

GSTR 2003/13A3 - Addendum - Goods and services tax: general law partnerships

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Addendum

Goods and Services Tax Ruling

Goods and services tax: general law partnerships

This Addendum amends Goods and Services Tax Ruling GSTR 2003/13 Goods and services tax: general law partnerships as a consequence of a change in the Commissioner's view in relation to the question of whether upon dissolution of a general law partnership an *in specie* distribution made by the partnership to a partner is made for consideration. The existing views contained in GSTR 2003/13 were reconsidered in the context of GSTR 2009/1 Goods and services tax: general law partnerships and the margin scheme. GSTR 2009/1 explains how the margin scheme in Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) applies to general law partnerships and its partners. This Addendum amends GSTR 2003/13 as it relates to the treatment of *in specie*¹ distributions by a general law partnership to its partners.

This Addendum also amends GSTR 2003/13 to reflect an amendment to the definition of partnership in section 995-1 of the *Income Tax Assessment Act 1997*. The amendment was made by *Tax Laws Amendment (2004 Measures No. 2) Act 2004* (see item 5 of Schedule 3), and applies to things done on or after 2 December 2003.

This Addendum also amends GSTR 2003/13 to reflect updated section number references from the *Taxation Administration Act 1953*, as a result of amendments to that act.

GSTR 2003/13 is amended as follows:

1. Paragraph 7

Omit 'section 37 of the *Taxation Administration Act 1953*'; substitute 'section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*'.

¹ In this Addendum, an *in specie* distribution has the same meaning as an in kind distribution, which is the terminology used in GSTR 2003/13.

2. Paragraph 8

After the note; insert:

The Addendum to this Ruling that issued on 8 April 2009 explains the Commissioner's view of the law as it applied from 11 June 2008, which is the date of issue of the draft Addendum. You can rely upon this Addendum (issued on 8 April 2009) on and from 11 June 2008 for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

3. Paragraph 9

Omit the second sentence; substitute:

That definition^{3A} states:

partnership means:

- (a) an association of persons (other than a company or a *limited partnership) carrying on business as partners or in receipt of *ordinary income or *statutory income jointly; or
- (b) a limited partnership.

4. Paragraph 10

Omit the first sentence; substitute:

The first limb of paragraph (a) of the definition refers to 'an association of persons (other than a company or limited partnership) carrying on business as partners'.

5. Paragraph 11

Omit the paragraph; substitute:

11. The second limb of paragraph (a) of the definition of partnership includes as a partnership an association of persons (other than a company or limited partnership) 'in receipt of ordinary income or statutory income jointly'. This type of partnership is referred to as a tax law partnership.

6. Paragraph 16

Omit the paragraph; substitute:

16. A general law partnership, as described in the first limb of paragraph (a) of the definition of a partnership, is 'an association of persons (other than a company or a limited partnership) carrying on business as partners'.

^{3A} The definition of partnership in subsection 995-1(1) of the ITAA 1997 was amended by *Tax Laws Amendment (2004 Measures No. 2) Act 2004* – see item 5 of Schedule 3.

7. Footnote 20

Omit the text; substitute:

See Goods and Services Tax Determination GSTD 2006/6 Goods and services tax: does MT 2006/1 have equal application to the meaning of 'entity' and 'enterprise' for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999*?

8. Footnote 48

Omit 'GSTR 2000/15'; substitute 'Goods and Services Tax Ruling GSTR 2006/4 Goods and services tax'.

9. Paragraph 86

Omit the paragraph including headings; substitute:

Operation of the partnership***In specie distributions during the operation of the partnership***

85A. The Commissioner considers that an *in specie* distribution of partnership property by a partnership to a partner is a supply made by the partnership. The supply is made in the course or furtherance of the partnership's enterprise and is for consideration.

In the course or furtherance of an enterprise

85B. The phrase, 'in the course or furtherance of an enterprise' is not defined in the GST Act. The phrase forms part of the requirements that must be satisfied in order for a taxable supply to be identified for the purpose of establishing a liability to GST.

85C. The Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Bill 1998* (the Explanatory Memorandum), at paragraph 3.10, supports a broad meaning of the phrase 'in the course or furtherance of'. It states:

'In the course or furtherance' is not defined, but is broad enough to cover any supplies made in connection with your enterprise. An act done for the purpose or object of furthering an enterprise, or achieving its goals, is a furtherance of an enterprise although it may not always be in the course of that enterprise. In the course or furtherance does not extend to the supply of private commodities, such as when a car dealer sells his or her own private car. See *Case N43* (1991) 13 NZTC 3361.

85D. Having regard to the context in which the phrase ‘in the course or furtherance of’ appears and the above statement from the Explanatory Memorandum, the phrase should be given a broad meaning so as to encompass supplies made in connection with the relevant enterprise.

85E. The application of an asset in an enterprise establishes the necessary connection between the supply of the asset and the relevant enterprise.^{49A}

85F. The GST Act does not require that an asset must be applied primarily or principally in carrying on the enterprise for the supply of an asset to be in the course or furtherance of an enterprise. Accordingly, a connection between the supply of partnership property by way of an *in specie* distribution and the enterprise carried on by the partnership exists even if, at the time of the supply, the partnership property is applied in carrying on the enterprise to a minor or secondary extent.

85G. Furthermore, for the purposes of the GST legislation a general law partnership is an association of persons carrying on business as partners. Therefore, the existence of a partnership implies that all of its activities are in the course of its business activities and thus in the course or furtherance of an enterprise carried on by the partnership.

Supply for consideration

85H. The Commissioner takes the view that an *in specie* distribution of partnership property by a partnership to a partner is made for consideration. The consideration may be monetary, non-monetary or a combination of both.

^{49A} It is noted that a supply that has no discernible relationship and hence no connection with an entity’s enterprise cannot be a taxable supply even if the asset is applied by entity in carrying on the enterprise. The Commissioner considers that it will be an exceptional circumstance for a supply of an asset that is applied in the supplier’s enterprise not to have a connection with the enterprise. One example of this circumstance is identified in paragraph 42 of Goods and Services Tax Ruling GSTR 2003/6. GSTR 2003/6 is about the transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances. Although such supplies are not in the course or furtherance of an enterprise, a partnership making such supplies should consider whether an adjustment under Divisions 129 or 138 is required in respect of all acquisitions or importations that relate to the making of the supply.

85I. 'Consideration' is defined widely in subsection 9-15(1) of the GST Act to include any payment, or any act or forbearance, in connection with, in response to or for the inducement of a supply of anything. Subsection 9-15(1) provides an inclusive definition of the term. Therefore, in addition to the specific terms in the GST Act, it incorporates the meaning of the term in contract law and also incorporates its broader meaning in conveyancing which was referred to by Dixon J in the High Court decision in *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)*^{49B} (*Archibald Howie*). For GST purposes 'consideration' is therefore a broad term.

85J. In *Archibald Howie*, the company transferred shares in another company to two shareholders who held shares in Archibald Howie Pty Ltd. The purpose of the transfers was to carry out a resolution for the reduction of the share capital of the appellant company. The reduction was carried out by a distribution of assets *in specie*. In relation to the facts Dixon J stated:

In the context I think that the word "consideration" should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts. The difference is perhaps not very material because the consideration must be in money or money's worth. But in the law of simple contracts it is involved with offer and acceptance: indeed properly understood it is perhaps merely a consequence or aspect of offer and acceptance. Under s. 66 the consideration is rather the money or value passing which moves the conveyance or transfer. (at 152)

...

The truth is, however, that the return of ... the amount paid up is the discharge pro tanto of a claim of the shareholder upon the assets of the company. (at 153)

...

The reduction in both the amount and value of the share affords an adequate consideration in money and in money's worth. (at 154)

85K. The Commissioner considers that the comments by Dixon J in *Archibald Howie* apply equally to *in specie* distributions by partnerships to partners.

^{49B} (1948) 77 CLR 143; [1948] HCA 28.

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85L. In *Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd*^{49C} (*Reliance Carpet*) the High Court noted that, under section 9-15 of the GST Act, consideration includes, among other things, any payment 'in connection with' a supply of anything. The High Court in *Reliance Carpet* in analysing the decision of the European Court of Justice in *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie*,^{49D} gave some indication that the connection between consideration and a supply need not be direct, though it did not expand on what the extent of the connection needs to be.^{49E}

85M. The capital contributed by a partner to the partnership entitles the partner to an interest in the partnership, and gives rise to an entitlement to a distribution of any surplus remaining on dissolution of the partnership (after payment of partnership debts and other liabilities and after return of capital to the partners). The right to an *in specie* distribution is a consequence of the partner contributing capital to the partnership and becoming a partner under the partnership agreement.

85N. The *in specie* distribution of property by a partnership to a partner has the effect of discharging a claim that the partner has over the assets of the partnership. Consequently, when an *in specie* distribution is made the partner's entitlement or claim over the assets of the partnership is proportionately reduced. The Commissioner considers that the partner's entitlement or claim over the assets of the partnership forms part of the partner's wider interest in the partnership. Therefore, the consideration for an *in specie* distribution from a partnership is the proportion of the partner's interest in the partnership. It is expected that the GST inclusive market value of this proportion of the partner's interest in the partnership, that represents consideration for the *in specie* distribution^{49F}, would be reflected by the value of the property distributed and may be represented by:

- (a) an amount debited to the capital account of the partner;
- (b) an amount debited to the current account of the partner; or
- (c) a combination of amounts debited to both the partner's capital account and current account.

^{49C} [2008] HCA 22 at [7].

^{49D} [2007] 3 CMLR 1003.

^{49E} [2008] HCA 22 at [30].

^{49F} See section 9-75. Where the consideration for a supply is non-monetary, the GST inclusive market value of that consideration is used to work out the price and value of the supply. 'GST inclusive market value' is defined in section 195-1.

85O. There may be circumstances where the value of the *in specie* distribution is greater than the total credit standing to the partner, as reflected by the combined balance of the partner's capital and current account. In these circumstances, the consideration for the *in specie* distribution, in addition to the proportion of the partner's interest in the partnership represented by the combination of amounts debited to both the partner's capital account and current account, will also include:

- any monetary payment by the partner to the partnership with respect to the partnership property; plus
- any entry into an obligation, or promise by the partner, to pay the partnership an amount in respect of the partnership property.^{49G}

85P. The consideration for the *in specie* distribution may be represented by one or more of the things described in paragraphs 85N and 85O of this Ruling.

86. If a partnership makes supplies to the partners or their associates in the course or furtherance of its enterprise without consideration or for inadequate consideration, Division 72 may apply.

10. Footnote 55

Omit '2000/2'; substitute '2006/1'.

11. Paragraph 102 to 103

Omit the paragraphs including heading and footnote; substitute:

102. For the purposes of Division 130, it is the private or domestic use by the partnership that is relevant. The Commissioner considers that when goods are removed from the partnership for private consumption by a partner, the partnership will not have an increasing adjustment under Division 130. Rather, there is a supply by the partnership in the course or furtherance of its enterprise.⁶⁰ If there is no consideration, or the supply is for inadequate consideration, Division 72 may apply and the supply may still be a taxable supply.^{60A}

^{49G} As reflected in the partner's loan account or similar.

⁶⁰ See paragraphs 85B to 85G of this Ruling.

^{60A} See paragraphs 86 to 92 of this Ruling.

12. Paragraph 135

Omit the paragraph; substitute:

135. The Commissioner considers that where an asset is distributed *in specie* to a partner there is a supply made by the partnership in the course or furtherance of the partnership's enterprise.^{90A} The GST Act specifically provides that anything done in connection with the termination of an enterprise is treated as done in the course of carrying on that enterprise. Accordingly, there can be no doubt that all supplies of assets made whilst the business of the partnership is being wound up are in the course of the enterprise that the partnership carries on.

Final distributions to the partners

135A. The Commissioner takes the view that an *in specie* distribution to the partners as part of the final distribution is made by a partnership for consideration.^{90B}

135B. A partner's interest in the partnership (including an interest in the capital of the partnership) entitles the partner to a return of capital when the partnership is dissolved. The partner's interest in the partnership entitles the partner to a share of the ultimate residue after the payment of the debts and liabilities of the partnership and after the return of capital.

135C. When a partnership makes an *in specie* distribution to a partner as part of a final distribution it is a consequence of the partner contributing capital to the partnership and becoming a partner under the partnership agreement or as a consequence of an accumulation of income within the partnership. The consideration for an *in specie* distribution from a partnership is the proportion of the partner's interest in the partnership. It is expected that the GST inclusive market value of this consideration would be reflected by the value of the property distributed and may be represented by:^{90C}

- (a) an amount debited to the capital account of the partner;
- (b) an amount debited to the current account of the partner; or
- (c) a combination of amounts debited to both the partner's capital account and current account.

^{90A} It makes no difference whether the *in specie* distribution is made while the partnership is continuing or under a general dissolution.

^{90B} See *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 (Archibald Howie) per Dixon J at pages 152-154; [1948] HCA 28. See paragraphs 85I and 85J of this Ruling for a discussion of *Archibald Howie*.

^{90C} See paragraphs 85M to 85P of this Ruling for further details.

Example 12: supplies made by a partnership to the partners on winding up

135D. *Jim and Myra, painters and decorators, decide to retire and wind up their GST registered partnership. The partnership plant and equipment are sold to another firm of decorators. The supply of plant and equipment is made to the other firm of decorators in the course or furtherance of the partnership's enterprise, and is a taxable supply by the partnership.*

135E. *However, not all of the partnership assets need to be sold to meet the debts and other liabilities of the partnership. The partnership is left with \$6,000 in money, and a motor vehicle with a GST inclusive value of \$5,500. The partnership's final distribution to Jim consists solely of the vehicle.*

135F. *Jim's interest in the partnership is reduced by the value of the vehicle upon the making of the final distribution to him. The supply of the vehicle by the partnership is made in the course or furtherance of the partnership's enterprise, for consideration equal to the reduction in the value of Jim's interest in the partnership (including his interest in the capital of the partnership). As a result, the supply by the partnership to Jim is a taxable supply. As the GST exclusive market value of the vehicle is \$5,000, the partnership has a GST liability of \$500. After discharging this liability, the partnership has \$5,500 in money.*

135G. *The partnership makes a final distribution of the remaining \$5,500 in money to Myra. This is not a supply for GST purposes.*

13. Paragraph 193

Omit:

Operation of the partnership	86
<i>The application of Division 72</i>	86
<i>Example 9: Goods own use</i>	103

Insert:

Operation of the partnership	85A
<i>In specie distributions during the operation of the partnership</i>	85A
<i>In the course or furtherance of an enterprise</i>	85B
<i>Supply for consideration</i>	85H
<i>Final distributions to the partners</i>	135A
<i>Example 12: supplies made by a partnership to the partners on winding up</i>	135D

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14. References

(a) Omit from the Related Rulings/Determinations references:

GSTB 2000/2
MT 2000/1
GSTD 2000/8
GSTR 2000/15

Insert:

GSTB 2006/1
MT 2006/1
GSTD 2006/6
GSTR 2006/4
GSTR 2003/6

(b) Omit from the Legislative references:

- TAA 1953 37

Insert:

- ANTS(GST) A99 9-75
- TAA 1953 Sch 1 105-60
- Tax Laws Amendment (2004 Measures No. 2) Act 2004 Sch 3
- ITAA 1997 995-1(1)

(c) Insert into Case references:

- Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143; [1948] HCA 28
- Case N43 (1991) 13 NZTC 3361
- Federal Commissioner of Taxation v. Reliance Carpet Co Pty Ltd [2008] HCA 22; (2008) 68 ATR 158; (2008) 2008 ATC 20-028
- Société Thermale d'Eugénie-les-Bains v. Ministère de l'Economie, des Finances et de l'Industrie [2007] 3 CMLR 1003

(d) Insert:

Other references:

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

This Addendum explains the Commissioner's view of the law as it applied from 11 June 2008, which is the date of issue of the draft Addendum. You can rely upon this Addendum on and from 11 June 2008) for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

ATO references

NO: 2006/20258

ISSN: 1443-5160

ATOlaw topic: Goods and Services Tax ~~ Rules for entity types ~~
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supply
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