GSTR 2005/5 - Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/8: use of the Going Concern provisions and the Margin Scheme to avoid or reduce the Goods and Services Tax on the sale of new residential premises

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Goods and Services Tax Ruling

Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/8: use of the Going Concern provisions and the Margin Scheme to avoid or reduce the Goods and Services Tax on the sale of new residential premises

Contents Para

What this Ruling is about 1
Date of effect 4
Background 7
Legislative context 11
Ruling 19
Explanation (this forms part of the Ruling) 26
Detailed contents list 82

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 (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

What this Ruling is about

1. This Ruling provides the Commissioner's view in relation to arrangements referred to in Taxpayer Alert TA 2004/8: Use of the Going Concern provisions and the Margin Scheme to avoid or reduce the Goods and Services Tax (GST) on the sale of new residential premises.

2. In particular, it considers:

- whether the supply of partially or substantially completed residential units, houses or lots without other things is the supply of a going concern under

Subdivision 38-J of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act);

- whether an entity that acquires a going concern can choose to apply the margin scheme under Division 75 on the supply of new residential premises or other real property to third parties; and
- whether the general anti-avoidance provisions in Division 165 may apply to the arrangement referred to in the Alert.

3. Unless otherwise stated, all legislative references in this Ruling are to the GST Act.

Date of effect

4. 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).

5. [Omitted.]

6. [Omitted.]

Background

7. Taxpayer Alert TA 2004/8 issued on 7 April 2004. It describes arrangements using Subdivision 38-J and Division 75 that purport to minimise GST payable on the supply of new residential premises. The arrangements can also purportedly be used to minimise GST payable on the supply of other types of real property such as commercial units or vacant lots.

Features of the arrangements

8. The arrangements exhibit some or all of the following features:

(a) participants are usually introduced to the arrangement by advisers who promote the purported GST benefits of the arrangement;

(b) two or more entities enter into arrangements for the purpose of constructing or developing and marketing residential premises or lots;

(c) the supplying entity owns or acquires land and constructs or develops, or arranges for the construction or development, of residential premises or lots;

(d) the supplying entity sells the partially or substantially completed residential premises or lots to the acquiring

entity, under an arrangement for the supply of a going concern. The entities agree in writing that the supply is the supply of a going concern;

(e) the acquiring entity completes the construction or development, or arranges for the completion of the construction or development, of the residential premises or lots (development activities);

(f) the acquiring entity sells the completed new residential premises or lots to third parties, applying the margin scheme to calculate the GST on the supply; and

(g) the supplying entity and acquiring entity are commonly associates or otherwise act in concert to obtain a GST benefit.

9. The supplying entity claims input tax credits for its costs incurred up to the time of the sale of the substantially or partially completed premises or lots. The acquiring entity claims input tax credits in relation to its activities in completing and selling the premises or lots.

10. Under these types of arrangements the GST payable on the sale of the completed premises or lots is purported to be substantially less than would otherwise be the case if the sale was made direct from the supplying entity to a third party.

Legislative context

Supplies of going concerns – Subdivision 38-J

11. Section 38-325 deals with supplies of going concerns. A supply of a going concern is defined in subsection 38-325(2) as 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 a part of a larger enterprise carried on by the supplier).

12. An enterprise includes 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.[1]

13. The supply of a going concern is GST-free under subsection 38-325(1) if:

(a) the supply is for consideration;

(b) the recipient is registered or required to be registered; and

[1] 'Enterprise' is defined in section 9-20.

(c) the supplier and the recipient have agreed in writing that the supply is of a going concern.

14. Goods and Services Tax Ruling GSTR 2002/5 Goods and services tax: when is a 'supply of a going concern' GST-free? explains the Commissioner's interpretation of section 38-325 and provides examples of supplies of going concerns.

Margin scheme – Division 75

15. The margin scheme is a method of calculating the GST payable on the taxable supply of real property. Subsection 75-5(1) states that you may choose to apply the margin scheme in working out the amount of GST on taxable supplies of real property by:

(a) selling a freehold interest in land;

(b) selling a stratum unit; or

(c) granting or selling a long-term lease.

16. Subsection 75-5(2) provides that you cannot choose to apply the margin scheme if you acquired the freehold interest, stratum unit or long-term lease through a taxable supply on which GST has been worked out without applying the margin scheme. This subsection does not apply if the acquisition satisfies the going concern requirements in section 38-325.

17. Subsection 75-10(2) provides that the margin for the taxable supply is the amount by which the consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question. The application of subsection 75-10(3) is not relevant to the matters referred to in this Ruling.

General anti-avoidance – Division 165

18. Division 165 operates to deter avoidance schemes that are designed to obtain GST benefits by taking advantage of the GST law in circumstances other than those intended by the GST law. The Division allows the Commissioner to make a scheme ineffective where it is reasonable to conclude that the scheme was entered into, or carried out, for the dominant purpose of an entity obtaining a GST benefit, or the scheme had the principal effect of an entity obtaining a GST benefit.[2]

Ruling

19. The supply by the supplying entity to the acquiring entity of:

- substantially or partially completed premises;

[2] Paragraphs 6.303 and 6.305 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

- substantially or partially completed lots; or
- land held for development,

may be the supply of a thing necessary for the continued operation of an enterprise for the purposes of paragraph 38-325(2)(a).

20. The supply of premises, lots or land without other things will not satisfy paragraph 38-325(2)(a). The supplying entity needs to supply the premises, lots or land to the acquiring entity with all of the other things that are necessary for the continued operation of the identified enterprise to satisfy the paragraph.

21. Whether the supplier continues to operate the enterprise is determined having regard to the substance of the matter rather than its form. Hence, a provision in the sale agreement to that effect is not conclusive.

22. The requirement for the continued operation of the enterprise *may* not be satisfied if the only activities continued by the supplier after entering into the contract of sale are those required to satisfy the terms of the contract. For example, the supplier may carry out some works on the land as required by the contract. However, the requirement for continued operation may not be satisfied if the supplier has ceased to carry out those activities, such as construction and marketing, which would be expected to be carried out during the relevant period if the operation of the development enterprise were continuing.

23. In determining whether the supplier continues the operation of the enterprise, consideration needs to be given to:

- the point to which the development has advanced when the contract is entered into;
- the period of time between contract and completion, and the activities carried out in that time; and
- all other relevant circumstances.

24. If under an arrangement the supply by the supplying entity to the acquiring entity of the premises, lots or land and the other necessary things is GST-free, because all of the requirements of section 38-325 are satisfied, the acquiring entity may choose, under section 75-5, to apply the margin scheme in working out the amount of GST on its subsequent taxable supply of the premises, lots or land.

25. The general anti-avoidance provisions in Division 165 may apply to arrangements of the types described in paragraph 8 depending on all the circumstances. Where section 38-325 and Division 75 are available and apply, the Commissioner would consider the application of Division 165 having regard to all the facts and circumstances of the particular case. On the basis of the facts outlined in this Ruling, Division 165 would apply to the arrangement.

Explanation (this forms part of the Ruling)

Supplies of going concerns – Subdivision 38-J

26. Whether the particular supply of premises, lots or land meets the going concern requirements in section 38-325 depends on a consideration of the character, activities and extent of the identified enterprise operated by the supplying entity. This is particularly relevant in considering whether the following requirements in paragraph 38-325(2)(a) of the definition of a 'supply of a going concern' are satisfied:

- the supplier supplies to the recipient all things necessary for the continued operation of an enterprise;
- the supplier carries on the enterprise until the day of the supply; and
- the enterprise is being operated by the supplier.[3]

Enterprise

27. The character, activities and extent of an enterprise of property development or construction may vary widely depending on the composition of the respective enterprise and may involve one or more of the following:

- land subdivision of small or large holdings;
- subdivision and construction of premises in project stages;
- subdivision, construction and marketing within the industry or direct to the public;
- purchase and resale of land with development approvals;
- the construction of houses only, the development of land or both; or
- part of a larger enterprise.

All things necessary

28. The particular things necessary for the continued operation of an enterprise need to be considered in relation to the identified enterprise. This is a question of fact in each case. Some of the things you may need to supply in the property and construction industry are listed in paragraphs 26 and 27.

[3] See GSTR 2002/5 for 'all things necessary' (paragraphs 72 to 130), 'carries on' (paragraphs 141 to 148) and 'operating' (paragraph 150).

29. For the supply of residential premises under construction, necessary things may include:

- title to the land;
- council or local authority applications and approvals;
- construction schedules;
- intellectual property such as names, project plans, construction plans and drawings, and details of covenants;
- marketing plans and contracts, and 'off the plan' sales contracts;
- quality assurance plans;
- assignment of subcontracts and lists of subcontractors; and
- a site sales and marketing office.

30. For the supply of lots or development land, necessary things may include:

- rezoning applications, approvals or deeds;
- intellectual property such as engineering plans for headworks construction and utilities infrastructure, and environmental impact studies; and
- rights of access.

Operation of an enterprise

31. Paragraph 150 of GSTR 2002/5 explains that a supplier is unable to supply all of the things necessary for the continued operation of an enterprise unless the enterprise is operating. The term 'operation of an enterprise' is different to that of 'carrying on an enterprise'. As defined in section 195-1, 'carrying on' an enterprise includes doing anything in the course of the commencement or termination of an enterprise while operation of an enterprise requires something more than this. The activity must be one which can properly be described as a business or undertaking capable of being handed over to the transferee in such a state that it may be carried on by the transferee if it so wishes. The particular business or undertaking must remain active and operating at the time of supply.[4]

32. The Commissioner considers that for GST purposes whether the supplier continues to operate the enterprise is determined having regard to the substance of the matter rather than its form. Hence, a provision in the sale agreement to that effect is not conclusive.

33. In the context of property development, the requirement for the continued operation of the enterprise *may* not be satisfied if the

[4] See paragraph 141 of GSTR 2002/5.

only activities continued by the supplier after entering into the contract of sale are those required to satisfy the terms of the contract. For example, the supplier may carry out some works on the land as promised in the contract. However, the requirement for continued operation may not be satisfied if the supplier has ceased to carry out those activities, such as construction and marketing, which would be expected to be carried out during the relevant period if the operation of the development enterprise were continuing.

34. In determining whether the supplier continues the operation of the enterprise, the point to which the development has advanced when the contract is entered into, the period of time between contract and completion and the activities carried out in that time, and all other relevant circumstances, need to be considered. It is important to weigh up all the relevant facts and circumstances; no single factor may be determinative.

35. Property development and construction projects typically involve a series of activities that need to be performed before the actual operations of the enterprise can commence. Activities may also be performed after the operations of an enterprise have ceased. These activities do not relate to operating the enterprise.

Land held in reserve – part of the enterprise

36. Property developers may hold land in reserve for future development. The land may be held for future stages of a current development, usually adjacent to a partly completed project, or held for planned future development projects at one or more locations. Builders may also acquire developed vacant lots for future construction of individual premises.

37. In the context of the property and construction industry, the question of whether land held in reserve is supplied under a relevant arrangement will depend on whether it is part of the identified enterprise. If the land is treated as trading stock for income tax purposes, then it can be part of the relevant arrangement. Taxation Determination TD 92/124 Income tax: property development: in what circumstances is land treated as 'trading stock'? (as amended by TD 92/124A) explains when land is treated as trading stock. The Determination states in part:

> 1. Land is treated as trading stock for income tax purposes if:
>
> - it is held for the purpose of resale; and
> - a business activity which involves dealing in land has commenced.
>
> 2. Both the required purpose and the business activity must be present before land is treated as trading stock. The business activity is taken to have commenced when a taxpayer embarks on a definite and continuous cycle of operations designed to lead to the sale of the land.

Land held in reserve – not part of the enterprise

38. The supply of land held in reserve as trading stock in the property and construction industry may be contrasted to other situations where the supply of land or other assets does not relate to the relevant arrangement. If the land held is not trading stock and therefore not part of the enterprise, it will not form part of the supply of a going concern. For example, in *Commissioner of Inland Revenue v. Smiths City Group Limited* 14 NZTC 9140, the New Zealand High Court found that vacant land sold with commercially leased car yards was not part of any taxable activity supplied, as it was not part of any taxable activity supplied as a going concern.[5] See also Example 29 in paragraph 170 of GSTR 2002/5 which states that residential premises sold with a motor repair business were not sold under the relevant arrangement.

Margin scheme – Division 75

39. If you acquire real property as part of the GST-free supply of a going concern, you can choose to apply the margin scheme for the purposes of working out the GST on your subsequent sale of the property. Although you may choose to apply the margin scheme, this may be subject to the overriding operation of Division 165.

Anti-avoidance – Division 165

40. Where section 38-325 and Division 75 are available and agreed or chosen to apply, consideration will be given to the application of the general anti-avoidance provisions in Division 165. Consideration would also be given to Division 165 in relation to any part of a GST benefit which may be derived from the arrangements outlined in paragraph 8 that is not addressed by the Commissioner's view in relation to the GST treatment of the land or partially or substantially completed premises (the relevant property).

41. Under Division 165, the Commissioner may negate a GST benefit an entity gets from a scheme if it is reasonable to conclude that the dominant purpose or principal effect of the scheme is to secure such a benefit.[6]

42. For the Division to apply, the following four elements need to be satisfied:

- one or more of the steps in the arrangement is a 'scheme' as defined in subsection 165-10(2);
- a 'GST benefit', as defined in subsection 165-10(1), arises under the scheme;

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[5] Paragraph 11(1)(c), *Goods and Services Tax Act 1985* (NZ), refers to the 'supply of a taxable activity' as a going concern.
[6] Section 165-40.

- an entity gets a GST benefit from the scheme;[7] and
- it would be reasonable to conclude, taking account of the matters described in subsection 165-15(1), that the dominant purpose or principal effect of entering into or carrying out the scheme was to get a GST benefit.[8]

43. The arrangements in paragraph 8 involve a scheme.

44. A GST benefit arises for the supplying entity as a consequence of the supply of relevant property to the acquiring entity being GST-free. A GST benefit can also arise if a smaller amount is or could reasonably be expected to be payable by the supplying entity than would have otherwise been payable if the supplying entity did not participate in the scheme.

45. The supplying entity gets a GST benefit if it is postulated that, but for the scheme, the supplying entity would or could reasonably be expected to have completed the relevant development activities and made a taxable supply of the property directly to a third party, rather than through the sale to the acquiring entity. A smaller amount of GST would or could reasonably be expected to have been payable by the supplying entity than would have been, apart from the scheme.

46. Whether it would be reasonable to conclude the dominant purpose or principal effect of the scheme would be to get a GST benefit requires an assessment of the scheme against the twelve matters set out in subsection 165-15(1). The references to the particular matters in this Ruling should not be regarded as exhaustive or limiting the Commissioner in the application of Division 165 in other cases.

47. Division 165 must be considered on a case by case basis to determine whether it would be concluded that the dominant purpose or principal effect of the scheme would be to get a GST benefit.

48. Consideration of some of the matters in subsection 165-15(1) may point in the direction of a tax avoidance purpose or effect, others may point in the opposite direction, and some may be neutral. It is the evaluation of these matters, alone or in combination, some for, some against, that section 165-15 requires in order to reach the conclusion to which section 165-5 refers.[9] Considering the matters in subsection 165-15(1), it is the Commissioner's view that Division 165 would apply to the arrangements of the kind referred to in paragraph 8. It is the Commissioner's view that paragraph 165-5(1)(b) does not prevent Division 165 from applying.[10]

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[7] Paragraph 165-5(1)(a).
[8] Paragraph 165-5(1)(c).
[9] *C of T v. Hart* [2004] HCA 26; 2004 ATC 4599; 55 ATR 712, *C of T v. Sleight* [2004] FCAFC 94; 2004 ATC 4477; 55 ATR 555, paragraph 67 of the judgment by Hill J. Cases concerning Part IVA of the *Income Tax Assessment Act 1936* provide guidance to the Commissioner in considering Division 165.
[10] In relation to the operation of paragraph 165-5(1)(b) see paragraphs 80 and 81.

Application of Division 165 to the arrangement

Paragraph 165-15(1)(a) – the manner in which the scheme was entered into or carried out

49. The manner in which the transfer of the property was carried out suggests the dominant purpose was to obtain a GST benefit.

50. In particular, the structured way the scheme was entered into and carried out, including the sale of the relevant property to the acquiring entity and its agreement to treat the supply as part of the supply of a going concern, suggests careful planning to get a GST benefit.

51. The manner in which the arrangement was entered into followed the advice of advisers promoting the GST benefits of the arrangements.

52. These factors suggest that the particular way in which the scheme was entered into was only or predominantly explicable by the taxation consequences.[11]

Paragraph 165-15(1)(b) – the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme; and

(ii) the economic and commercial substance of the scheme

53. The form of the scheme involves a supply between separate legal entities that agree in writing to treat the supply as the supply of a going concern.

54. The acquiring entity does not provide substantial services in connection with its on-sale of lots or the completed premises to third parties. It merely appears as a vendor in the sale contracts to third parties. In relation to any development activity, the acquiring entity engages the supplying entity to complete the activity with the acquiring entity itself adding little or no additional value.

55. Other relevant circumstances include but are not limited to:

(a) the supplying and acquiring entities are often associated and/or have common directors;

(b) the supplying entity finances the purchase of the relevant property and any expenses in completing the development activity and/or on-selling the premises or lots. The supplying entity continues to finance insurance on the property and guarantees the acquiring entity's obligations under the sale contracts to third parties; and

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[11] *C of T v. Spotless Services Ltd* (1996) 186 CLR 404 at 420 and 423; 96 ATC 5201 at 5209 and 5210; 34 ATR 183 at 191-192 and 193.

(c) the acquiring entity has not previously sold residential premises or other property and has no experience or history in the industry.

56. While these factors would not necessarily be determinative in themselves, when combined with the other factors, they are consistent with a reasonable conclusion that the scheme was entered into with the dominant purpose of obtaining a GST benefit.

Paragraph 165-15(1)(c) – the purpose or object of the [GST] Act... and any relevant provision of this Act… [whether the purpose or object is stated expressly or not]

57. In relation to residential premises, the purpose of Subdivision 40-C is to input tax the supply of residential premises unless they are new residential premises.[12] The purpose of Subdivision 38-J is to provide a concession to the purchaser of a going concern so it does not have to obtain additional funds to cover the GST included in the price of the going concern.[13] Subdivision 38-J is not intended to be used as a device to defeat the purpose of Subdivision 40-C.

58. The intention of Division 75 is to grant a concession on the sale of real property (in this case new residential premises or developed lots), by ensuring, if a choice is made to apply the margin scheme, GST is only payable on the value added. It was not intended to be used by itself, or in combination with Subdivision 38-J, as a device for avoiding the intention of Subdivision 40-C by reducing the value added and consequently the GST levied on the supplies of new residential premises or the supplies of developed lots. Nor was it intended to be used by itself, or in combination with other provisions, to reduce the GST payable on otherwise taxable supplies.

59. It would be contrary to the above purposes for an entity to obtain a GST benefit where GST on the value added is avoided or reduced.

60. The Commissioner considers this matter points to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(d) – the timing of the scheme

61. The scheme discussed in this Ruling is introduced or occurs after the introduction of GST. Prior to the introduction of GST, the supplying entity would have completed the development activities itself and then sold the real property directly to third parties at market value.

62. The careful attention to planning points to the scheme being for the dominant purpose or principal effect of obtaining a GST benefit.

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[12] See paragraphs 5.164 to 5.167 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

[13] See paragraph 5.108 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

Paragraph 165-15(1)(e) – the period over which the scheme was entered into and carried out

63. The period over which the scheme was carried out is relatively short especially the period between the sale from the supplying entity to the acquiring entity and the on-sale to third parties.

64. This factor, together with the limited value added by the acquiring entity, points to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(f) – the effect that [the GST Act] would have in relation to the scheme apart from this Division

65. Apart from Division 165, GST is not levied on the supply of the relevant property from the supplying entity to the acquiring entity because it would be GST-free under Subdivision 38-J. GST would apply to the margin on the sale of the property by the acquiring entity to a third party but the margin would be reduced.

66. The Commissioner considers these to be matters that point to a dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(g) – any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme

67. On behalf of the supplying entity, it is argued there is no GST on the sale to the acquiring entity. This transaction reflects all or substantially all of the value added by the parties. Where the acquiring entity has chosen to apply the margin scheme to the sale to third parties, the GST will be levied on a reduced amount based on the acquisition cost of the acquiring entity. The supplying entity may also share in the increased profit brought about by the reduced GST payable by the acquiring entity.

68. On this basis, but for Division 165, the supply by the supplying entity has either not borne GST or GST has been reduced.

69. But for the scheme, it is reasonable to expect that the supplying entity would have directly sold the relevant property to third parties. A direct sale by the supplying entity would have given rise to a GST liability. In other words, the scheme would, but for Division 165, enable the supplying entity to obtain a GST benefit. On the basis that the supply by the supplying entity is GST-free, the financial position of the supplying entity substantially improves.

Paragraph 165-15(1)(h) – any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a

connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature

70. Where applicable, the acquiring entity has a relevant connection with the supplying entity as they are associates. There has been a change in the financial position of the acquiring entity. This is because, as a result of the scheme, the supply of the relevant property to third parties will be under the margin scheme and the margin on which GST is levied is reduced.

71. In some cases, the directors of the supplying or acquiring entity, their family members or the advisers can purchase the completed residential premises at below market value.

72. The benefit to the acquiring entity points to the scheme being entered into for the dominant purpose or principal effect of the supplying entity obtaining a GST benefit.

Paragraph 165-15(1)(i) – any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out

73. In some cases the supplying entity finances the acquisition by the acquiring entity and all of its related expenses and arranges for the completion of any development activities. This is inconsistent with the interposition of the acquiring entity to insulate the supplying entity from commercial risk or to conduct its business more efficiently or profitably. This points to the scheme being entered into for the dominant purpose or principal effect of obtaining a GST benefit.

74. Alternatively, the entry into or carrying out of the arrangement may have been due to liquidity problems or due to industrial disputes with contractors. The Commissioner will consider these and other consequences in relation to the facts of each particular case.

Paragraph 165-15(1)(j) – the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length

75. The supplying entity and the acquiring entity may be associates, which is a circumstance contemplated by the scheme. This association, although not conclusive, would point to the scheme being entered into for the dominant purpose or principal effect of obtaining a GST benefit in the context of transfer of a going concern.

76. Where the supplying and acquiring entity are not associates, there may be evidence they are acting not at arm's length but in concert to obtain a GST benefit for one or both of them. This would point to the scheme being entered into for the dominant purpose or principal effect of obtaining a GST benefit.

Paragraph 165-15(1)(k) – the circumstances surrounding the scheme

77. The parties were introduced to the scheme by an adviser highlighting the GST benefits that may be obtained by entering into the scheme. While not conclusive, this factor when combined with other matters referred to above, points to a dominant purpose of obtaining a GST benefit.

Paragraph 165-15(1)(l) – any other relevant circumstances

78. The Commissioner would consider any other relevant circumstances. For example, the activities of the parties' advisers in relation to the promotion of the arrangement.

Division 165 – conclusion

79. The Commissioner would consider the application of Division 165 to the particular matters in section 165-15 having regard to all the facts and circumstances of the case in question. On the basis of the facts and circumstances outlined in this Ruling, Division 165 would apply to the arrangement.

Alternative view – Application of Division 165

80. There is an alternative view that the Commissioner is unable to negate a GST benefit arising from the arrangement. This view is based on paragraph 165-5(1)(b) which provides that Division 165 does not operate if a GST benefit is 'attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law'. Subsection 38-325(1) expressly allows parties to agree in writing to make a supply of a GST-free going concern. Section 75-5 expressly allows a party to choose to apply the margin scheme. It is argued paragraph 165-5(1)(b) would apply as the GST benefit arising under the arrangement will be attributable to the agreement made under subsection 38-325(1) or choice made under section 75-5.

81. The Commissioner does not accept this argument. It is the Commissioner's view that the GST benefit arising under the arrangement is not attributable to the agreement to sell the relevant property as part of the supply of a going concern and/or the choice to apply the margin scheme. Rather, it is considered that the GST benefit would be attributable to the intermediate sale from the supplying entity to the acquiring entity, completion of development activities by the acquiring entity and subsequent sale of premises or lots to third parties. The transfer of title and the entirety of the arrangement produces the benefit rather than the agreement made under subsection 38-325(1) or choice under section 75-5.

Detailed contents list

82. Below is a detailed contents list for this Goods and Services Tax Ruling:

	Paragraph
What this Ruling is about	**1**
Date of effect	**4**
Background	**7**
Features of the arrangements	8
Legislative context	**11**
Supplies of going concerns – Subdivision 38-J	11
Margin scheme – Division 75	15
General anti-avoidance – Division 165	18
Ruling	**19**
Explanation (this forms part of the Ruling)	**26**
Supplies of going concerns – Subdivision 38-J	26
Enterprise	27
All things necessary	28
Operation of an enterprise	31
Land held in reserve – part of the enterprise	36
Land held in reserve – not part of the enterprise	38
Margin scheme – Division 75	39
Anti-avoidance – Division 165	40
Application of Division 165 to the arrangement	49
Paragraph 165-15(1)(a) – the manner in which the scheme was entered into or carried out	49
Paragraph 165-15(1)(b) – the form and substance of the scheme, including:	
(i) *the legal rights and obligations involved in the scheme; and*	
(ii) *the economic and commercial substance of the scheme*	53
Paragraph 165-15(1)(c) – the purpose or object of the [GST] Act... and any relevant provision of this Act... [whether the purpose or object is stated expressly or not]	57
Paragraph 165-15(1)(d) – the timing of the scheme	61
Paragraph 165-15(1)(e) – the period over which the scheme was entered into and carried out	63

Paragraph 165-15(1)(f) – the effect that [the GST Act] would have in relation to the scheme apart from this Division 65

Paragraph 165-15(1)(g) – any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme 67

Paragraph 165-15(1)(h) – any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature 70

Paragraph 165-15(1)(i) – any other consequence for the avoider's a connected entity of the scheme having been entered into or carried out 73

Paragraph 165-15(1)(j) – the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length 75

Paragraph 165-15(1)(k) – the circumstances surrounding the scheme 77

Paragraph 165-15(1)(l) – any other relevant circumstances 78

Division 165 – conclusion 79

Alternative view – Application of Division 165 80

Detailed contents list **82**

Commissioner of Taxation
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Previous draft:

GSTR 2004/D6

Related Rulings/Determinations:

TR 2006/10; GSTR 2002/5; TD 92/124

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- GST anti-avoidance
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- GST margin scheme
- residential premises

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- ANTS(GST)A99 165-5(1)(b)
- ANTS(GST)A99 165-5(1)(c)
- ANTS(GST)A99 165-10(1)
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- ANTS(GST)A99 165-15(1)(b)

- ANTS(GST)A99 165-15(1)(c)
- ANTS(GST)A99 165-15(1)(d)
- ANTS(GST)A99 165-15(1)(e)
- ANTS(GST)A99 165-15(1)(f)
- ANTS(GST)A99 165-15(1)(g)
- ANTS(GST)A99 165-15(1)(h)
- ANTS(GST)A99 165-15(1)(i)
- ANTS(GST)A99 165-15(1)(j)
- ANTS(GST)A99 165-15(1)(k)
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