



The Taxpayer

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FBT rates & thresholds 2008/09

by Heather Schache

The Tax Office has released a number of statutory rates that apply for the FBT year commencing on 1 April 2008. The car parking threshold will be published in late April.



Benchmark interest rate

The benchmark interest rate is used for calculating the FBT taxable value of loans and car fringe benefits under the operating cost method. The benchmark interest rate for the FBT year commencing on 1 April 2008 is 9% per annum. This rate replaces the rate of 8.05% that has applied for the previous FBT year commencing on 1 April 2007.

Private use of motor vehicle (other than a car)

For FBT purposes, the private use of an employer's motor vehicle (other than a car) is subject to FBT. Those affected have two options available to calculate the private component of any benefit. They can –

- calculate the actual value of the benefit involved; or
- apply the Tax Office rates (see page 292) to the number of private kilometres that the motor vehicle has travelled during the FBT year.

The motor cycle rate applies to all motor cycles. The other rates apply to other road vehicles that are not cars and that have a carrying capacity of 1 tonne or more. That includes panel vans, utility trucks, dual cabs and other road vehicles that have a passenger capacity of 9 or more persons.

The cents per kilometre rates to be used for the 2008/09 FBT year commencing 1 April 2008 are shown on page 292 (see TD 2008/4).

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Brady King case appealed

The decision in *Brady King Pty Ltd v Commissioner of Taxation* [2008] FCA 81 as reported in issue 17 of *The Taxpayer* was an important one as it changed the fundamental interpretation and application of the margin scheme for property developers. It is therefore in the interest of property developers to know that the taxpayer, *Brady King*, has since lodged an appeal to the Full Federal Court.

As reported in issue 17, the Federal Court decided in *Brady King* that the taxpayer was not entitled to use the valuation method to calculate the margin scheme on subsequent sale of stratum land. This decision was made on the basis that the interest sold was different to the interest acquired before 1 July 2000.

The earlier Federal Court's decision is contrary to the submission by the Commissioner as well as the Tax Office's long-standing practice in relation to the margin scheme as reflected in GSTR 2000/21, GSTR 2006/7 and GSTR 2006/8. The Tax Office has since released a decision impact statement stating that it will maintain its long-standing position in relation to the application of the margin scheme until further development. Taxpayers relying on the Tax Office's current rulings to self-assess their GST liabilities will be protected from retrospective adjustments.

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Cents per kilometre car rates

Under the cents per kilometre method, a taxpayer may claim a deduction for car expenses based on the number of business kilometres the car travelled during the income year. The claim is limited to a maximum of 5,000 business kilometres per car, regardless of the number of cars involved. The business travel should be based on a reasonable estimate.

The claim is calculated by multiplying:

Business kilometres travelled in the income year (5,000 km limit) x rate based on car's engine capacity

The rates for the 2007/08 income year are unchanged from the 2006/07 year rates (see below).

Cents per kilometre car rates 2007/08

| Description | Engine capacity of car not powered by a rotary engine (cubic centimetres) | Engine capacity of car powered by a rotary engine (cubic centimetres) | Rate per kilometre (cents) |
|-------------|---|---|----------------------------|
| Small car | Not exceeding 1600cc | Not exceeding 800cc | 58.0 |
| Medium car | Exceeding 1600cc but not exceeding 2600cc | Exceeding 800cc but not exceeding 1300cc | 69.0 |
| Large car | Exceeding 2600cc | Exceeding 1300cc | 70.0 |

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Glaring anomalies under *Simpler Super*



Now that the dust has settled on the *Simpler Super* reforms which came into operation on 1 July 2007, it's an opportune time to look at some of the glaring anomalies which still have not been addressed.

The first of these anomalies relates to the inability of some taxpayers to salary sacrifice superannuation contributions. There still remains a significant number of employers who do not allow their employees to salary sacrifice additional super contributions in excess of the 9% Superannuation Guarantee Contribution (SGC) amount. This is despite the introduction of choice of superfunds two years ago, allowing employees the ability to nominate the fund receiving their superannuation contributions.

Given that we now have one universal cap on the amount of deductible super that can be claimed each year from all sources, it seems odd that employees who cannot salary sacrifice additional super are left out in the cold. The tax concessional cap is \$50,000 for anyone under 50 and \$100,000 for those over 50 years of age. These caps include SGC contributions made by employers.

If the Government is serious about encouraging taxpayers to contribute more into super it should immediately look at addressing this nonsensical restriction. Allowing employees to claim a personal tax deduction for additional super contributions (up to the annual cap) through their individual tax returns would rectify the situation in cases where employees are restricted from doing so.

Where employees are permitted to salary sacrifice additional super, the law allows employers to offset these amounts against the compulsory 9% SGC. Whilst most ethical employers would not offset any additional super contributions against their compulsory super guarantee contributions the opportunity does exist. The law currently allows

for this offset which should be removed in the interest of fairness and equity. The employer's SGC obligations are based on the employee's salary, excluding super payments.

The other significant anomaly relates to the 10% rule for the deductibility of super contributions by those who are substantially 'self-employed'. Persons who are employed can still avail themselves of deductions for super contributions if they satisfy the 10% rule. This rule requires that their employment income is less than 10% of their total income. Given we have new superannuation rules with an annual cap on the amount of deductible super contributions that can be claimed by the self employed, there appears to be no logical reason why we should continue to have the 10% rule. It may have been relevant in the past but it should be abolished under the new regime as its use-by date has passed.

Again, extending the tax deductibility to personal contributions up to the contribution limit, regardless of employment status, would address this issue and simplify the unnecessary current rules by eliminating the complexity of the 10% rule. All superannuants would then be treated equally with respect to access to the concessional cap.

We would like to think that some of these anomalies will be addressed in the May 2008 Federal Budget. These superannuation recommendations did form part of Taxpayers Australia Inc's pre-budget submission and we are optimistic that the new government will address some of these glaring anomalies and make *Simpler Super* even simpler.

Tony Greco, Chief Executive Officer

| Engine capacity | Rate per kilometre |
|-----------------|--------------------|
| 0 - 2,500cc | 42 cents |
| Over 2500cc | 51 cents |
| Motor cycles | 13 cents |

Example

An employee borrows a commercial van (3500cc) from his employer for 40 days in the year and travels 4,000 kms. The vehicle also travelled 45,000 business kms. The taxable value would be \$2,040 (4,000 kms at 51 cents).

Housing in non-remote areas

FBT is payable by employers that provide accommodation or housing to their employees, and the FBT liability is determined by the value of the accommodation. Since 1 April 2000 remote area housing has been exempt from FBT for all employers. Special rules apply to living away from home allowances (for more information see the *Tax Summary*).

The employer has two options available to calculate the taxable value of employee accommodation so long as the accommodation is provided in a non-remote area and is not provided in a public type facility (eg. hotel, motel, guest-house or hostel) –

- the market value of the accommodation; or
- the statutory formula.

Regardless of which option is chosen, the taxable value of the benefit provided is reduced by the amount of any contribution made or paid by the employee towards that accommodation.

For the 2008/09 FBT year commencing on 1 April 2008 the following indexation factors have been approved by the Tax Office (TD 2008/5) to value non-remote housing.

| Non-remote housing indexation factors | |
|---------------------------------------|-------|
| New South Wales | 1.045 |
| Victoria | 1.044 |
| Queensland | 1.073 |
| South Australia | 1.041 |
| Western Australia | 1.097 |
| Tasmania | 1.054 |
| Australian Capital Territory | 1.059 |
| Northern Territory | 1.072 |

Example

When calculating the 2007/08 taxable value of non-remote accommodation in Victoria the employer used its market value of \$300.

When calculating the taxable value of similar accommodation in 2008/09, the employer can choose either the market value of the accommodation or the statutory formula adjusted amount.

The 2008/09 market value is \$350. The statutory formula amount is \$313 (ie. \$300 x 1.044), resulting in a lower FBT liability.

Living away from home allowance for expatriates

TD 2008/3 sets out the 2008/09 amounts for the reasonable food component of living away from home allowances for expatriate employees.

Genuine living away from home allowances are not subject to income tax. They are paid as compensation for the added costs of living and working away from the employee's usual place of residence.

The employer may be liable to pay FBT on the following components of the allowance –

- the statutory food component; and
- the amount of the payment that is in excess of reasonable compensation for food and/or accommodation.

The statutory food component represents the amount that employees would ordinarily incur on food regardless of where they reside.

The following statutory amounts are subject to FBT as they represent a benefit to the employee –

- the first \$42 per week for adults; and
- the first \$21 per week for children (ie. under 12 years of age at the start of the FBT year).

As a general rule, when calculating the reasonable food component of a living away from home allowance for the 2008/09 FBT year, the following amounts should be used (higher amounts can be used if supported by receipts or detailed records).

'Adults' are persons who have reached 12 years of age before the start of the FBT year. For larger families, the Tax Office accepts a food component based on the figures in the following table plus \$127 for each additional adult and \$62 for each additional child.

| Number of persons | \$ per week |
|------------------------------------|-------------|
| One adult | \$211 |
| Two adults | \$338 |
| Three adults | \$379 |
| One adult and one child | \$273 |
| Two adults and one or two children | \$379 |
| Two adults and three children | \$442 |
| Three adults and one child | \$442 |
| Three adults and two children | \$505 |
| Four adults | \$505 |

Example 1

A taxpayer with a spouse and two children (under 12 years) receives a living away from home allowance from her employer of \$700 per week as compensation for the cost of extra food while living away from her normal place of residence overseas.

| | |
|---|-------|
| Allowance received | \$700 |
| Less reasonable component (TD 2008/3) | \$379 |
| Excess subject to FBT | \$321 |
| Statutory amounts: 2 adults @ \$42 each | \$84 |
| 2 children @ \$21 each | \$42 |
| Amount subject to FBT | \$447 |

Example 2 [from TD 2008/3]

Bob and his wife and their five children (all under 12 years of age) are temporarily living in Australia while Bob is working on a project for his employer (an overseas company). Bob is in receipt of a living-away-from-home allowance.

The amount that is considered to be a reasonable food component of the allowance for the year commencing 1 April 2008 is \$566 per week (that is, \$442 plus \$124).

Record keeping exemption threshold

The exemption threshold for the FBT year commencing 1 April 2008 is \$6,766. This replaces the amount of \$6,614 that applied in the previous year commencing on 1 April 2007.

For the record keeping exemption arrangements to apply to an employer for an FBT year the following two conditions must be satisfied:



- a base year must be established (see the *Tax Summary* and s.135C of the *Fringe Benefits Assessment Act 1986*); and
- during the FBT year immediately before the current year the employer has not received notice from the Tax Office requiring the employer to resume record keeping.

Editor

Employers qualifying for the record keeping exemption are still required to include details of Reportable Fringe Benefits on payment summaries of their employees. This obligation may negate any benefit from the exemption as they may still be required to record the same or similar information for statutory purposes. ■

What is a 'credible purpose'?

By Audrey Teoh

GSTR2008/1 concerns the matter of when the acquisition of anything or importation of goods is solely or partly for a credible purpose. This recently finalised ruling, which supercedes GSTR 2007/D1, focuses on the operation of s.11-15(1) and (2). The operation of s.11-15(3), (4) and (5) is only described briefly in Part C of this Ruling and is not discussed in this article.



'Creditable purpose'

Creditable purpose is defined in s.11-15 as follows:

- (1) You acquire a thing for a credible purpose to the extent that you acquire it in carrying on your enterprise.
- (2) However, you do not acquire the thing for a credible purpose to the extent that:
 - (a) the acquisition relates to making supplies that would be input taxed;¹ or
 - (b) the acquisition is of a private nature.

'Carrying on an enterprise'

The definition of 'enterprise' is explored in detail in Miscellaneous Taxation Ruling MT 2006/1. According to s.9-20(1) 'an enterprise is an activity or series of activities'. Consequently, before determining whether an acquisition is made in carrying on an enterprise, one must first identify the activity or activities that constitute the enterprise.

NOTE: *When determining which activity or activities constitute part of an enterprise, don't forget to include anything done in the course of the commencement or termination of the enterprise. These activities form part of carrying on an enterprise (MT 2006/1).*

Is the acquisition made in carrying on an enterprise?

Whether a thing is acquired in carrying on an enterprise requires a connection or link between the thing acquired and the enterprise.

The Commissioner considers it necessary to make an objective assessment based on all the facts and circumstances, and not based on superficial appearance. The subjective purpose or motive in making an acquisition is relevant but not determinative. Factors that may indicate an acquisition is made in carrying on an enterprise include:

- the acquisition is incidental or relevant to the commencement, continuance or termination of the enterprise;
- the thing acquired is used by the enterprise in making supplies;
- the acquisition secures a real benefit or advantage for the commencement, continuance or termination of the enterprise;
- the acquisition is one which an ordinary business person in the position of the recipient would be likely to make for the enterprise;

¹: According to s.11-15 (3), (4) and (5), there are certain circumstances in which an acquisition is not treated as relating to making supplies that would be input taxed. These subsections are not discussed in this article.

- the acquisition does not meet the personal needs of individuals such as partners or directors;
- the acquisition helps to protect or preserve the enterprise entity, structure or organisation; and
- the acquisition is made by the entity in accordance with, or to satisfy, a statutory requirement imposed on the enterprise.

Please note that unlike the income tax context, an acquisition can be for a creditable purpose if it is made in carrying on an enterprise (having regards to all the above mentioned factors), notwithstanding that the acquisition is not 'necessarily incurred'.

Further, the GST Act does not restrict capital expenditures from being made for a creditable purpose. Therefore, capital acquisitions are treated in the same manner as other acquisitions for GST purposes.

Capital acquisitions are made for a creditable purpose if the acquisitions are made in relation to carrying the enterprise, and are neither private in nature nor relate to making supplies that would be input taxed.

Acquisitions that are private or domestic in nature

An acquisition is not acquired for a creditable purpose to the extent that it is of a private or domestic nature (s.11-15(2)(b)).

Expenditures characterised as living expenses are private in nature and therefore not acquired for a creditable purpose. These are expenses that although may be an essential prerequisite to carrying on an enterprise, are not incidental or relevant to the activities of the enterprise.

However, care must be taken when determining whether an acquisition is private or domestic in nature. Simply because expenditure has the characteristics of a living expense, or is commonly used for private or domestic purposes, does not automatically mean that it is private or domestic and is therefore prevented from being incurred for a creditable purpose.

Example 1 [extracted from GSTR 2008/1]

A childcare cost although necessarily incurred by a taxpayer in order to enable the taxpayer to carry on its enterprise, is not incidental or relevant to the operations of that enterprise and therefore is not for a creditable purpose.



However, if the childcare cost was paid by an employer as part of the remuneration package of the employee (either directly to the childcare provider or a reimbursement to the employee), this expense is incurred to provide a benefit in respect of employment in the enterprise. The acquisition is therefore made for a creditable purpose as it is made in carrying on the enterprise of the employer and not private or domestic in nature. The interaction of GST and fringe benefits is discussed further in GSTR 2001/3.

NOTE: Certain acquisitions that are recreational or private in nature are specifically precluded from being creditable acquisitions under Division 69.

Examples include penalties, relative's travel expenses, entertainment expenses and non-compulsory uniform expenses.



Tripartite transactions – who is entitled to claim input tax credits?

It is essential to identify who is the recipient of a supply in order to determine whether the supply was made for a credible purpose. It is usually fairly straight-forward to do so in a two-party transaction, but the identification of a recipient entity may be more difficult in a tripartite transaction. An example of a tripartite transaction is when one entity acquires a thing but then the thing is supplied to another party.

The concept of a tripartite arrangement is discussed in GSTR 2006/9. The recipient entity (or the entity to which the supply is made) is the entity that acquires the thing. Consequently, it is the recipient entity that must satisfy the credible purpose requirements under s.11-15. In a tripartite transaction, the recipient entity is the entity which is in receipt of the contractual flow of the supply. This entity may or may not be the recipient of the actual supply.

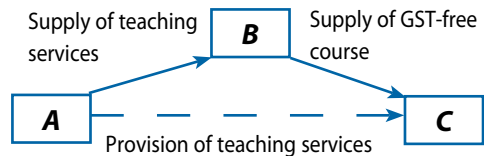
Example 2 [extracted from GSTR 2006/9]

A, a supplier of teaching services, enters into a contract with B, a course provider, to provide teaching services to B's students.

B conducts professional or trade courses that are GST-free under s.38-85. Students enrol with, and pay fees directly to, B. When a student completes the course, B is authorised by the relevant State or Territory authority to conduct a test. If a student passes the test, B facilitates the issuing of the qualification/licence by the relevant State or Territory authority.

A has no contractual relationship with the students.

A makes a supply of the teaching services to B and A provides this supply to the students. A's supply is not a GST-free supply of a professional or trade course.



However, B does make a GST-free supply of a professional or trade course to the students. The students enter into contractual arrangements with B for the supply of the professional or trade course. B makes a supply of the course to the students. It does not matter whether B's employees do the actual teaching or B subcontracts the teaching to another entity (in this case A).

Based upon these contractual arrangements, the students are the recipients of the supply of the professional or trade course made by B, and B is the recipient of the supply of teaching services made by A.

B's acquisition of A's teaching services is made in carrying on its enterprise and is in relation to making a GST-free supply. Therefore, the acquisition is for a credible purpose.

Note: An acquisition is not for a credible purpose if it is in relation to making an input taxed supply. It is for a credible purpose if the acquisition relates to making a taxable or GST-free supply.

Example 3 [extracted from GSTR 2008/1]

A private company acquired advice concerning share value to be provided to its individual shareholders in order to enable those individuals to secure private finance.

It is the individual shareholders that are the recipient of the actual supply. However, it is the private company that is the recipient entity as it receives the contractual supply. Therefore, it is the private company that must satisfy the creditable purpose requirements under s.11-15.

The advice provides no benefit to the company and is not acquired in carrying on its enterprise. The acquisition relates to each individual's shareholding rather than the enterprise that is being carried on. It satisfies the personal needs of the shareholders rather than the company. Therefore, the acquisition of advice is not made for the creditable purpose of the private company.

Acquisitions relating to making input taxed supplies

Only entities that make, have made, or intend to make, input taxed supplies will need to consider whether any part of an acquisition is not for a creditable purpose because it is related to making supplies that would be input taxed (s.11-15(2)(a)). This ruling gives examples of some situations that may give rise to particular considerations in establishing connection between an acquisition and the making of supplies that would be input taxed.

One will need to determine the creditable purpose of an acquisition based on the connection between the acquisition and the supplies the entity makes (present supplies), made (past supplies) or intends to make (future supplies). This connection may be direct, indirect, substantial or real, but is not necessary to trace the acquisition to a specific supply. The

connection must be relevant and therefore a remote connection would not suffice.

Whether an acquisition is for a creditable purpose depends on the acquisition being related to supplies which, if made, would be input taxed, notwithstanding the fact that:

- the entity has not made the intended supply, has not decided on whether to proceed with making the particular supply, or that the intended supplies never eventuate (future supplies); or
- the entity has ceased making those supplies (past supplies).

NOTE: *When an acquisition precedes a supply, the purpose of s.11-15(2) is to focus on the intended usage of the acquisition. There may be a requirement to make an adjustment under Division 129 at a later time to reflect the actual usage of the acquisition.*

Apportionment

The wording of s.11-15(2) 'to the extent that' suggests that there is a requirement of apportionment for acquisitions that is related to making both input taxed supplies and taxable supplies. This ruling draws out two types of acquisitions that require apportionment: see the table below.

The overarching principle is that apportionment should be applied on a fair and reasonable basis, having regards to the factual circumstances. GSTR 2006/3 and GSTR 2006/4 provide guidance on fair and reasonable basis for apportionment.

| Types of acquisitions that require apportionment | | |
|---|---|---|
| Types of acquisitions | Examples | Apportionment method |
| Acquisitions that directly relate to particular taxable and input taxed supplies. | Acquisition of land upon which it is intended to build commercial and residential properties for lease. | Apportioned based on factors that directly connect the acquisitions to the supplies. |
| Acquisitions not directly linked to making particular supplies, but instead are used for all the supplies made in carrying on the enterprise which makes taxable/GST-free and input taxed supplies. | Director's fee, cost of maintaining a register of shareholders. | Apportioned on the basis of current supplies that are made by the entity in carrying on the enterprise, although this may not always be the case. |



Appropriate connection between acquisitions and supplies

It is important also to determine which supplies the acquisition is most appropriately connected to. The example given in this ruling is when an acquisition is made in the course of raising capital (other than by borrowing). Is the acquisition made in the course of raising capital most appropriately related to supplies comprising the raising of capital (ie. the issue of shares) or to the enterprise's underlying activities (which may consist of taxable or GST-free supplies)? The Commissioner views this acquisition to be related to the share issue and not to how the subsequent funds are used.

Example 4 [extracted from GSTR 2008/1]

Noddy Industries Pty Ltd is a private company that manufactures furniture for sale thereby making taxable supplies. Noddy needs to upgrade its manufacturing equipment to remain competitive with other manufacturers. To do this it needs to raise \$10,000,000. The shareholders of Noddy decide to list the company and raise the necessary capital through an initial placement offer.

A merchant bank is engaged to arrange the flotation. Noddy makes supplies of interests in securities (financial supplies) when it issues the shares.

The acquisition of the arranging service is made in carrying on Noddy's enterprise and is to raise capital through the issue of securities, which are input taxed supplies. The acquisition of the arranging service relates to making supplies that would be input taxed (issue of securities) and is not for a credible purpose under section 11-15.

Equal application of credible purpose test for credible importations

The credible purpose tests in Division 11 (credible acquisitions) and Division 15 (credible importations) are similarly structured, using the same words, and therefore this ruling considers the tests of credible purpose to be intended for similar application. Consequently, the ruling treats a reference to Division 11 as also applying to Division 15.

Addendum issued

An addendum has been issued to amend GSTR 2002/2 regarding 'GST treatment of financial supplies and related supplies and acquisitions' to be consistent with GSTR 2008/1. ■

Carried forward revenue losses and the same business test

By Philip Moore

To claim a deduction for carried forward revenue losses, a company must satisfy either a continuity of ownership test or the same business test. There are also not dissimilar tests for capital losses. In *Coal Developments (German Creek) Pty Ltd v C of T* [2008] FCAFC 27, the Full Federal Court found the company involved to have failed the same business test and the case makes for interesting reading.

The facts

The taxpayer company had claimed a deduction for carried forward losses of \$13,372,739. There had been a change of ownership and control on 25 March 1998. It was accepted that the taxpayer could deduct carried forward losses incurred after that time if the same business test was passed. The problem was that the taxpayer had sold the business itself on 25 June 2001.

The law

The same business test involves the carrying on of the same business through a 'test period'. The business was required to be the *same* as that carried on immediately before 25 March 1998 on the facts of this case.

It was accepted by the Court that there was no suggestion of dealing in a loss company or diverting income.

One case mentioned in argument was *FC of T v Broken Hill South Ltd* [1941] HCA 33. The case involved a mine maintained by employees in a 'closed down' situation, the price of the lead to be mined was being watched until it rose and made the operation profitable. It was said by the Court in *Coal Developments* that this was accepted to be merely a 'lull' in conduct of the same business, and not the same as selling the whole business on 25 June 2001 which is what happened in *Coal Developments*.

The Court said:

The fact that a former owner, after the sale of a business, retains liabilities in respect of some

incidents of the business, such as a lease of real estate or machinery, does not require the conclusion that the former owner continues to carry on the same business after control of it has passed to the purchaser. The activities undertaken by...[the taxpayer]...in the present case, such as the assignment of mining leases and novation of rights under port user agreements and other contracts as well as the preparation of tax returns and the claiming of concessions for research and development, are more explicable, as a matter of fact, as having been engaged in as a consequence of the sale of the business rather than of its being 'wound down'.

In a similar fashion, the Court indicated that the collection of unpaid debts from trade debtors will not necessarily show that the vendor of a business continues to carry it on.

It was accepted that sale of assets of a business to various purchasers over time might in some instances be merely 'winding down', in the sense of continuing to carry the business on for a time. But this was not seen to apply to a single sale of the business to one purchaser.

The taxpayer in *Coal Developments* thus failed the relevant test.

Comment

Many corporate taxpayers might assume they pass the same business test even when they have disposed of the undertaking and are 'tying up loose ends'. This case is a warning that it will often not be so. ■

GST implications of hotel managed investment schemes

By Audrey Teoh

The Tax Office has recently released an Interpretative Decision (ATO ID 2008/37) regarding the GST implications of hotel managed investment schemes (MIS). Does supply of a new strata-titled accommodation suite in a hotel by a hotel owner to a purchaser, who then licenses it back to the hotel owner in the capacity of a responsible entity (RE) under a MIS arrangement, qualify as a taxable supply of a new residential premises and therefore subject to GST?



The arrangement

The hotel MIS arrangement is as follows:

- Entity A (registered for GST) acquired a vacant block of land and constructed a hotel on the land, consisting mainly of accommodation suites. Entity A obtains strata title for each accommodation suite resulting in each of the units having a separate legal title.
- Entity A (in the capacity of a vendor) sells the accommodation suites to purchasers, who then license it back to Entity A (in the capacity of a RE). Entity A then leases the accommodation suites to another entity, the hotel operator.

The decision

The agreement between the hotel owner and the purchaser is for the supply of an accommodation suite in the hotel with a clause for the purchaser to

license the unit back to vendor, in the capacity of an RE, to be managed under the terms of management agreement.

The purchase price set out in the contract is approximately the same as what the accommodation suite might otherwise be sold for as real property that is not under a MIS arrangement. Therefore, the monies paid by the purchaser are the consideration for the supply of the accommodation suite.

Further, this supply also satisfies s.9-5(b)–(d), in that:

- the supply was made in connection to the vendor/RE's enterprise;
- it was made in connection with Australia; and
- the vendor/RE is registered for GST.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed (s.9-5). According to s.40-65(1), a sale of a residential

property is input taxed but only to the extent the property is residential property used predominantly for residential accommodation. It is not input taxed to the extent that the residential premises are commercial residential premises or new residential premises (s.40-65(2)).

The accommodation suite in itself is residential premises (GSTR 2000/20 paragraph 26), however it cannot by itself be commercial residential premises (GSTR 2000/20 paragraph 51). The accommodation suite in this case is new residential premises pursuant s.40-75. The unit was recently constructed and the sale to the purchaser is the first sale of the residential premises. Further, the property was sold within five years from when it was first built.

Therefore, the Commissioner gave the view that the supply of the accommodation suite made from the Entity A, in the capacity of a vendor, to the purchaser satisfies the criteria of a taxable supply under s.9-5 and therefore is subject to GST.

Concluding remarks

The Commissioner's preliminary view expressed in GSTR 2008/D1 on GST and registered agricultural MIS (see issue 17 of *The Taxpayer*, 17 March 2007) has no relevance to this ATO ID. As stated in paragraph 4 of GSTR 2008/D1:

There are a variety of types of MIS that are quite different in legal form, structure and substance from agricultural MIS arrangements. The GST treatment of such arrangements relies on individual facts and circumstances of each type of arrangement. The views expressed in this draft Ruling (GSTR 2008/D1) are only considered for GST purposes to apply to the particular circumstances of agricultural MIS arrangements within the class of entities and schemes covered by this draft Ruling.

The arrangement outlined in this ATO ID is different from that in GSTR 2008/D1. In this ATO ID:

- the purchaser is the legal owner of the accommodation suite and therefore subject to rights and responsibilities of ownership of that property; and
- there is a strong nexus between the consideration paid by the purchaser and the purchaser obtaining legal title of that property.

However, in GSTR 2008/D1 the investor of a scheme (purchaser), under the agricultural MIS arrangement, has acquired and paid consideration for 'a right to benefits produced by the MIS'. This right according to GSTR 2008/D1 is a financial supply and therefore input taxed. ■

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Questions and answers

Q Subi works for a large public company in Australia. Recently, she has been given a large parcel of shares under the company's employee share scheme. How are the shares treated for tax purposes?

There are special provisions which tax the difference between what Subi paid for the shares (in this case nothing) and the value of the shares received. In some cases the taxing point is up-front (with a \$1,000 discount on the assessable discount in limited circumstances), and in other cases it is a future time (see the 2007 and 2008 Tax Summary at 4.850). The employee share scheme provisions treat the assessable amount as income and not as a capital gain, but it is possible for the CGT provisions to apply as well in some instances (for cost base see the 2007 and 2008 Tax Summary at pp. 248-9). Matters can become rather more complex if the employee shares relate to work done outside Australia while the employee is not a tax resident of Australia.

Q Bill and Ben agree that in exchange for Ben doing some gardening work for Bill, Bill will hand over some public-company shares as payment. They sign an agreement on 14/3/08 and the work is done the following August. Assuming Bill's shares are ordinary post-CGT assets and were not obtained under an employee share scheme, what is Bill's date of disposal and what are the general CGT consequences?

Where a CGT asset changes ownership pursuant to a contract, it is usually the date of the contract that determines the timing of the CGT event. In this case it appears the date of the agreement (14/3/08) is determinative, and the time of CGT event A1 for Bill. If Bill and Ben dealt at arm's length, the value of the gardening will be the sale proceeds. If Bill and Ben did not deal at arm's length, the proceeds will be deemed to be the market value of the shares at the time of the contract. The capital gain or loss will be based upon subtracting Bill's cost base from the actual or deemed proceeds.

The shares might attract the CGT discount if there are at least 365 clear days between Bill's date of acquisition of the shares and the date of sale - not counting days of purchase and sale - and with

an extra day in a leap-year. In the case of public company shares it is unlikely that these would be active assets and subject to the small business concessions, because there is unlikely to be a 'significant individual' who meets the \$6 million asset or \$2 million 'turnover' test: see the 2007 and 2008 Tax Summary at Chapter 5.

Q Janine purchased a block of land by contract dated 12/12/2006. She built an investment dwelling on the land during January and February 2007, and rented the property out for some months before selling by contract dated 10/1/08. Does the CGT discount apply to the building as well as the land?

The answer is that it might. A post-CGT building forms part of post-CGT land and together they form a single CGT asset. There does not appear to be any specific Tax Office guidance on the point, but given that the time of the CGT events (contract dates) for the land were more than 12 months apart the CGT discount would in theory apply.

However, if the intention of purchase was not to obtain a rental property but merely to buy, develop and sell at a profit then the profit would more likely be taxed as ordinary income. In that event the CGT discount would not be relevant to any gain. All matters surrounding the transaction might be in evidence to determine the point.

Q For a discretionary trust, what are the main advantages and disadvantages of making a family trust election?

The advantages include the availability of dividend imputation credits (not available to an ordinary discretionary trust because the beneficiaries and trustee do not hold the shares 'at risk' of market movements): the only other way of using the credits, apart from making the election, is to distribute them to an individual beneficiary or beneficiaries who are each within the total \$5,000.00 imputation credit limit (from all sources) for the tax year. Shares acquired by the trust before 3pm on 31 December 1997 do not have such restrictions on use of imputation credits, but even certain CGT rollovers will not preserve the acquisition date of

certain shares as regards imputation credits.

Another advantage of making the family trust election is that the rules affecting use of revenue losses and the claiming of bad debts by the trust apply in a less severe fashion to a family trust (see the 2007 and 2008 Tax Summary at 11.950). The main disadvantage of the election is that distributions may only be made within the family group (see the 2007 and 2008 Tax Summary at 11.870) and distributions outside the group attract the maximum rate of tax.

Q Ho and John signed a form of agreement for John to purchase a property from Ho. The arrangement is said to be subject to John obtaining finance. Assuming the sale will attract CGT for Ho, is the date of the CGT event (ie date of formation of a contract) the date of signing or the date of the finance becoming available to John?

There appears to be disagreement on the point. The difficulty is that contract law stems largely from cases and not from anything contained directly in tax legislation: tax legislation states when a contract is relevant, but not when one is formed. Some case material suggests that where there is a condition, there is no contract on signing but only a contract when the condition is fulfilled. Other material suggests the opposite. The more modern view may be that there is a contract on signing, but taxpayers are probably left to obtain a binding private ruling from the Tax Office in circumstances where the issue is of importance (eg. when it affects the timing of a CGT event and thus which tax year a capital gain falls into). It does seem, however, that there is no CGT event A1 if a contract falls through before completion, because there is no change in ownership. Note also the 2007 and 2008 Tax Summary at 5.034 concerning forfeited deposits.



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