

TDP 2016/1 - Discussion paper on issues concerning electronic distribution platforms (EDPs)

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⚠ The issues in this discussion paper were finalised in LCR 2018/2 *GST on supplies made through electronic distribution platforms*



DISCUSSION PAPER ON ISSUES CONCERNING ELECTRONIC DISTRIBUTION PLATFORMS (EDPs)

This paper is seeking submissions on possible guidance products to be developed by the Australian Taxation Office (ATO).

Purpose and status of this discussion paper

The purpose of this paper is to facilitate consultation between the Australian Taxation Office (ATO) and the community as part of the process of developing advice on the application of the indirect tax law.

This paper is prepared solely for the purpose of obtaining comments from interested parties. All views in this paper are therefore preliminary in nature and should not be taken as representing either an ATO view or that the ATO will take a particular view.

This paper is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this paper does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

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Contact officer <i>(for comments or further information)</i>	<i>Contact officer details have been removed as the comments period has ended.</i>
Final date for comments	20 January 2017

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Introduction

1. Schedule 1 of the [Tax and Superannuation Laws Amendment \(2016 Measures No. 1\) Act 2016](#) (Amending Act) amended the [A New Tax System \(Goods and Services Tax\) Act 1999](#) (GST Act) to impose goods and services tax (GST) on digital supplies and services. This change applies in working out net amounts for tax periods starting on or after 1 July 2017.

2. The GST Act was amended to insert special rules for operators of electronic distribution platforms (EDPs) concerning the GST on the sale to Australian consumers of their digital products and services. Broadly the new rules ensure that the operator of an EDP is treated as having made supplies of digital products and services that are made through the EDP. Under these rules, the operator of the EDP, instead of the supplier, includes the value of the supplies in its GST turnover to determine whether it is required to register for GST. The operator also pays the GST on the supplies.

Differences from European Union (EU) approach

3. Both the EU approach and the Australian approach have rules that deem an intermediary involved in key aspects of the supply to be the supplier. Under the EU approach, for each transaction in the supply chain, each entity is seen to have received and supplied further the digital supply itself (reseller assumption). This approach does not necessarily follow the legal supply route.

4. In contrast, under the Australian rules:

- An EDP is treated as the supplier¹ of an inbound intangible consumer supply² but this treatment does not extend to deeming the supplier to have acquired the digital content of the supply.
- The supplies provided by the operator of the EDP, such as agency or facilitation services are treated separately in accordance with the business agreements.
- Australian suppliers who supply digital products and services through the EDP are treated as the supplier.³ However, this is unless the supplier and operator of the EDP agree in writing to treat the operator of the EDP as the supplier.⁴ However, this agreement will not affect the treatment of supplies such as, facilitation or agency services by the operator of the EDP, to the supplier.

Low value goods

¹ Section 84-55.

² Section 84-65.

³ Subsection 9-25.

⁴ Section 84-60.

5. [Exposure Draft Bill – Treasury Laws Amendment \(2017 Measures No 1\) Bill 2017](#) proposes to amend the [GST Act](#) to ensure that GST is payable on supplies of goods valued at \$1,000 (Australian) or less at the time of sale that are purchased by consumers and are to be imported to Australia. It is proposed that this change will collect GST from the supplier through the taxable supply rules and apply to working out net amounts for tax periods starting on or after 1 July 2017.

6. The current \$1000 GST, duty and reporting threshold in relation to taxable importations of goods remains unchanged. For further information on how GST currently applies on goods imported into Australia see – [GST on imported goods](#) on ato.gov.au.

7. The special rules for operators of EDPs described in [paragraph 2](#) will also apply to supplies of low value goods made through the EDP. Consultation has been held by Treasury on this Exposure Draft Bill.

Legislative references

8. All legislative references in this paper are to the [GST Act](#) unless otherwise indicated.

Purpose

9. The ATO is seeking your input through this consultation paper, so that we can provide you with relevant advice and guidance products to assist you in complying. We are seeking your input to highlight any areas you think are unclear, cause difficulties in understanding your obligations or areas where there are practical compliance issues.

Overview of the Law

10. There are a number of elements that need to be satisfied before an operator of an EDP is treated as being a supplier. In this paper, we have grouped these elements into four steps which are illustrated in [Figure 1](#) below.

Step 1	The definition of an EDP is met. ⁵
Step 2	The operator of the EDP must be making inbound intangible consumer supplies.
Step 3	The operator of the EDP is not liable to pay GST if it does not control the key elements of the supply.
Step 4	There are hierarchy rules if multiple EDP operators could be considered the supplier.

Step 1 - Definition of EDP

Consultation Question (1)

Are there any aspects of the definition of a EDP under section 84-70 that require guidance to be provided by the Commissioner? If yes, please advise us which criteria need guidance and why guidance is needed.

11. An EDP is defined in terms of a service and this service is run by an operator. Examples of services that may be an EDP including a 'website, internet portal, gateway, store or marketplace'

12. The operators need to meet the criteria listed under the positive limb [subsection 84-70(1)] and not be excluded by the negative limb [subsection 84-70(2)]. These criteria are set out in [Figure 1](#).

13. Broadly, to meet this criteria:

⁵ Section 84-70.

- The platform must allow entities to use the platform to make supplies to end-users. This requirement would not be satisfied by advertising on a business directory or by a click-through sites to an advertiser’s website.
 - The platform must be operated by means of electronic communication. This would include platforms operated over the internet but exclude physical stores.
 - The supplies made through the platform must be made by electronic communication.
14. In addition the service is excluded from being an EDP where:
- It is a carriage service which would include internet service providers and telecommunication companies.
 - The service consists of one or more of the following:
 - provides access to a payment system
 - processes payments
 - provides ‘face value vouchers’ (see consultation [question 3](#) for further details).

Consultation Question (2)

Is guidance required in relation to the degree of human intervention that can occur and still meet the definition of a service delivered by means of electronic communication? If yes, what examples, that include human intervention, require guidance?

15. The criteria in the positive limb (subsection 84-70(1)) require that a service satisfies the following to qualify as an EDP:

- (a) The service allows entities to make supplies available to end-users.
- (b) The service is delivered by means of electronic communication.
- (c) The supplies are to be made by means of electronic communication.

16. The last two criteria require actions by the means of electronic communication and this term has the same meaning as in the [Electronic Transactions Act 1999](#) (ETA).⁶ The ETA is administered by the Attorney-General’s Department and guidance on the term ‘electronic communication’ can be found in [Legal Briefing Number 59](#). Supplies made by means of an EDP may involve some aspects of human intervention. For example, human intervention through call centres may help facilitate the ordering of the goods concerned.

17. Our preliminary view is that where human intervention plays a role in facilitating the purchase, the service may still be delivered and the supplies made by means of electronic communication but this will depend on the degree of human intervention. For example, a call centre operative may key the purchase details into an electronic data base but the rest of the process is delivered and made by electronic communication. However, the criteria will not be satisfied if the entire transaction is made through human intervention.

Consultation Question (3)

Are there any issues you, as an operator of an EDP, would like guidance on in respect of vouchers that you issue as part of your business?

18. There are a number of excluded services that are excluded from the definition of an EDP. The negative limb included in [Figure 1](#) lists these excluded services.

⁶ Section 195-1.

19. One of these exclusions is that a service is not an EDP⁷ solely because it is a service providing 'face value vouchers'. The term 'face value voucher' (FVV) is explained in paragraph 11 of Goods and Services Tax Ruling [GSTR 2003/5 Goods and Services Tax: Vouchers](#). Broadly, FVV are vouchers, which, on redemption, the holder of the voucher is entitled to receive supplies up to the monetary value of the voucher.⁸ An example of a FVV is a voucher that entitles the holder to any goods from a store up to a stated value.

20. FVVs are not treated as a taxable supply on their initial issue.⁹ The GST liability is determined when a supply is made on their redemption. In contrast, the tax treatment of vouchers that are non-FVV are determined on their supply.¹⁰ Due to the different taxing arrangements operators of EDPs will need to distinguish between FVV and non-FVVs.

21. Our preliminary view is that paragraphs 84-70(1)(b) and (c) will not be satisfied where non-FVV vouchers that are issued as plastic cards and these cards are subsequently used to redeem the supply. In contrast, non-FVV vouchers that issued electronically and those vouchers are then used to redeem a supply then the issue of the non-FVV will meet the requirements of 84-70(1)(b) and (c).

Step 2 - The operator of the EDP must be making inbound intangible consumer supplies

Consultation Question (4)

Is guidance required in relation to the type of supplies that can be included in an agreement between the supplier and the operator of an EDP under section 84-60? If yes, for which type of supplies should guidance be given?

22. Section 84-60 allows an operator of an EDP to make a written agreement with a supplier to shift the GST liability for supplies that are not inbound intangible consumer supplies¹¹ made by the supplier through the EDP to the operator of the EDP.

23. The operator of an EDP may make an agreement with a supplier about the following type of supplies where all of the following apply:¹²

- The supply is made through an EDP
- The supply is covered by a written agreement entered into between the supplier and operator of the EDP before the supply is made. Under the agreement the supply is to be treated as if it were an inbound intangible supply made through the platform.
- The operator is registered for GST.
- The supply is not an ineligible supply.

24. The operator of an EDP cannot enter into an agreement with a supplier where the supply¹³:

- is GST- free¹⁴ or input taxed¹⁵, or
- the operator of the EDP would not be treated under section 84-55 as being the supplier of, and making the supply, if it were an inbound intangible consumer supply. That is, a supply that the operator of the EDP would not be liable for. This would occur

⁷ Subsection 84-70(2).

⁸ Section 100-5.

⁹ Section 100-5. See also paragraphs 8 and 9 of [GSTR 2003/5](#).

¹⁰ See paragraphs 168-181 of [GSTR 2003/5](#).

¹¹ Section 84-65.

¹² Subsection 84-60(1).

¹³ Subsection 84-60(2).

¹⁴ Section 9-30 and Division 38 explain the meaning of GST-free supplies.

¹⁵ Division 40 explains input taxed supplies.

where if the operator does not control the key elements of how the supply is made (see [Figure 1](#), step 3).

25. Our preliminary view is that for the operator to make an effective agreement under section 84-60, the supplies need to be digital supplies which will meet the definition of 'inbound intangible consumer supply' apart from the exclusions being:

- the thing is done wholly in the indirect tax zone¹⁶, or
- the supplier makes the supply wholly through an enterprise that the supplier carries on in the indirect tax zone.¹⁷

26. Section 84-60 does not provide scope to bring other types of supplies within the agreement.

Step 3 - The operator of the EDP is not liable to pay GST if it does not control the key elements of the supply

Consultation Question (5)

Is guidance needed in respect of when an operator does not authorise:

- *the charge to the recipient for the supply, and*
- *the delivery of the supply,*

where there is an agreement between the operator and the supplier that the supplier will be liable for GST on the supply? If yes, what aspects of the requirements need clarification?

27. Broadly, the operator of an EDP will not be liable to pay the GST on the supply if the operator does not control key elements of how the supply is made and the liability of the supplier is made clear in related documentation.¹⁸ In order for the operator of the EDP not to be liable for the GST, each and every one of the following criteria¹⁹ need to be met:

- A document is issued to the recipient of the supply that identifies both the supply and the supplier as the supplier of the supply.
- The supplier and the operator have agreed in writing that the supplier is the entity responsible for paying GST for the supply. Alternatively, the supplier and the operator have agreed in writing that the supplier is the entity responsible for paying GST for a class of supplies that includes the supply concerned.
 - The operator of the EDP does not:
 - authorise the charge to the recipient for the supply,
 - authorise the delivery of the supply, and
 - set the terms and conditions under which the supply is made.²⁰

28. Our preliminary view is that the term 'authorise' in the context of the last three criteria should be read broadly, particularly in the context of a chain of related steps that ultimately lead to the authorisation of the charge or delivery. In this context the operator of an EDP can be viewed to have authorised the payment even where other entities are involved, for example, a third party payment processor. This is because the operator of the EDP is integral to the authorisation process.

¹⁶ This is the area Australia's GST applies to.

¹⁷ Paragraph 84-65 (1)(a) and paragraph 84-65(1)(b).

¹⁸ Subsection 84-55(4).

¹⁹ Subsection 84-55(4).

²⁰ Paragraph 84-55(4)(c).

Step 4 - There are hierarchy rules if multiple EDP operators could be considered the supplier

Consultation Question (6)

Are there any circumstances where it would be desirable for the Commissioner to create an instrument²¹ to prescribe rules as to how to determine which operator is liable for GST where there are multiple operators?

29. In some circumstances, an inbound intangible consumer supply may be made through multiple EDPs. There are special hierarchy rules to ensure that only one of the operators is treated as the supplier liable for the GST on the supply.

30. Under the second hierarchy rule the Commissioner has power, by legislative instrument, to prescribe additional rules to override or supplement the default rules.

Other issues

Consultation Question (7)

Are there any circumstances where advice or guidance is needed to assist with distinguishing the types of supplies that are subject to the new rules? If yes, for which type of supplies should clarification be given?

31. The changes made by the [Amending Act](#) extend the scope of the GST to supplies of services and intangibles by any supplier to an Australian consumer.²² This change impacts supplies of services and intangibles that are supplied by foreign suppliers who make the supplies into Australia.

32. The operator of an EDP is treated as being the supplier of an inbound intangible consumer supply where it is made through the EDP. The meaning of ‘inbound intangible consumer supply’²³ includes a supply of anything other than goods or real property if the recipient is an Australian consumer and excludes circumstances where:

- the thing is done wholly in the indirect tax zone (broadly Australia excluding the geographical areas where the GST does not apply, such as external Territories)
- the supplier makes the supply wholly through an enterprise that the supplier carries on in the indirect tax zone.

33. Broadly, this means for business to consumer supplies (B2C supplies) that the operator of the platform will need to distinguish between supplies made by Australian suppliers and those made by foreign suppliers. This is because Australian suppliers will remain responsible for the GST on supplies to Australian consumers.

34. Also the operator of the EDP will need to distinguish those supplies where the recipient will have the tax obligation (if any) via reverse charge. The reverse charge rules in Division 84 broadly ensure that the recipient must pay GST on the portion of the acquisition for which an input tax credit (ITC) would not have been available. For an explanation of the reverse charge rules, see paragraphs 1.80 to 1.88 of the [EM](#) to the [Amending Act](#).

Consultation Question (8)

Are there any other issues in the EDP provisions²⁴ on which the Commissioner should provide advice or guidance? If yes, please set out these circumstances.

²¹ Under subsection 84-55(3).

²² Paragraph 9-25(5)(d).

²³ Section 84-65.

²⁴ Sections 84-55, 84-60 and 84-70.

35. We are interested in your suggestions for any other topics on which the Commissioner may issue advice or guidance.

References

ATO law topic(s)	<p>Goods and services tax ~ General rules and concepts ~ Supplies ~ Connected with Australia</p> <p>Goods and services tax ~ International ~ Cross border</p> <p>Goods and services tax ~ International ~ Electronic commerce</p> <p>Goods and services tax ~ International ~ Reverse charging</p>
Legislative references:	<p>ANTS(GST)A 1999</p> <p>ANTS(GST)A 1999 9-25</p> <p>ANTS(GST)A 1999 9-25(5)(d)</p> <p>ANTS(GST)A 1999 9-30</p> <p>ANTS(GST)A 1999 Div 38</p> <p>ANTS(GST)A 1999 84-55</p> <p>ANTS(GST)A 1999 84-55(3)</p> <p>ANTS(GST)A 1999 84-55(4)</p> <p>ANTS(GST)A 1999 84-55(4)(c)</p> <p>ANTS(GST)A 1999 84-60</p> <p>ANTS(GST)A 1999 84-60(1)</p> <p>ANTS(GST)A 1999 84-65</p> <p>ANTS(GST)A 1999 84-65(1)(a)</p> <p>ANTS(GST)A 1999 84-65(1)(b)</p> <p>ANTS(GST)A 1999 84-70</p> <p>ANTS(GST)A 1999 84-70(1)</p> <p>ANTS(GST)A 1999 84-70(1)(b)</p> <p>ANTS(GST)A 1999 84-70(1)(c)</p> <p>ANTS(GST)A 1999 84-70(2)</p> <p>ANTS(GST)A 1999 100-5</p> <p>ANTS(GST)A 1999 195-1</p> <p>Electronic Transactions Act 1999</p> <p>Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016</p>
Case references:	
Other references:	<p>GSTR 2003/5 Goods and Services Tax: Vouchers</p> <p>Exposure Draft Bill - Treasury Laws Amendment (2017 Measures No 1) Bill 2017</p>
ATO references:	1-7TWD04S

FIGURE 1

When is an operator of an electronic distribution platform (EDP) a supplier under section 84-55 and liable to pay GST?

