


# ***GSTR 2002/5A3 - Addendum - Goods and services tax: when is a 'supply of a going concern' GST-free?***

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## Addendum

### Goods and Services Tax Ruling

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

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2002/5 to reflect the Federal Court's decision in *Aurora Developments Pty Ltd v. Commissioner of Taxation* (2011) 192 FCR 519; [2011] FCA 232; (2011) 82 ATR 91; 2011 ATC 20-250 where the supply of a residential development site was held not to be a GST-free supply of a going concern.

The Addendum also amends the Ruling to take account of amendments made to the *Acts Interpretations Act 1901* by the *Acts Interpretation Amendment Act 2011*. Relevantly, there is now a general 'contrary intention' provision that qualifies all relevant provisions of the Acts Interpretation Act and the definition of 'writing' has moved to a new 'definitions' section of the Act.

#### **GSTR 2002/5 is amended as follows:**

##### **1. Paragraph 20**

Insert the footnote at the end of the paragraph:

<sup>2G</sup> 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.

##### **2. Paragraph 29**

Insert the paragraphs after paragraph 29:

29A. These conclusions are consistent with the comments and findings of Justice Greenwood in *Aurora Developments*<sup>3A</sup> (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):

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<sup>3A</sup> *Aurora Developments Pty Ltd v. Commissioner of Taxation* (2011) 192 FCR 519; [2011] FCA 232

...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.<sup>3B</sup>

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;<sup>3C</sup> nor
- an independent enterprise of conducting earthworks on the land.<sup>3D</sup>

29C. Rather, such activities represented Aurora's continuing withdrawal from the development of the land<sup>3E</sup> 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.<sup>3F</sup>

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

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<sup>3B</sup> *Aurora Developments* (2011) 192 FCR 519 at 572-3; [2011] FCA 232 at [253-4].

<sup>3C</sup> *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [263].

<sup>3D</sup> *Aurora Developments* (2011) 192 FCR 519 at 575; [2011] FCA 232 at [266].

<sup>3E</sup> *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [263].

<sup>3F</sup> *Aurora Developments* (2011) 192 FCR 519 at 575; [2011] FCA 232 at [266].

<sup>3G</sup> *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [261].

<sup>3H</sup> *Aurora Developments* (2011) 192 FCR 519 at 574; [2011] FCA 232 at [262].

**3. Footnote 4**

Omit the footnote; substitute:

<sup>4</sup> *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.

**4. Paragraph 43**

Omit: ‘, unless the contrary intention appears’.

**5. Paragraph 44**

Before the first sentence; insert: ‘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.’<sup>4A</sup>.

**6. Paragraph 142**

At the end of the first sentence insert the following footnote:

<sup>17AA</sup> 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.

**7. Paragraph 161**

At the end of the first sentence insert the following footnote:

<sup>18A</sup> 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’.

**8. Paragraph 180**

In the first sentence, omit ‘Section 25’; insert ‘Section 2B’.

**9. Legislative references**

Omit:

- Acts Interpretation Act 1901 25

Insert:

- Acts Interpretation Act 1901 2(2)
- Acts Interpretation Act 1901 2B

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<sup>4A</sup> Subsection 2(2) of the *Acts Interpretation Act 1901*.

## 10. Case references

Insert:

- Aurora Developments Pty Ltd v. Commissioner of Taxation (2011) 192 FCR 519; [2011] FCA 232; (2011) 82 ATR 91; 2011 ATC 20-250

This Addendum applies on and from its date of issue.

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**Commissioner of Taxation**

27 March 2013

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ATO references

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