


# ***GSTR 2004/9A5 - Addendum - Goods and services tax: GST consequences of the assumption of vendor liabilities by the purchaser of an enterprise***

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## Addendum

### Goods and Services Tax Ruling

#### Goods and services tax: GST consequences of the assumption of vendor liabilities by the purchaser of an enterprise

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2004/9 to clarify when an entity makes a supply as a result of the decision of the High Court in *Commissioner of Taxation v. MBI Properties Pty Ltd* (2014) 254 CLR 376; [2014] HCA 49; (2014) 92 ATR 241; 2014 ATC 20-474.

#### **GSTR 2004/9 is amended as follows:**

##### **1. Paragraph 8**

Omit the Note; substitute:

**Note:** the Addenda to this Ruling that issued on 14 August 2013 and 20 December 2017 apply both before and after their date of issue. You can rely upon the Addenda on and from their date of issue for the purpose of section 357-60 of Schedule 1 to the *Taxation Administration Act 1953*.

##### **2. Paragraph 9**

Omit the first sentence; substitute 'If the Addendum conflicts with a previous private ruling that you have obtained or a previous public ruling, the Addendum prevails.'

##### **3. Paragraph 41**

- (a) Omit the first sentence; substitute 'In adopting the ordinary and natural meaning of the term, 'to furnish or provide', court and tribunal decisions have suggested that an entity must take some action to 'make a supply'.<sup>8A</sup>'
- (b) Omit the words 'normalised verbs' in the second sentence; substitute 'terms'.

<sup>8A</sup> *Shaw v. Director of Housing and State of Tasmania (No. 2)* [2001] TASSC 2, 2001 ATC 4054, (2001) 46 ATR 242; *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461, 2006 ATC 4363, (2006) 62 ATR 682; *Re Hornsby Shire Council v. Commissioner of Taxation* [2008] AATA 1060, 2008 ATC 10-061, (2008) 71 ATR 442, *Reglon Pty Limited v. Commissioner of Taxation* (2011) 212 FCR 422, 2011 ATC 20-267, (2011) 81 ATR 599. This is also discussed in further detail in GSTR 2006/9 at paragraphs 71 to 79.

## 4. Paragraphs 42 to 44

Omit paragraphs 42 (including the heading), 43 and 44 including footnotes 9, 10 and 11; substitute:

42. However, the High Court decision in *Commissioner of Taxation v. MBI Properties Pty Ltd* (2014) 254 CLR 376; [2014] HCA 49; (2014) 92 ATR 241; 2014 ATC 20-474 (*MBI Properties*) recognises that performance of an obligation can result in the entity making a supply, even though in performing the obligation the entity may do nothing more than refrain from taking some action or tolerate a situation during a contractually defined period.<sup>9</sup> In this context, the High Court observed that the making of a supply need not always involve the taking of some action on the part of the supplier.<sup>9A</sup>

43. The Commissioner considers that to make a 'supply' an entity must provide something of value to another entity.<sup>10</sup> In addition, the Commissioner considers that an entity does not make a paragraph 9-10(2)(g) obligation supply simply by having a legal obligation imposed on it because circumstances exist which bring the entity within the terms of the obligation in question.<sup>11</sup>

## 5. Paragraph 45

Omit the second sentence; substitute 'It is necessary to determine whether the purchaser provides something under the agreement.'

## 6. Paragraph 50

Omit the second sentence; insert 'If this were the case, it would follow that the purchaser makes a supply in satisfaction of those obligations.'

## 7. Paragraph 51

- (a) Omit the first sentence; substitute 'However, for there to be a supply in the context of obligations arising by operation of law, an entity must provide something in satisfaction of those obligations.'
- (b) Omit the last sentence; substitute 'This obligation is imposed by statute, irrespective of anything done by the purchaser.'

## 8. Paragraph 53

Omit the first two sentences; substitute 'In these cases, the purchaser does not 'make a supply' simply by having a legal obligation imposed on it because circumstances exist which bring the entity within the terms of the obligation.'

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<sup>9</sup> *Commissioner of Taxation v. MBI Properties Pty Ltd* (2014) 254 CLR 376; [2014] HCA 49 at [34]-[36]. See also GSTR 2006/9 at paragraph 77.

<sup>9A</sup> *MBI Properties* at [33].

<sup>10</sup> See proposition 5 of GSTR 2006/9.

<sup>11</sup> See paragraph 78 in GSTR 2006/9.

**9. Detailed contents list**

Omit:

*'Make a supply'* 42**10. Case references**

Insert:

- Commissioner of Taxation v. MBI Properties Pty Ltd (2014) 254 CLR 376; [2014] HCA 49; (2014) 92 ATR 241; 2014 ATC 20-474
- Re Hornsby Shire Council v. Commissioner of Taxation [2008] AATA 1060, 2008 ATC 10-061, (2008) 71 ATR 442
- Reglon Pty Limited v. Commissioner of Taxation (2011) 212 FCR 422, 2011 ATC 20-267, (2011) 81 ATR 599
- Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd (2006) 152 FCR 461, 2006 ATC 4363, (2006) 62 ATR 682

Omit:

- Walter Construction Group Ltd v. Walker Corporation Ltd (2001) 47 ATR 48; [2001] NSWSC 283

This Addendum explains the Commissioner's view of the law as it applies both before and after its date of issue.

**Commissioner of Taxation**

20 December 2017

## ATO references

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 Goods and services tax ~~ Property ~~ Other

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