCR 519 at 575; [2011] FCA 232 at [266].
[3E] *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [263].
[3F] *Aurora Developments* (2011) 192 FCR 519 at 575; [2011] FCA 232 at [266].
[3G] *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [261].
[3H] *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [262].

Example 3: an enterprise within a larger enterprise

31. *Stay-Puff Bakeries is a chain of retail bakeries conducted by Pufferies Pty Ltd ('Pufferies'). Pufferies sells the bakery operating in a particular suburb to Pies and Things partnership. As the suburban bakery is part of the larger enterprise being conducted by Pufferies and is operating as an independent enterprise, the aggregate of all of the things necessary to operate the suburban bakery, supplied under the arrangement, will be a 'supply of a going concern'.*

32. A supply of all the things necessary for the continued operation of an activity which is part of an enterprise cannot be a 'supply of a going concern' unless the conduct of the activity is itself an 'enterprise' as defined in section 9-20.

Example 4: supply of an activity which is not an enterprise in its own right

33. *BCA NL ('BCA') is a large public company engaged in the mining industry. A decision is made to outsource its information technology ('IT') services to a private company, ServiCo. Prior to outsourcing taking place, the IT function within BCA is performed by its own employees. BCA does not maintain a separate accounting system nor is there any internal user charging for the provision of the IT function. The employment of staff performing the IT function is terminated and some staff are offered employment by ServiCo. ServiCo leases office accommodation within the BCA building and purchases all of the relevant equipment and software from BCA*.

34. *The IT services function of BCA was not capable of being an enterprise in its own right because it was not operated in the form of a business or in the form of an adventure or concern in the nature of trade. This is not the 'supply of a going concern'*.

35. It has been suggested that an enterprise is not being carried on where the internal division does not make supplies to external clients. This means that many sales of distinct parts of a larger enterprise, including privatisations of public infrastructure, would not fall within the scope of Subdivision 38-J. We are of the view that the use of the term 'in the form of' in paragraph 9-20(1)(a) suggests that not all of the features of a business need to be present. For example, making supplies only to internal clients will not necessarily disqualify the supply of part of an enterprise from being a 'supply of a going concern'.

36. Similarly, it will not be necessary for every element of the larger enterprise to be supplied, for example, shared service arrangements. However, where shared service arrangements are essential for the continued operation of the enterprise, they must be supplied. What is essential for the continued operation of the enterprise depends on the nature of the 'identified enterprise' being carried on. The 'identified enterprise' is a smaller enterprise within the larger overall enterprise being conducted by the supplier. Where the 'identified enterprise' is part of a larger enterprise being conducted by the supplier, the 'identified enterprise' may not require the shared services to continue to operate.

37. The following elements are indicators that part of an enterprise may be carried on 'in the form of' a business:

- a degree of autonomy;
- a separate management structure;
- a system of internal user charging;
- a separate budget; and
- agreements with internal service providers or external customers.

Example 5: part of an enterprise which is an enterprise in its own right

38. *Zinco is a manufacturer of metal products which uses a large amount of electricity for its processes. Zinco has its own power generation plants to ensure that it has sufficient electricity supplies at all times. The power generation activity is a separate division with substantial operations which are separate and distinct from those of the larger organisation. It has a system of internal user charging for those services. The power generation division has a separate management structure and a degree of autonomy within the company structure. It does not deal with nor generate any revenue from external customers but supplies the power it generates to other divisions under internal service agreements*.

39. *Zinco sells the power generation activity to an independent power provider. Zinco transfers the plant and premises which are used in power production, the benefit of existing contracts with external suppliers, the separate management structure, and facilitates the transfer of necessary employees. As a part of the sale agreement, a contract is entered into under which the power provider is to supply electricity to Zinco*.

40. *Because Zinco is conducting the power generation operations as a separate division and in the form of a business within its larger enterprise, the activities of that division may be an enterprise. The supply of the power generation operation is the 'supply of a going concern' provided the activity of power generation is conducted by Zinco up to the day of the supply and all of the things that are necessary for the continued operation of the division are supplied to the recipient*.

What is meant by 'the supplier supplies'?

41. This term emphasises that the elements of paragraph 38-325(2)(a) must be satisfied from the perspective of the supplier. The ability of the recipient to provide some of the things necessary for the continued operation of the enterprise is not a relevant consideration.[4] The meaning of 'all things necessary' is discussed in detail at paragraphs 72-89.

[4] *Aurora Developments* (2011) 192 FCR 519 at 573; [2011] FCA 232 at [254]; *Belton v. CIR* (1997) 18 NZTC 13 403; *Allen Yacht Charters Ltd v. CIR* (1994) 16 NZTC 11 270.

42. The requirements in paragraphs 38-325(2)(a) and (b) must be met by the same single supplier.

43. Section 23 of the *Acts Interpretation Act 1901* provides rules as to gender and number. It states:

> 23 In any Act:
>
> (a) words importing a gender include every other gender; and
>
> (b) words in the singular number include the plural and words in the plural number include the singular.

44. However, the application of section 23 of the *Acts Interpretation Act 1901* to another Act, or a provision of another Act, is subject to a contrary intention.[4A] We are of the view that a contrary intention is evidenced by the words used in subsection 38-325(2). This requires an entity to conduct the enterprise which is to be carried on until the day of the supply. It follows that the supplier is *an* entity (singular) as only *an* entity can carry on *an* enterprise. Section 184-1 states that an entity includes a partnership. Therefore, the partnership, rather than the individual partners, is the single supplier of a going concern.

45. Similarly, the requirement in paragraph 38-325(2)(a) can only be met where a single entity is the recipient of the supply. This is because the supplier must supply all of the things that are necessary for the continued operation of the 'identified enterprise' to the recipient and the recipient must be put in a position on the day of the supply where it can, if it so chooses, continue to operate that enterprise. Only *an* entity can operate *an* enterprise and the supplier cannot put more than one recipient in a position to operate a single enterprise.

46. A GST group is treated under Division 48 as a single entity for specific purposes.[5] The purposes for which a GST group may be treated as a single entity do not include the supply or receipt of supplies under an arrangement for the 'supply of a going concern'. However, a member of a GST group may individually make a 'supply of a going concern'.

Things that the supplier can supply

47. The term 'thing' is defined in section 195-1 as anything that can be supplied or imported. The things which are necessary for the continued operation of an 'identified enterprise' will vary according to the nature of the enterprise and the thing supplied.

[4A] Subsection 2(2) of the *Acts Interpretation Act 1901.*

[5] For example, in relation to supplies and acquisitions made wholly within a GST group.

48. In some circumstances, it may not be possible for a supplier to transfer or convey some of the things necessary for the continued operation of an enterprise. For example, in some States, a logging licence cannot be assigned and must be surrendered before a new licence is issued by the relevant authority.[6] Similarly, the benefit of certain contracts are not assignable because of the nature of the contract itself, for example, employment contracts, or because of limitations which are imposed under the relevant contract, such as franchise agreements.

49. Because the relevant thing which is incapable of assignment is necessary for the continued operation of an enterprise, it is arguable that the supplier is unable to supply one of the necessary things. A narrow or technical construction of the term 'supplier supplies' leads to a conclusion in these circumstances that the supplier would not have supplied a thing which is necessary where the thing has in fact been supplied to the recipient by a third party.

50. We are of the view that the surrender of the relevant licence, permit or quota should be taken to be the supply of that thing which is necessary for the continued operation of the enterprise in circumstances where it is highly probable that the licence, permit or quota will be automatically reissued by the relevant government or agency.

51. Where the relevant thing is the rights under an existing contract, the surrender of those rights, in circumstances where the third party has committed to enter into a contract under which substantially similar rights will be created in favour of the recipient, will satisfy the requirement that the relevant thing is supplied.

52. The requirement that the supplier supply the relevant thing will not however be satisfied where the supplier simply chooses not to supply that thing. Further, the relevant thing is not supplied if the statutory authority or the third party does not supply that thing to the recipient.

53. The supply of a thing which is necessary for the continued operation of an enterprise by a party other than the supplier is taken to be a supply to the recipient of that thing for the purposes of section 38-325 in the following limited circumstances:

(a) the thing must be incapable of assignment or supply because of a statutory or legal impediment; and

- the supplier must make all reasonable efforts to have the thing supplied to the recipient, for example by way of surrender; and
- the supply must be by a statutory authority or other party to the contract with the supplier; and
- the thing is actually supplied to the recipient by a party other than the supplier; or

[6] See, for example, the discussion in *Marbut Gunnersen Industries Pty Ltd v. FC of T* 82 ATC 4182; (1982) 12 ATR 926.

(b) if there is no statutory or legal impediment to assignment; and

- normal commercial practice dictates that the supply can only be effected in this way[7]; and
- the supplier conditionally surrenders or terminates their right to the thing and facilitates the entry into a new arrangement between the recipient and the statutory authority or other party to the contract; and
- the thing is actually supplied to the recipient by the statutory authority or other party to the contract.

Example 6: surrender of licence is sufficient

54. *Totenwood Pty Ltd ('Totenwood') conducts an enterprise of sapling removal from pastoral properties. It is required to have a licence from the relevant State authority to remove native trees. The licence is not able to be transferred to another entity without the permission of the State authority. In practice, approval of a transfer by the State authority is not given. However, when a licence is surrendered, it is reissued to the potential transferee in all but exceptional cases*.

55. *Totenwood enters into an agreement with Tree-Away Pty Ltd ('Tree-Away') for the sale of the enterprise as a going concern. All of the things that are necessary for the continued operation of the enterprise (e.g., machinery, advertising material, client lists), other than the licence, are supplied under the arrangement*.

56. *Totenwood applies to the relevant State authority for permission to transfer the licence and is refused, in accordance with usual practice. Totenwood effects the supply of the licence to Tree-Away by surrendering the licence and asking the State authority to reissue it to Tree-Away*.

57. *As there was a statutory impediment to the transfer of the licence, and Totenwood made all reasonable efforts to have the licence transferred, the surrender of the licence and its reissue to Tree-Away will be taken to be the supply of the licence by the supplier*.

Supply of Right to Occupy Premises

58. Many enterprises operate from leased premises. The supplier may supply the lease either by assignment or by surrendering the lease and facilitating the entry by the recipient into a lease or agreement to lease the same premises by the day of the supply.

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[7] *Marbut Gunnersen Industries Pty Ltd v. FC of T* 82 ATC 4182; (1982) 12 ATR 926.

Example 7: surrender of lease

59. *Cleaver and Son is a partnership which operates an enterprise of retail meat sales from premises leased from Monitor Trust. The terms of the lease agreement permit the assignment of the lease with the approval of the landlord*.

60. *Cleaver and Son enter into an agreement to sell the enterprise to Fillet Pty Ltd ('Fillet'). The agreement is for the supply of the things that are necessary for the continued operation of the enterprise, including plant and equipment, stock, trade name and advertising.*

61. *The current lease will expire in 3 months time*. *Fillet wants the security of a longer lease. The parties therefore agree that Cleaver and Son will notify Monitor Trust, advising them of the sale of the business to Fillet. They also seek the agreement of Monitor to terminate the lease early, on the condition that Monitor Trust will enter into a new lease agreement with Fillet.*

62. *Monitor Trust agrees to this request*. *The new agreement provides Monitor Trust with the opportunity to review the conditions of the lease agreement and to gain a new tenant with a longer period of tenancy.*

63. *Cleaver and Son will be taken to have made a supply of the premises, even though the actual supply of the premises has been made by Monitor Trust. Cleaver and Son have supplied all of the things that are necessary for the continued operation of the enterprise*.

Periodic Tenancies and Tenancies at Will Circumstances

64. Where a supplier occupies premises pursuant to a mere tenancy at will, e.g., during a brief holding over upon expiration of a lease and pays no rent, the supplier is unable to supply those premises because a tenancy at will is not capable of assignment. If the premises occupied under a tenancy at will are a thing necessary for the continued operation of the relevant enterprise, the supplier is not able to make a supply of a going concern.

65. However, if upon expiration of a lease, the tenant is allowed to continue in possession pursuant to a short term periodic tenancy, the new periodic tenancy may be capable of assignment. A periodic tenancy means that the tenant pays rent to the landlord with reference to a period and therefore has a legally enforceable right to occupy the premises for the period.

66. The law of the States and Territories may prescribe certain requirements which will have to be met in respect of the creation or assignment of such tenancies. A supplier who occupies premises under a periodic tenancy therefore can supply the right to occupy the premises to a recipient and would not be precluded from making a supply of a going concern in circumstances where the premises were a thing necessary for the continued operation of the relevant enterprise.

Example 8: Premises occupied under a tenancy at will arrangement

67. *Greg and Isabel own a commercial property as tenants in common. They also are the sole shareholders and directors of a company (GI Panels Pty Ltd) that operates a panel beating enterprise from these premises. The company pays the council rates and taxes on behalf of Greg and Isabel. It does not have a written lease agreement, and does not make any other payments to Greg and Isabel on a regular basis. GI Panels does not have a legally enforceable right to occupy the premises for a specified period.*

68. *The company occupies the premises under a tenancy at will arrangement. GI Panels decides to sell the enterprise to another entity (Bodies from Heaven Pty Ltd). As the premises, or the right to occupy some premises cannot be supplied by GI Panels to Bodies from Heaven, and premises are one of the necessary things, the supply of the panel beating enterprise is not a GST-free supply of a going concern.*

Example 9: Leasing enterprise without written lease agreement

69. *DiggerCo owns a parcel of land from which a car yard is operated by Beaut Cars Co (BCC). The two companies have common directors. BCC occupies the premises on a periodic basis with rent paid monthly in advance. Because of the commonality of directors, no formal lease agreement for occupation was ever entered into. BCC pays a commercial rate of rent on a monthly basis in advance.*

70. *RE Pty Ltd wishes to buy the property and will allow BCC to continue to occupy the premises under the same tenancy arrangements currently in existence. DiggerCo can supply the enterprise of leasing of this property to RE Pty Ltd as a going concern, provided the current periodic tenancy has not terminated and will continue.*

Chattel Leases

71. Where entities lease plant and equipment under a financing arrangement with a financier, the financier has legal title over the chattels. When the entity disposes of the enterprise, the finance is usually paid out as part of the settlement process. The entity therefore obtains legal title to the chattels for at least a brief period of time and is capable of supplying the chattels to the recipient as part of the 'supply of a going concern'. How the recipient finances the purchase of the chattels as part of the arrangement is not a relevant factor.

All of the things that are necessary for the continued operation of an enterprise

72. The term 'necessary' incorporates every attribute of an enterprise that is essential for the continued operation of the 'identified enterprise'. The things that are 'necessary' will depend on the nature of the enterprise carried on and the core attributes of that enterprise. The term 'all of the things that are necessary' does not refer to every conceivable thing which might be used in the 'identified enterprise'. Access to environmental factors, for example, access to public roads, public telephone systems and postal services, are not ordinarily things which must be supplied by the supplier.

73. A 'thing' is necessary for the continued operation of an 'identified enterprise' if the enterprise could not be operated by the recipient in the absence of the thing. For example, a boat may be essential to the conduct of the businesses of a professional fisherman, a water-ski instructor, a deep-sea diving instructor or a repairer of underwater structures because, in most instances, the relevant business could not be conducted at all without a boat.[8] The supplier must supply the boat for the continued operation of the enterprise.

74. The supplier is required to supply to the recipient all of the things that are necessary to carry on the 'identified enterprise' so that the recipient is put in a position to carry on the enterprise if it chooses.

75. Two elements are essential for the continued operation of an enterprise:

- the assets necessary for the continued operation of the enterprise including, where appropriate, premises, plant and equipment, stock-in-trade and intangible assets such as goodwill, contracts, licences and quotas; and
- the operating structure and process of the enterprise consisting of the commercial or economic activity relevant to the type of enterprise being conducted, for example, ongoing advertising and promotion.[9]

76. In the New Zealand case *Allen Yacht Charters Ltd v. CIR* (1994) 16 NZTC 11 270, the Court was asked to consider whether the sale of a yacht charter business was a supply of a taxable activity as a going concern for the purposes of the former subsection 11(1) of the *New Zealand Goods and Services Tax Act 1985.*

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[8] *Case R63* 84 ATC 457
[9] *Case M89* (1990) 12 NZTC 2556

77. In holding that the sale of a yacht and equipment by the vendor of a yacht charter business, without a transfer of goodwill or of forward bookings, was not the supply of a taxable activity as a going concern, the Court observed:

> 'In this case the 'going concern' consisted of two elements. One was the assets necessary for the business or undertaking, namely Chateau Briand and the equipment on her, together with the Ministry of Transport survey and the berth on Z pier. The other is what Barber DCJ described in *Case M89* (1990) 12 NZTC 2,556 at p 2,561 … as the business structure and process that had been operated by the objector with the emphasis on the process rather than the structure.'

78. The business, or operating structure and process of an enterprise is difficult to define and will always be a matter of fact and degree in a particular context.[10] The structure and processes used by the supplier in the operation of the relevant enterprise must be supplied by the supplier to the recipient if the recipient is to be placed in a position to continue to operate the enterprise in the future. That is, the means of operation of the relevant enterprise must be supplied.

79. In New Zealand, courts and tribunals have had regard to such factors as the continuation of forward bookings or orders, the passing on of information relating to operation of the enterprise, the introduction to existing clients and the continuity of marketing arrangements to the time of supply in determining whether operating structure and process has been supplied. These indicia are provided by way of example only and do not comprise an exhaustive list of relevant factors. The relevance of any particular factor would depend on the nature of the enterprise in question; a particular factor may not be present in each and every case where a 'supply of a going concern' is made.

80. The supplier supplies all of the things that are necessary for the continued operation of an enterprise when the supplier supplies those things which will put the recipient in a position to carry on the enterprise, if it chooses.

81. The intended and actual use by the recipient of all of the things supplied are not relevant in determining if there is a 'supply of a going concern'.[11] The enterprise may be continued as a different enterprise, as part of a larger enterprise, or may not be continued at all by the recipient.[12]

82. A number of things which are commonly necessary for the continued operation of an enterprise are discussed in the following paragraphs (refer paragraphs 90 -130), but not all of these things will always be necessary for the continued operation of a particular enterprise.

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[10] *Case M89* (1990) 12 NZTC 2556
[11] However, the use by the recipient may be relevant for an adjustment under Division 135.
[12] *Pine v. CIR* (1998) 18 NZTC 13 570; *Belton v. CIR* (1997) 18 NZTC 13 403; *Allen Yacht Charters Ltd v. CIR* (1994) 16 NZTC 11 270

83. Certain things which are used in the enterprise as a matter of choice by the supplier conducting the enterprise are not necessary in circumstances where the enterprise could be carried on in the absence of those things, (that is, they are not essential).

Example 10: things that are not necessary

84. *Bill is the proprietor of a medium sized insurance broking firm. He operates his business entirely from an inner city office building and all appointments with clients are conducted at these premises. He does not require a motor vehicle for business purposes*.

85. *Bill enters into an agreement to sell his business to Jake. Under the arrangement, Bill supplies his client list, goodwill, office furniture and equipment, and assigns the lease over the premises*.

86. *As a motor vehicle is not one of the things that is essential for the continued operation of Bill's enterprise, it is not necessary for Bill to supply a motor vehicle to Jake as part of the arrangement. That is, it is not one of the things that must necessarily be supplied under the arrangement in order for the sale of Bill's insurance broking firm to qualify as a 'supply of a going concern'.*

Example 11: things that are necessary

87. *Ben conducts a mobile mechanic business. He has a specially fitted out van which carries all his tools and equipment. Ben travels widely throughout the metropolitan area and carries out repairs at clients' premises. He does not have a workshop of his own where repairs can be performed*.

88. *Ben enters into an agreement with Pistons Pty Ltd ('Pistons'), a company that owns several motor repair workshops, to sell his business. Under the arrangement between Ben and Pistons, Ben supplies his client list, the mobile telephone number, goodwill and motor vehicle, together with all the equipment and tools*.

89. *Ben's motor vehicle is essential to the continued operation of his enterprise and is one of the things that must necessarily be supplied under the arrangement for the sale of his business to qualify as a 'supply of a going concern'.*

Premises that are necessary

90. Where particular premises are necessary for the continued operation of an enterprise, these premises must be supplied. Characteristics or attributes of particular premises may be determinative of the necessity for those particular premises to be supplied. For example, a factory building may have specially modified floors to take the weight of certain necessary machinery. The characteristics of the building itself are such that those particular premises are necessary for the continued operation of the enterprise.

91. Where an enterprise is necessarily conducted from premises, but particular premises are not necessary, then suitable premises, or the right to occupy such premises, must be supplied as one of the things that are necessary for the continued operation of the enterprise. Where premises are necessary for the continued conduct of the enterprise and premises are not supplied by the supplier because the recipient has, or is able to secure, suitable premises prior to the day of the supply, the supplier is not supplying a thing which is necessary for the continued operation of an enterprise.

92. In limited circumstances, an enterprise may not need to operate from premises and therefore premises are not one of the things necessary for the continued operation of that enterprise. This is the case where an enterprise requires few tangible assets, for example, a personal fitness trainer who visits clients and does not need any premises to operate the enterprise.

Example 12: premises that are not necessary

93. *Betty is a clairvoyant who works from home. Betty provides tarot readings over the telephone using a 0055 number. Betty sells her business including her cards, the files on her regular clients, her advertising material, her trading name 'Madame Ecarte' and the 0055 number to Bruce. She is not required to supply her home as a part of the 'supply of a going concern'. Premises are not an essential part of her enterprise*.

Example 13: premises that are necessary

94. *DeliCo conducts a delicatessen business from leased premises adjacent to a large grocery retailer within a suburban shopping mall. DeliCo negotiates the sale of the business to another registered entity, NewCo, which has its own premises from which it intends to operate the delicatessen. The contract provides that the business name, plant and equipment, stock and goodwill are to be supplied to NewCo. DeliCo retains its premises and intends to commence another business from these premises*.

95. *Because the delicatessen is conducted from premises within the mall, some premises are necessary for the conduct of the delicatessen business. The supply is not the 'supply of a going concern' as DeliCo is not supplying premises which are one of the things that is necessary for the continued operation of the supplier's enterprise*.

Example 14: particular premises

96. *Heavy Duty Ltd manufactures earth moving equipment in its suburban factory. Heavy Duty Ltd intends to sell its manufacturing business. The factory floors have been specially modified to handle the extreme weights of the manufacturing plant and earth moving equipment produced. Heavy Duty Ltd must supply the factory as one of the things that is necessary for the continued operation of the enterprise*.

Example 15: supply of alternative leased premises

97. *Apothecary Co conducts a pharmacy business from leased premises located on an arterial road. Newfellow Co enters into negotiations to acquire the pharmacy business but does not want to operate from the same premises as are currently used. A new shopping centre operated by Centre Co is about to open in the same suburb and Newfellow Co has indicated that it would prefer to operate the pharmacy business from a site within the new shopping centre.*

98. *Apothecary Co enters into a tripartite agreement with Newfellow Co and Centre Co under which (i) Apothecary Co will sell its pharmacy business to Newfellow Co; (ii) Newfellow will enter into a lease of premises from Centre Co; and (iii) Centre Co will grant a lease in favour of Newfellow Co. The granting of a lease of premises within the shopping centre is a condition precedent to the sale of the pharmacy business.*

99. *As the agreement for a lease of alternative premises is enforceable by Apothecary[13], Apothecary has supplied a right to occupy suitable premises to Newfellow. Apothecary will not be required to supply the premises which it currently occupies as a 'thing necessary for the continued operation' of the pharmacy business.*

Things brought into existence on the day of the supply

100. The supply of all of the things that are necessary for the continued operation of an enterprise may require that the supplier enters into contracts, leases or other things which were not in existence prior to the day of the supply. This will be the case where the supplier retains the ownership of premises from which an enterprise is conducted, but supplies the business structure and possession of the premises by way of a lease.

[13] Usual privity of contract principles apply. Because Apothecary is a party to the contract which confers a right to a new lease upon Newfellow, Apothecary is taken to have supplied, for the purposes of paragraph 38-325(2)(a), a thing (i.e. the premises) that is necessary.

Example 16: contracts entered into on the day of the supply

101. *Sunset Unit Trust owns and operates a nursing home on a particular site. Hands On Pty Ltd ('Hands On') enters into a contract to purchase the business of operating the nursing home. Plant and equipment, residents' records and stock are supplied as part of the arrangement. Permission was sought and granted by the relevant authority to transfer the bed allocation and a lease agreement was entered into with Hands On, effective on the day of settlement.*

102. *As the premises were supplied by way of lease, the supplier has supplied all of the things that are necessary for the continued operation of the enterprise.*

Statutory licences, permits, quotas or similar statutory authorisations

103. The supply of all of the things that are necessary for the continued operation of an enterprise that has or is required to have, as part of its business activities, statutory licences, permits, quotas or similar things, other than personal qualifications discussed in paragraph 130 of this Ruling, must include those things as part of the supply in order for there to be a 'supply of a going concern'.

104. Some enterprises are required by law to be operated under a licence, permit or other statutory authorisation. Examples of this are liquor licences and fishing licences. Some industries also have statutory allocations or quotas, such as water allocations or sugar quotas.

105. Where a supplier is permitted by the relevant statutory regime to transfer the licence, permit or other statutory authorisation, it must transfer it. Where the supplier may only transfer the thing with permission from a relevant entity, it may attempt to gain that permission. As discussed in paragraph 50 above, where the supplier, having made all reasonable attempts to transfer the thing, has no option but to surrender it in favour of the recipient, the surrender and reissue will be taken to be a supply of the licence, permit or other statutory authorisation by the supplier for the purposes of section 38-325.

106. Alternatively, the supplier may know from past experience and industry practice that the relevant entity does not normally approve transfer. The supplier may therefore merely choose to surrender the licence, permit or other statutory authorisation and request that it be reissued to the recipient by the relevant entity. The surrender and reissue of the thing by the relevant entity will be taken to be a supply by the supplier for the purposes of section 38-325.

107. Where the statutory permissive licence is necessary for the continued operation of an enterprise and a new licence is not in fact issued to the recipient in consequence of the surrender by the supplier of an existing licence, the supplier has not provided that thing to the recipient regardless of whether the supplier has used best endeavours to procure the intended result. The supply of all other things that are necessary for the continued operation of an enterprise will not satisfy the requirement in paragraph 38-325(2)(a). In these circumstances the supplier will not be making a 'supply of a going concern'. The supplier will have a liability to pay GST.

Management and services contracts relating to the lease of a property

107A. An identified enterprise may consist solely of the leasing of a property to a tenant or tenants. Such an activity is an enterprise under paragraph 9-20(1)(c).[13A] This is the case even though the leasing of the property may be carried on as part of the supplier's broader enterprise.[13B] Where the identified enterprise consists solely of leasing a property, management and services contracts related to the lease are not things necessary for the continued operation of that enterprise. That is, where the identified enterprise is one of leasing, the supply of the property subject to the existing leases to the tenant or tenants is all that is required to satisfy paragraph 38-325(2)(a).

Example 16A: management and services contracts relating to an enterprise of leasing

107B. *As part of a portfolio of real estate assets, SellCo owns a large combined retail shopping centre and office tower known as Black Tower. SellCo is selling Black Tower to AcquireCo subject to all existing tenancies.*

107C. *SellCo outsources the management of all of its properties to ProManagement under a portfolio wide management agreement. SellCo has also entered into other services contracts with third parties specific to Black Tower only. Among other things, those contracts cover services such as electricity, gas, telephone, internet, lift and escalator maintenance, air-conditioning maintenance, cleaning, security, advertising and centre promotions.*

[13A] See paragraphs 23 and 24 of this Ruling.
[13B] See paragraphs 30 and 131 of this Ruling. See also *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [37]; 2014 ATC 20-474; (2014) 92 ATR 241.

107D. *The management agreement with ProManagement cannot be transferred to AcquireCo in respect of Black Tower as it applies to all of SellCo's properties on a portfolio wide basis. Some of the services contracts in relation to Black Tower are due to expire and will not be renewed before settlement. Other services contracts will be assigned or novated to AcquireCo on settlement. However, AcquireCo has its own preferred service contractors for some services so requires SellCo to terminate those particular services contracts on settlement.*

107E. *Even though the management agreement and some of the services contracts are not being supplied by SellCo to AcquireCo, SellCo is supplying AcquireCo with all of the things that are necessary for the continued operation of the identified enterprise of leasing Black Tower. This is because the supply of Black Tower subject to the existing leases to the tenants is all that is required for this identified enterprise. Therefore, paragraph 38-325(2)(a) is satisfied and, provided the other requirements of section 38-325 are met, SellCo is making a 'supply of a going concern'.*

107F. *While none of the management or services contracts are necessary for the continued operation of the leasing enterprise, any services contracts that are assigned or novated to AcquireCo are transferred as part of the leasing enterprise, and can also be included as part of the 'supply of a going concern' by SellCo.*

Supply by a lessor of the benefits of covenants under a lease

108. The owner of an enterprise which consists solely of the leasing of property cannot make a 'supply of a going concern' when supplying the real property subject to the lease to the lessee. All of the things that are necessary for the continued operation of the enterprise includes the supply of the property and the covenants. The owner is not able to supply to the lessee the benefit of the covenants which are necessary for the continued operation of the existing enterprise of leasing the property.

109. In the decision of the New Zealand Court of Appeal in *Pine v. CIR* (1998) 18 NZTC 13,570, the majority of the Court held that the supplier could supply the interest in the real property subject to a lease to the tenant as a going concern. The decision of the Court turned largely on a consideration of the doctrine of merger, the Court concluding that the merger of the interests in the land did not occur until after the point of supply. The ability of the supplier to supply the benefit of the covenants under a lease was not considered by the Court. Consequently, the decision in *Pine v. CIR* has no application to the issue of whether the benefit of covenants can be passed on to the recipient of a supply of freehold premises where the recipient is a lessee under an existing lease.

Goodwill

110. Goodwill is intangible property. It attaches to a business and cannot attach to an enterprise which is not a business. As stated by Gaudron, McHugh, Gummow and Hayne JJ in *FC of T v. Murry*:

> 'From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes 'the attractive force which brings in custom.' Goodwill…is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.'[14]

111. So, if the 'identified enterprise' is a business, goodwill is supplied as one of the things that is necessary for the continued operation of that enterprise.

112. Goodwill which emanates from the personality, reputation, skills or attributes of an individual is not transferable. However, goodwill emanating from other sources will continue to draw custom to the enterprise and can be supplied.

Example 17: goodwill emanating from personal attributes

113. *Enrico's Coffee Emporium is well known not only for the quality of its coffee beans, but also for Enrico's friendliness and knowledge of coffee. A large number of his clients travel some distance to purchase coffee from his store and to discuss the rival merits of various blends with him. Enrico intends to retire and sells the store complete with all stock, fixtures, plant, etc., to Julius.*

114. *Much of the goodwill of the business emanates from Enrico's personal attributes. This part of the goodwill of the enterprise is not transferable. However goodwill can be supplied as custom will continue to flow from the other sources of goodwill. Julius is acquiring all of the things that are necessary for the continued operation of the enterprise of Enrico's Coffee Emporium.*

Restrictive Covenants

115. Some arrangements for the supply of a business may include restrictive covenants. Where a restrictive covenant is supplied as part of an arrangement, it is one of those things that is necessary for the continued operation of an enterprise.

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[14] *FC of T v. Murry* (1998) 193 CLR 605; (1998) 39 ATR 129; 98 ATC 4585; and Taxation Ruling TR 1999/16.

Intellectual property

116. Where intellectual property exists and is one of the things that is necessary for the continued operation of the enterprise which is the subject of the arrangement, the benefit of the intellectual property must be supplied to the recipient under the arrangement.

Franchises

117. The benefit of a franchise agreement is a thing which is necessary for the continued operation of an enterprise. A franchisee cannot sell its franchise as a 'supply of a going concern' to another entity which is to become the franchisee, unless the franchisee is capable of supplying all of the things that are necessary for the continued operation of the enterprise. In many instances, restrictions are imposed under the franchise agreement on the ability of the franchisee to transfer or assign the benefit of the franchise agreement.

118. The principles discussed in paragraph 53 apply equally to franchises. If either the franchise agreement does not allow the transfer of the agreement to the recipient or permission to transfer the agreement is withheld by the franchisor, or the recipient wishes to extend the term, a surrender of the rights under the agreement in favour of the recipient will be taken to be the supply of the agreement, provided a new agreement is entered into by the franchisor and the recipient.

Example 18: supply of a franchise without franchise agreement

119. *Outgoing Ltd ('Outgoing') is carrying on a franchised cleaning business and has the exclusive right under the franchise arrangement to operate in a particular area. It does not operate from premises, but has plant and equipment, contracts with the entities for which it supplies cleaning services, and a franchise agreement with the franchisor. The head franchise agreement requires any prospective purchaser of the business to take over the existing agreement or, with the mutual agreement of the three parties involved, to enter into a new franchise agreement.*

120. *Outgoing enters into a contract of sale which includes the assets of the business and the service contracts with clients with Incoming Ltd ('Incoming'). Outgoing, after discussions with the franchisor and Incoming, concludes that the best option for them is to surrender its rights under the franchise agreement in favour of Incoming. The franchisor enters into a new agreement with Incoming on similar terms as the previous agreement.*

121. *Outgoing has supplied the benefit of the franchise agreement by the surrender of its rights under the agreement and securing the entry into a new franchise agreement between the franchisor and Incoming.*

Staff

122. The services of employees are necessary for the operation of many enterprises. Employees are not 'things' as defined in section 195-1 and therefore are not of themselves 'things that are necessary for the continued operation of an enterprise'. As a matter of law, employment contracts are personal contracts and are incapable of assignment.[15] The supply of the services of existing employees of an enterprise is not a thing necessary for the continued operation of the enterprise.[16]

123. However, continuity of employment of the existing workforce is not an entirely irrelevant consideration in determining whether there is a 'supply of a going concern'. The fact that the employment of existing employees has been terminated prior to the day of supply is a relevant consideration, but not necessarily a decisive one, in determining whether the enterprise in question has continued to operate until the day of supply.

124. Further, the continued employment by the recipient of a significant portion of an existing workforce is consistent with the operating structure and processes of the supplier's enterprise having been supplied to the recipient. However, as the recipient of a 'supply of a going concern' may choose not to carry on the enterprise after the day of supply, a recipient need not take on the existing workforce in order to establish that the necessary operating structure and process has been acquired. Whether the operating structure and process has been supplied in any given case is always a question of fact and degree to be determined in the light of all relevant circumstances.[17]

125. Some entities have key personnel whose skills and knowledge are so unique and integral to the continued operation of the enterprise that the relevant enterprise could not be conducted without the services of the particular employee. Although key employees are not 'things' capable of being supplied, the particular and unique skills and knowledge of such a key employee is the thing which is necessary for the continued operation of the enterprise. The supplier must take all reasonable steps to facilitate the transfer of such skills and knowledge utilised by the key employee in the enterprise.

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[15] *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.
[16] See discussion on key employees at paragraphs 125-128.
[17] See earlier discussion of the requirement of 'operating structure and process' at paragraphs 77-78.

126. This transfer can be facilitated in a number of different ways. For example, the employee may enter into a new contract of employment with the recipient, either on an ongoing basis or for a limited period of time only, which would be sufficient to train another person to perform the relevant tasks. Alternatively, the supplier may arrange to have the employee prepare a set of instruction/training manuals which are to be provided to the recipient upon transfer of the enterprise that will enable another person to perform the duties of the key employee. Where the enterprise cannot continue to operate without the particular employee's skills and knowledge, the supplier has not supplied all of the things that are necessary for the continued operation of the enterprise.

Example 19: key personnel

127. *Geordie is a computer programmer with GoingCom Ltd ('GoingCom'), an entity that conducts a software business. Geordie developed GoingCom's best selling product, a virus checker, and is the only person who is capable of updating the software for new viruses, debugging it and providing technical support in relation to that product as part of GoingCom's after sale service. GoingCom agrees to sell its entire business to DigiConcern Pty Ltd ('DigiConcern'). GoingCom agrees that the sale of its entire business to DigiConcern is a 'supply of a going concern'.*

128. *Without the services of Geordie, the enterprise cannot continue. An agreement by Geordie to continue to work with the software business under DigiConcern is sufficient to enable the supply by GoingCom to be the 'supply of a going concern'. Geordie's agreement may be for an indefinite period of time. Alternatively, Geordie may agree to work for DigiConcern for a limited period of time which is sufficient to train new staff to perform the tasks normally carried out by him.*

129. The services of a sole proprietor are not provided pursuant to a contract and therefore are not a thing that is necessary for the continued operation of the enterprise. Similarly, where the nature of the business is such that personal qualifications (e.g., educational qualifications, practicing certificates, etc.) attaching to an individual are necessary for the continued conduct of the business, we consider that the supply of those attributes would require the supply of the individual. However, as the individual is not a 'thing', because an individual is not capable of being supplied, the supply of an individual with such attributes is not required under paragraph 38-325(2)(a).

Example 20: personal qualifications

130. *Marco, a health practitioner, supplies his practice to another practitioner. Marco is required to hold a practising certificate which he gained through study and supervised practice. The qualification is personal to Marco and cannot be transferred to another entity. Provided that everything else necessary to continue to operate the practice is supplied, including the client list, the supply of Marco's practice will be a 'supply of a going concern'.*

Supply of parts of an existing enterprise to two or more recipients

131. Paragraph 38-325(2)(a) expressly recognises that the supply under the relevant arrangement of all of the things that are necessary for the continued operation of part of a larger enterprise that is capable of separate independent operation may be a 'supply of a going concern'. Therefore, there may be more than one 'supply of a going concern' when separately identifiable parts of a larger enterprise are supplied.

132. Where the owner of both a business enterprise and of the real property upon which the business enterprise is necessarily conducted sells the business enterprise to a second entity and the business premises to a third entity, the supply to the second entity will not be the 'supply of a going concern'. This is because the second entity has not been supplied with one of the things necessary for the continued operation of that enterprise, by the supplier, that is, the business premises.

133. Where the owner of both the business enterprise and the premises grants a lease of the premises in favour of the second entity by the day of the supply of the business enterprise to that second entity, the supplier is supplying the second entity with all of the things that are necessary for the continued operation of the enterprise. The requirement that the premises are supplied to the second entity is met even if the property is subsequently sold to a third entity subject to a lease.

134. Similarly, the supply of the real property to the third entity on a later day that is subject to a lease to a second entity in the circumstances described in the preceding paragraph, may also be the 'supply of a going concern'. This is because an enterprise of leasing the relevant property is conducted by the supplier up to the day of the supply, albeit for a brief period of time. The supplier, being the owner of both the business and the real property, is making two supplies, each of which is capable of being the 'supply of a going concern'.

Example 21: One supplier and two recipients

135. *Smithers Pty Ltd (Smithers) operates a bookshop enterprise from premises that it owns. It decides to sell the bookshop enterprise. The purchaser, Bookworm Pty Ltd (Bookworm), for financial reasons does not want to purchase the freehold. Smithers agrees to sell the bookshop enterprise and enters into an agreement to lease the premises to Bookworm. Assuming all other requirements of subdivision 38-J are satisfied, Smithers is making a GST-free 'supply of a going concern', provided that the property is supplied with the lease intact.*

136. *Landmark Pty Ltd (Landmark) is a separate legal entity, although its directors and shareholders are also directors and shareholders of Bookworm. Landmark enters into an agreement with Smithers to acquire the building. The day of supply will be 31 August. Smithers supplies the building to Landmark with the lease intact. For the purposes of section 38-325, we will accept that Smithers has carried on an enterprise of leasing, albeit for only a day, and can therefore make a GST-free supply of a going concern, when it supplies the leasing enterprise.*

Supply of two separate enterprises by two suppliers to one recipient

137. It is not uncommon to have a business structure in which one entity owns the land and buildings and a separate legal entity operates the business from those premises under a lease. When the two entities sell their enterprises to one recipient and the contracts are interdependent, each supply must be considered separately.

138. Where both supplies occur on the same day, each enterprise which is the subject of the separate supplies must be capable of continued operation by the recipient. The supplier of each enterprise can supply all of the things necessary to the recipient to enable them to continue to operate both enterprises. When the supply of both enterprises occurs simultaneously, the recipient of the reversionary interest at the time of the supply of that interest is therefore capable of receiving the benefits of the covenants under the lease.

Example 22: Supply of two enterprises to one recipient

139. *Mr Flintrock owns a commercial property that he leases to Bedstone Pty Ltd, a company of which Mr and Mrs Flintrock are directors and shareholders. Bedstone operates a motel enterprise from the premises. Stoneage Pty Ltd will acquire both enterprises. The successful completion of each contract is subject to the completion of the other contract. Both settlements will take place at the same time.*

140. *Mr Flintrock is carrying on an enterprise of leasing and can supply everything necessary for the continued operation of that enterprise to Stoneage as a GST-free 'supply of a going concern', provided that the property is supplied with the lease intact. Bedstone will sell all the plant, equipment and goodwill, together with forward bookings. Provided that Bedstone also assigns the lease of the premises to Stoneage, it will be making a GST-free supply of a going concern.*

Supplier carries on the enterprise until the day of the supply

141. The supply of everything necessary for the continued operation of an enterprise will only be a 'supply of a going concern' where the enterprise is carried on by the supplier until the day of the supply. All of the activities of the enterprise must be active and operating on the day of the supply. The activities must be capable of continuing after the transfer to new ownership.

142. A supply will not be a 'supply of a going concern' where, on the day of the supply, the activity carried on by the enterprise has ceased.[17AA] The New Zealand case of *Belton v. CIR* (1997) 18 NZTC 13,403 provides a useful illustration of a failure to fulfil a similar requirement under the New Zealand law. In that case, an owner of an operating motel sold the motel. Under the contractual agreement, the sale was subject to vacant possession and the land, building and chattels only were transferred to the purchaser. At settlement, the motel had been closed down and there were no future bookings. After the settlement date, the premises was not immediately operated as a motel, but began operating again several weeks later.

143. The Court accepted that the vendor had supplied all the assets necessary for the supply of the motel as a going concern:

> 'The fact that the purchaser could resume operations shortly after the transfer illustrates that there was available a business structure as well as the business activity. Mr Belton could exploit the location goodwill and the benefits flowing from pre-existing clientele, advertising and background. At settlement he was in a position to resume the operation of the motel business notwithstanding the vacant possession which he demanded and received.'

144. However, the supply was held not to be of a going concern because, at the time of the supply, the motel business was not operating.

145. A supplier, who temporarily ceases some activities of an enterprise for a short period, for example, for cleaning and maintenance purposes, to facilitate its supply of everything necessary for the continued operation of the enterprise under the arrangement,[17A] has not ceased to carry on the enterprise for the purposes of paragraph 38-325(2)(b).

146. The enterprise must be carried on by the supplier which may do so itself or have another entity carry on the enterprise on its behalf. However, an entity that does not have legal ownership or possession of the enterprise is not in a position to deal with that enterprise and therefore cannot be the supplier of all of the things that are necessary to continue to operate the enterprise.

Example 23: enterprise not carried on at the day of the supply

147. *Old Salt Limited ('Old Salt') owns a fishing vessel and fishing licence, both of which it leases to the Rockhopper partnership on a month to month basis. The partnership carries on a business of fishing using the trawler and licence. Old Salt enters into a contract to sell the fishing boat and licence to George Gudgeon, terminating the lease arrangement with Rockhopper two days before the settlement date.*

[17AA] See, for example, *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [261]. By the date of the contract Aurora was no longer engaged in the development of the land (the residential development project enterprise) but was instead engaged in the sale of a residential development site as part of its general business undertaking.

[17A] This is a reference to an arrangement that satisfies the requirements of paragraphs 38-325(2)(a) and (b).

148. *Old Salt did not carry on the enterprise of leasing the trawler and licence up to the day of the supply and therefore cannot sell the trawler with the licence as a 'supply of a going concern'.*

Continued operation

149. The term 'carrying on an enterprise' includes doing anything in the course of the commencement or termination of the enterprise.[18] A supplier may carry on an enterprise to the day of the supply for the purposes of paragraph 38-325(2)(b) during the period of commencement or termination of an enterprise.

150. A supplier is unable to supply all of the things that are necessary for the continued operation of an enterprise unless the relevant enterprise is not only being 'carried on', but is also operating. Where an enterprise engaged in an activity ceases to carry on that activity and the assets are in the course of being sold off, the enterprise is being 'carried on', but is not operating.

151. The activity of leasing a building which has previously been leased to a tenant remains an 'enterprise' of leasing for the purposes of section 9-20 during the period of temporary vacancy when a new tenant is being actively sought by the building owner. However, where a building has not previously been leased to a tenant, but is being actively marketed, an 'enterprise of leasing' is not operating until the activity of leasing actually commences. The activity of leasing commences when at least one tenant enters into an agreement to lease or occupies the building.

Example 24: partly tenanted building

152. *The Bullish Unit Trust enters into a contract to sell a large commercial building which it has leased out for several years. At the time of sale, the building has only one tenant which occupies a part of the available floor space. The balance of the floor space is available for lease and the trust has engaged a leasing agent to find tenants for the remaining area. The trust is carrying on an enterprise of leasing the building as it is carrying on leasing activities on a regular or continuous basis.*

153. In the course of conducting an enterprise of leasing a building, certain floors may be unavailable for lease temporarily while repairs, refurbishments or other activities requiring vacancy take place. The requirement that vacant floors be actively marketed will not apply to those floors for the period during which the activities are taking place.

[18] Section 195-1.

154. Some areas or floors may not be available for lease but may still be part of the enterprise of leasing the building. The areas may be used for storage of cleaning equipment, as offices for the building manager or for some other purpose relevant to the enterprise of leasing. Where the supplier can demonstrate that all of the floor space in the building is part of an enterprise of leasing on the day of the supply, the supply of the whole building together with all of the other things necessary for the continuation of the leasing enterprise may be the 'supply of a going concern'.

Example 25: part of the building that is not actively marketed

155. *Bearish Pty Ltd enters into a contract to sell a large commercial building which it has leased out for a number of years. At the time of sale, the building has no tenants. A number of floors are available for lease and the company has engaged a leasing agent to secure tenants for those floors. The remaining floors are being refurbished and these floors are neither tenanted nor actively marketed*.

156. *The company is carrying on an enterprise of leasing the building as it is carrying on leasing activities on a regular or continuous basis. The refurbishment of the vacant floors is one of the activities of the enterprise of leasing the building.*

Example 26: some of the building that is not part of the enterprise of leasing

157. *Breakeven Distributors Pty Ltd ('Breakeven') owns a large commercial property on a single title. The building has five levels. Breakeven conducts a discount retail business from the ground and first floors of the building, and leases the upper three floors as professional offices. Breakeven enters into a contract to sell the building and the agreement states that the supply will meet the requirements of a 'supply of a going concern'. At the time of contract, two levels are leased and the other is being advertised for lease. An office on the first floor is being used as the building manager's office from which the enterprise of leasing the building is conducted. The remaining floor space on this floor is used in the discount retailing business and has never been available for lease.*

158. *The identified enterprise is the leasing of commercial premises. The portion of the building in which an enterprise of leasing is being conducted is the upper three floors and the area occupied by the building manager's office. Provided the conditions in subsection 38-325(2) are satisfied, the supply of this portion of the building together with the other necessary things will be a 'supply of a going concern'.*

Successive Sales

159. Where all of the things that are necessary for the continued operation of the same enterprise are supplied two or more times in succession, each supply subsequent to the initial 'supply of a going concern' cannot be a 'supply of a going concern' unless the relevant supplier of that supply has actually operated the enterprise and carries on the enterprise until the day of the supply.

160. The recipient of a 'supply of a going concern' that immediately on-sells the things that are necessary for the continued operation of the enterprise to a subsequent purchaser without actually operating the enterprise cannot satisfy the requirement in subsection 38-325(2) that it carry on the enterprise to the day of the supply. However, if the operation of the enterprise continues uninterrupted throughout the subsequent supply(s), each supplier will be capable of satisfying the subsection.

The day of the supply

161. The day of the supply is determined in each case by reference to the terms of the particular contract, if applicable, and the nature of the supply.[18A] It is the date on which the recipient assumes effective control and possession of the enterprise carried on by the supplier. The day of the supply occurs when the supplier has done everything to satisfy the obligations under the contract or arrangement governing the supply and the recipient has assumed effective control and possession of all of the things that are necessary for the continued operation of the enterprise.

Example 27: no change in effective control

162. *On 1 August 2000, Frank enters into negotiations to buy a manufacturing business from Kerry. Negotiations are concluded on 31 August and contracts are exchanged on that date with settlement occurring on 31 October 2000. Kerry continues to conduct the business until 31 October. The contract provides that the transfer of the assets and undertaking of the business is deemed to have occurred at midnight on 31 August and that profits or losses incurred after that date are those of the purchaser.*

163. *The day of the supply in these circumstances is the date on which effective control actually passes, that is, 31 October 2000. Notwithstanding that the economic risk and benefit are deemed to have passed at an earlier date, effective control did not pass until 31 October.*

[18A] In *Aurora Developments* (2011) 192 FCR 519 at 573; [2011] FCA 232 at [255-6] Justice Greenwood concluded that the day of settlement of the contract (for the sale of the residential development site) was the 'day of the supply'.

Example 28: change in effective control

164. *Sue enters into a contract to purchase a whale watching business from Cheryl. The assets of the business include a boat, goodwill and a statutory permissive licence from the State Government. Sue takes possession of the boat on 31 October 2000 and commences to carry on the business from that date. The transfer of the licence is subject to formal consent from the relevant Minister and this process is not completed until 30 November. Under the contract, Cheryl is required to work in the business until the transfer of the licence to Sue has been completed. Settlement will occur on the day the licence is issued to Sue.*

165. *The day of the supply is 31 October 2000 because economic ownership and effective control of the enterprise has actually passed to Sue on that day, despite the delay in supply of one of the things necessary for the continued operation of the enterprise.*

Supply of things in addition to those necessary for the continued operation of an enterprise

166. The arrangement to which subsection 38-325(2) refers is the arrangement under which all of the things that are necessary for the continued operation of an enterprise are supplied (paragraph 38-325(2)(a)). It may include the supply of those things which, while not essential to the continued operation of the business, are utilised in the enterprise carried on by the supplier until the day of the supply (paragraph 38-325(2)(b)).

167. [Omitted].

168. Supplies which are not made under the relevant arrangement will not form part of the 'supply of a going concern' and will not be GST-free under subsection 38-325(1).

169. If part of a supply is under the relevant arrangement and part is not, section 9-80 provides a method of apportionment of the GST-free part and the taxable part.

Example 29: supply of things not under the relevant arrangement

170. *A motor mechanic contracts to sell his motor repair business, including the building from which it operates, and a residence located on an adjoining block in which he lives. The supply of the business and any related buildings are supplied under the relevant arrangement. The supply of the residential premises is neither the supply of a thing which is necessary to the continued operation of the 'identified enterprise', nor the supply of a thing used in carrying on the enterprise until the day of the supply. Therefore it is not a supply under the relevant arrangement.*

Going concerns and shares

171. When all of the shares constituting the issued capital of a company are supplied as part of the supply of everything necessary for the continued operation of an enterprise under an arrangement, whether or not the supply of the shares will be under a relevant arrangement will be a question of fact. If the shares are utilised in carrying on the 'identified enterprise', then they may be supplied under the relevant arrangement. Where shares are merely passive investments, they will not be capable of being supplied under the relevant arrangement.

172. The supply of a bundle of shares which does not constitute the whole of the issued capital of a company will be a supply of one of the things necessary for the continued operation of an enterprise where the shares are essential to the continued operation of the enterprise, for example, as trading stock, membership of buyers' cooperatives or a shareholding in a competitor.

Example 30: supply of shares in a subsidiary company

173. *XYZ Ltd ('XYZ') is a parent company for the XYZ group of companies which are engaged in an office furniture manufacturing business. The manufacturing premises are owned by XYZ which conducts the business in its own right, however, a wholly owned subsidiary, Subco Ltd ('Subco'), owns all plant and equipment used by XYZ pursuant to various lease arrangements. XYZ enters into an agreement to sell the manufacturing business to ABC Ltd. Under the contract, XYZ agrees to sell all assets associated with the business, including shares held in Subco.*

174. *The equipment in Subco is utilised solely in the business of XYZ, Subco owns no other assets nor conducts any other enterprise. As the arrangement includes the shares in Subco, the supply of those shares will be considered to be a supply under the relevant arrangement.*

Example 31: shares held as trading stock

175. *Joe Trader is a registered stockbroker who carries on an enterprise of buying and selling shares from leased premises. He enters into an agreement to supply everything necessary for the continued operation of his stockbroking enterprise to another registered stockbroker, Bob Bearish. Under the arrangement Joe is supplying his staff, trading stock (i.e., shares), office equipment, client list and leased premises. For Joe Trader to make a 'supply of a going concern', he must supply his trading stock (i.e., shares) as one of the things that is necessary for the continued operation of the enterprise.*

Example 32: shares as a passive investment

176. *Sparky Pty Ltd ('Sparky') owns a small electrical repairs business which it operates from rented premises. It enters into an arrangement with Ampere Ltd under which Sparky will supply the stock on hand, work-in-progress, advertising material, signage and the lease of the premises. The supply under the contract also includes three parcels of shares in blue chip companies from which Sparky derives dividend income.*

177. *The part of the supply which relates to the parcel of shares is not under the relevant arrangement. The shares are not necessary for the continued operation of the enterprise and are not used in carrying on the enterprise until the day of the supply.*

Agreed in writing

178. One of the requirements of section 38-325 is that the supplier and the recipient have agreed in writing that the supply, being the supply under an arrangement of everything necessary for the continued operation of an enterprise, is a 'supply of a going concern'. This agreement need not necessarily form part of the arrangement under which the 'supply of a going concern' is made.

179. The GST Act does not specify what form the agreement has to be in, nor does it define the term 'agreed in writing'. The term 'agreed' means 'to be in one mind; harmonise in opinion or feeling'.[19]

180. Section 2B of the *Acts Interpretation Act 1901* defines 'writing' as 'includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form.' In *Peverill v. Meir* (1990) 95 ALR 401, Justice Burchett concluded that:

> 'When the Act requires the request to be in writing, I think it refers to a request which read reasonably, conveys the information that the procedure in question is to be performed.'

181. The term 'agreed in writing' means that the supplier and the recipient have made a mutual declaration in such form that clearly evidences that they agree that the supply, being the supply under an arrangement of everything necessary for the continued operation of an enterprise, is a 'supply of a going concern'.

182. The supplier and the recipient must agree that the supply is a 'supply of a going concern' on or before the day of the supply.

[19] Macquarie Dictionary (1997; 3rd edition).

183. An agreement in writing by the parties that there is a 'supply of a going concern' will not conclusively determine that there is a 'supply of a going concern' where the other requirements of subdivision 38-J are not satisfied. This will depend on a consideration of all factual circumstances. For example, there will not be a 'supply of a going concern' under subdivision 38-J where all of the things necessary for the continued operation of an enterprise are not supplied under the relevant arrangement, notwithstanding the terms of any agreement between the parties that the supply is a 'supply of a going concern'.

184. The supply of everything necessary for the continued operation of an enterprise to a recipient who is not registered or required to be registered[20] will not be a GST-free supply, despite the terms of any agreement between the parties that the supply is a 'supply of a going concern'.

185. Where all of the things that are necessary for the continued operation of an enterprise are supplied to a registered recipient but there is no agreement in writing between the parties, there will not be a GST-free 'supply of a going concern'.

Recipient is registered or required to be registered

186. Paragraph 38-325(1)(b) requires that the recipient is registered or is required to be registered. A recipient that is required to be registered in respect of the enterprise on and from the date of the supply will satisfy the requirement in paragraph 38-325(1)(b). If the recipient is not required to be registered, but chooses to register to obtain the benefit of the provision, the mere lodging of an application to be registered will not satisfy the requirements of paragraph 38-325(1)(b). The effective date of registration of the recipient must be on or before the day of the supply.

Options to acquire a thing or things as a going concern

187. Subsection 9-30(1) deals with supplies that are GST-free. In addition to those supplies which are GST-free under Division 38, including the 'supply of a going concern', the subsection also provides that the supply of a right to receive a supply that would be GST-free under Division 38 is GST-free.

188. The supply of an option to acquire a 'supply of a going concern' is a supply of a right to receive a 'supply of a going concern'. Whether the supply of the option is GST-free will depend upon the wording of the option. The wording must have the effect that the supply made on the exercise of the option is GST-free, or the option will not be exercised.

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[20] Division 23.

189. When this principle is applied to the option to acquire a 'supply of a going concern', the parties to the option must agree that, on the exercise of the option, the supply will be a GST-free 'supply of a going concern'. The parties must specify that, on the exercise of the option, what is supplied will satisfy the conditions of section 38-325.

Going concerns and partnerships

190. A partnership interest is the property of the partner and may be assigned or sold by the partner. Merely admitting new partners cannot be the 'supply of a going concern'. What has happened is that a partnership interest has been created. The new partner has been supplied with an interest in each of the assets of the partnership and not with all of the things that are necessary for the continued operation of an enterprise.

191. As the enterprise is carried on by the entity which is the partnership, the supply of an interest in the partnership by either assignment or sale will not be the supply of all of the things that are necessary for the continued operation of the enterprise.

192. When a partner in a partnership disposes of their interest, the supply of that interest will not be a taxable supply because the supply is not in the course or furtherance of an enterprise that is carried on by the partner. However, where an enterprise which involves the acquisition of interests in a number of partnerships is being conducted, the supply of an interest in one of those partnerships is an input taxed supply under item 10 of subsection 40-5.09(3) of the *A New Tax System (Goods and Services Tax) Regulations 2019*.

193. Where the partnership entity sells the enterprise it operates to another entity and that entity is registered or required to be registered, the supply may be GST-free as a 'supply of a going concern'. Similarly, where the partnership sells part of its enterprise which forms part of a larger enterprise, to another entity and all of the conditions of section 38-325 are satisfied, the supply may be GST-free as the 'supply of a going concern'.

194. The GST status of the supplies which are made on formation of a partnership will depend on the facts and circumstances surrounding the supplies in question, including the registration status of the parties to the arrangement and the nature of the enterprise concerned. A sole trader/practitioner will make a supply of a going concern to a partnership of which he or she is a partner in circumstances where he or she supplies all of the things necessary for the continued operation of an enterprise and continues to carry on the enterprise to the day of supply to the partnership.

Going concerns and joint ventures

195. Whether or not a business structure is a joint venture is a matter of fact. If the business structure is a joint venture, then each joint venturer is an entity which is capable of conducting an enterprise. Provided that all of the requirements of section 38-325 are satisfied, it is possible for a joint venturer entity to make a GST-free 'supply of a going concern'. This may be when part or all of the enterprise conducted by the joint venturer is supplied, provided that what is supplied is all of the things that are necessary for the continued operation of the 'identified enterprise'.

Going concerns and companies

196. The supply of all of the shares in a company that conducts an enterprise is not the 'supply of a going concern' when the shares are all that is supplied. The supply of the shares may satisfy the test in paragraph 38-325(2)(a) as it is the supply of all of the things that are necessary for the continued operation of an enterprise. The supplier of the shares is the shareholder. The supply will fail the test in paragraph 38-325(2)(b) because the supplier of the shares does not conduct the enterprise and so cannot carry it on until the day of the supply. The 'identified enterprise' is the enterprise conducted by the entity which is the company. A supply of shares may be a financial supply.[21]

197. However, where an entity which conducts an enterprise is a company and the company supplies all of the things that are necessary for the continued operation of the enterprise in accordance with the conditions of subdivision 38-J, there will be a GST-free 'supply of a going concern'.

Going concerns and trusts

198. An enterprise may be conducted by an entity which is a trust. It is the trustee of the trust, as the entity conducting the enterprise, which may make a 'supply of a going concern'.

A 'supply of a going concern' which would otherwise be input taxed

199. Where a supply under an arrangement is GST-free because of the application of Subdivision 38-J, input tax credits on creditable acquisitions made in relation to the supply are available to the supplier.

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[21] Item 10 of subsection 40-5.09(3) of the *A New Tax System (Goods and Services Tax) Regulations 2019*.

200. Input tax credits relating to a supply, which would have otherwise been input taxed but is GST-free because of the operation of the Subdivision 38-J, are available to the extent that they relate to the supply under the arrangement. This means that input tax credits relating to the acquisition and use of the thing supplied will not be available, but those relating to the supply of the thing under the arrangement are available.

201. The acquisition of a thing used to make input taxed supplies is not a creditable acquisition to the extent that it is used for that purpose. Input tax credits are also not available in relation to the use of the thing to make input taxed supplies. However, as the supply of the thing under an arrangement which satisfies the conditions of Subdivision 38-J is GST-free, acquisitions for the purposes of making that supply are for a creditable purpose and the input tax credits which relate to those acquisitions will be available to the supplier.

Example 33: availability of input tax credits

202. *Gerald acquires a block of flats which are subsequently let as residential premises for several years. Gerald sells the property to Grace with existing leases intact. The supply is for consideration, Gerald and Grace are both registered for GST and they agree in writing that the 'supply is of a going concern'. In the course of the sale, Gerald consults a solicitor and utilises the services of a real estate agent*.

203. *As the acquisition of the premises by Gerald is for the purpose of making input taxed supplies, it is not acquired for a creditable purpose and input tax credits are not available in relation to the acquisition. The acquisitions made in the course of the leasing activities, such as plumbing and painting, are also not acquisitions for a creditable purpose. The input tax credits in relation to these acquisitions are not available to Gerald*.

204. *The supply of the premises as a 'supply of a going concern' is GST-free and acquisitions made in the course of making that supply are made for a creditable purpose. The input tax credits in relation to the acquisition of legal services and real estate services are available to Gerald*.[22]

Mortgagee exercising a power to dispose of a debtor's property

205. Division 105 deals with supplies made by creditors of property belonging to a debtor where the supply is made in satisfaction of a debt owed to the creditor. The Division may be relevant when the property in question is being utilised to conduct an enterprise, such as the leasing of premises.

[22] As Grace intends to continue to lease the premises for residential purposes, she will be making wholly input taxed supplies and will have an increasing adjustment under section 135-5. See *Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 at [46]; 2014 ATC 20-474; (2014) 92 ATR 241.

206. At law or by virtue of the security documents, the creditor may be acting as agent for the debtor. In this case, the act of the creditor will be the act of the debtor and there is no need to consider the application of Division 105 as the ordinary rules will apply.[23] If this is not the case, it is necessary to consider the operation and application of Division 105.

207. Subsection 105-5(1) provides that a supply of property by a creditor is a taxable supply if the supply would have been a taxable supply had it been made by the debtor.

208. However, subsection 105-5(3) provides that a supply is not a taxable supply if either:

(a) the debtor has given the creditor a notice in writing that the supply would not be a taxable supply if the debtor were to make it, or,

(b) the creditor believes on the basis of reasonable information that the supply would not be a taxable supply if the debtor were to make it.

209. One view is that on a strict literal interpretation of subsection 105-5(3), a creditor could not sell a leasing enterprise, including the property from which it is conducted, that would otherwise have been a GST-free 'supply of a going concern' if hypothetically made by the debtor because the debtor would be unable to satisfy one or more of the three requirements in subsection 38-325(1). In particular, the debtor may not be able to:

(a) enter into an agreement required under paragraph 38-325(1)(c);

(b) supply all of the other things necessary for the continued operation of the enterprise as required under paragraph 38-325(2)(a); or

(c) carry on the enterprise to the day of supply as required under paragraph 38-325(2)(b).

210. We consider the better view is that by using the words 'if the debtor were to make it' in subsection 105-5(3) the legislation contemplates a hypothetical or notional supply by the debtor since there is no supply in fact made by the debtor. The notional transaction can only be analysed and effect given to the intent of the provision by treating the supply as if it were made by the debtor in the same circumstances as the supply contemplated and actually made by the creditor. If it could be concluded that a supply hypothetically made by the debtor in the same circumstances as the actual supply contemplated and made by the creditor would have satisfied the requirements of section 38-325 then the actual supply by the creditor is not a taxable supply.

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[23] See GSTR 2000/37 Goods and Services Tax: Agency Relationships and the Application of the Law.

211. Before a creditor can treat a supply as not taxable under Division 105, it is necessary that the requirements of subsection 105-5(3) are satisfied. This may be achieved by either the debtor giving the creditor a written notice stating the supply would not be a taxable supply if the debtor were to make it, and stating fully the reasons why the supply would not be a taxable supply, or if the creditor cannot obtain such a notice, the creditor believes on the basis of reasonable information that the supply would not be a taxable supply if the debtor were to make it.

Example 34: Mortgagee sale of whole enterprise

212. *Mr White (debtor) owns a commercial property that is fully tenanted. He is registered for GST. A Bank Ltd (creditor) lent the funds to Mr White to acquire the property and holds a mortgage over the property.*

213. *When Mr White defaults on the loan repayments, A Bank Ltd takes possession of the property and continues to carry on the leasing enterprise whilst marketing the property for sale, subject to the existing leases. A purchaser is found and A Bank Ltd and the purchaser of the property agree that the sale is a 'supply of a going concern'. Mr White gives a written notice to A Bank Ltd stating the supply would not be a taxable supply if he were to make it and stating fully the reasons based on section 38-325 why the supply would not be a taxable supply.*

214. *Because the supply if notionally made by the debtor would have been a GST-free supply of a going concern, the supply will not be a taxable supply when actually made by the creditor.*

Alternative 1: A Bank Ltd exercises power of sale without entering into possession

215. *The same facts as in the example above except, Mr White remains in possession and continues to carry on the leasing enterprise of the property during the marketing campaign and up and until settlement of the sale (by the mortgagee exercising its power of sale) to the purchaser. Mr White carries on the enterprise as a representative of the creditor.*

216. *Because the supply if notionally made by the debtor would have been a GST-free 'supply of a going concern', the supply will not be a taxable supply when actually made by the creditor.*

Alternative 2: A Bank Ltd appoints a receiver and manager, but nonetheless disposes of the property using power of sale

217. *The same facts as in the example above except, A Bank Ltd appoints a receiver and manager who takes possession of the property on behalf of A Bank Ltd and continues to carry on the leasing enterprise. The supply, if notionally made by the debtor would have been a GST-free 'supply of a going concern'. Consequently, the supply will not be a taxable supply when actually made by the creditor. (Note: if the receiver sells the property in its capacity as receiver of an incapacitated entity, the receiver is the supplier. Liability for GST would rest with the receiver under Division 58 and Division 105 would not apply. That being the case, the receiver has to satisfy the section 38-325 requirements in his own capacity.)*

Example 35: supply by creditor and debtor

218. *Rent Me Pty Ltd (debtor) operates a national car hire enterprise. The fleet of hire vehicles was financed under a loan from Big Bank Ltd (creditor) which holds a chattel mortgage over the vehicles. Rent Me defaults on its repayments and Big Bank decides to exercise its power of sale under the chattel mortgage but allows Rent Me to continue to use the vehicles to operate the enterprise during the period in which Big Bank searches for a buyer of the vehicles.*

219. *Driveby Pty Ltd, a competitor of Rent Me expresses an interest in acquiring the fleet of vehicles as well as acquiring the leasing enterprise that Rent Me is carrying on. Driveby enters into an agreement to buy the vehicles from Big Bank and separately secures the agreement of Rent Me to acquire its enterprise. The agreements are conditional upon each other. The contracts are to be completed on the same day and Rent Me, Big Bank and Driveby agree that the supply is a 'supply of a going concern'. Before settlement of the contracts, Big Bank received the necessary written notice from Rent Me as required by paragraph 105-5(3)(a).*

220. *Had Rent Me supplied the vehicles in conjunction with the supply of its enterprise then the supply of the fleet vehicles would have formed part of a 'supply of a going concern' that would have been GST-free under subdivision 38-J. The supply of the vehicle fleet by Big Bank will not be a taxable supply in these circumstances.*

Detailed contents list

221. Below is a detailed contents list for this Ruling:

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Commissioner of Taxation
16 October 2002

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NO: 2001/019185
ISSN: 2205-6157
ATOlaw topic: Goods and services tax ~~ Other GST topics (A to M) ~~ Going concern ~~ Other

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