

Tax Law Update

July 2008

At the tax face – focus on GST rulings

Since the last edition of our Tax Face a number of rulings, draft rulings and determinations have issued from the Australian Taxation Office primarily in relation to goods and services tax ("GST").

Partitioning of Land

Draft ruling GSTR 2008/D3 deals with partitioning of land and considers the GST consequences of the partitioning of jointly owned real property between the owners.

Partitioning can be done by agreement or, in some circumstances, via a court order.

Partitioning is common with parties to a property development who own land jointly but after subdivision wish to own separate, subdivided parcels. If done appropriately, savings in stamp duty can result.

The draft Ruling analyses what is a partition in some detail and expresses the view that even if no money passes hands between the co owners the supply of title from one owner to another is sufficient consideration for GST purposes.

Traditionally at law, sale and partition have traditionally been treated as alternatives – that is, a partition is not a "sale" of land. Not for GST purposes, according to the Commissioner. If jointly owned land is subdivided and joint owners end up owning subdivided parcels individually as a consequence of a partitioning agreement, then a taxable supply may have taken place – even if no money has changed hands.

The ruling sets out typical examples and shows how the GST is calculated based on the exchanged value of the land

"given up" to obtain the individual title. This value is the "consideration" for GST purposes.

The ruling also refers to section 51-30(2). This provides, in essence, that if a joint venture operator makes a supply to a participant in the joint venture it is not taxable if the recipient acquired the supply for consumption, use or supply in the course of activities for which the joint venture was entered into.

This carve out does not apply if the recipient participant in the joint venture uses the thing supplied (personally) for sale, retaining or renting. Why? This is not an acquisition in the Commissioner's view for "consumption, use or supply in the course of activities for which the joint venture was entered into".

This is a curious conclusion as it is extremely common to have joint ventures entered into where one or other of the parties "sells retains or rents" one or more of the properties as his or its part of the joint venture profit.

GSTD 2008/2 – Trusts in specie distribution

Draft GST Tax Determination GSTD 2008/2 deals with in specie distributions of assets "applied or intended to be applied in an enterprise carried on by a discretionary trust to a beneficiary of the trust" and attempts to explain when such supplies may be taxable for GST purposes.

It contains some confusing concepts.

Private Commodity Concept

Paragraph 8 introduces a concept of a "private commodity" and seems to suggest that if a private commodity is supplied by an entity described as an "ultimate consumer" then the supply is not made in the course of an enterprise (which is one of the elements required for a supply to be taxable).

Of course the first question that appears to Mr Simple reader is how an "ultimate" consumer ("ultimate being a superlative term suggesting "final") can supply anything – if he supplied something then he is not the "ultimate" consumer.....but we digress....

In the context of a discretionary trust, therefore, paragraph 8 seems to infer that the supply by a trust of an in specie distribution as such by an "ultimate consumer" may not be taxable – without illustrating how this could be possible in the context of a discretionary trust.

Paragraph 9 then proceeds to state as follows:

"The application, or intended application of an asset in an enterprise establishes the necessary relationship between the supply of the asset and the relevant enterprise. The fact that the supply in question was made by an in specie distribution rather than by sale does not alter the analysis."

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Unfortunately this part of the Ruling does not refer to whose "intention" is relevant in the "application" and which "enterprise" the Commissioner is referring to, that is, the supplier or the recipient.

The confusion is cleared momentarily in paragraph 10 where the Commissioner states:

"It is not relevant to consider the use or intended use of the asset by the recipient of the supply."

But then we end up with a curious position where the "intended application" (which indicates either an intention in the future – i.e a prospective intention - or a present intention intended to be put in place or manifested in the future) of an asset by a trust determines whether or not the trust is making a supply which is possibly taxable when the trust supplies the asset by in specie distribution to the beneficiary.

And we know the "enterprise" the Commissioner is referring to in paragraph 9 cannot be the beneficiary's

enterprise because paragraph 10 advises us of that. It must be the trusts enterprise.

No indication is given as to what point in time this "intended application" is to be examined – that is, pre, during or post supply?

We all know what he is trying to say. We think. But some clarification is required. No doubt there will be a few submissions about that one.....

Bare Trusts

GST ruling GSTR 2008/3 deals with dealings in real property by bare trusts. Bare trusts are of particular relevance now with the holding of assets by bare trustees for superannuation funds under instalment warrant provisions and the Ruling should be read with some interest.

The Ruling outlines that for all intents and purposes the entity making the acquisition and the supplies under a bare trust is the beneficiary and follows common sense. It contains a solid analysis of what the law relating to bare

trusts, distinguishes bare trusts from the concept of agency and towards the end sets out in paragraphs 78 and 79 how to deal with tax invoices.

The Commissioner takes the view that it is satisfactory for the trustee to issue the tax invoice where supplies are made and in these circumstances the Commissioner would exercise his discretion under section 29-70 of the *GST Act* to treat such a document as a tax invoice where the trustee appears as the supplier instead of the beneficiary.

On the GST front there has been a flurry of commentary on the decision of the Full Federal Court in the Brady King decision overturning the decision of the trial judge. In the context of this matter, it has been good to see a purposive construction applied to s 75-10(3) – and some certainty with the application of the margin scheme where there is a lack of identity between the interests in the real property caused by subdivision. This will be the subject of a separate publication.

Recent tax issues at Hunt & Hunt – tax sharing deeds; mutuality; transfer pricing and others

Over the course of a month to a few weeks, we at Hunt & Hunt are involved in looking at tax issues. A number of issues occur in practice at the same time from different clients as yearly timing sometimes dictates whether an issue is trendy. Some of the interesting issues we have examined have been:

- Drafting a very complex tax sharing deed. It is amazing how these documents have morphed into 80 page documents. The most common method of allocation of the tax liabilities now seems to be on a stand

alone basis rather than a share of accounting profit. At least that seems to be our experience.

- Examining the mutuality principle for a community title where a common area was to be used by the community title to provide services to members. There are a few interesting rulings now on mutuality which are worth reading.
- As the client base globalises and clients start setting up businesses overseas, transfer pricing becomes a regular issue and the new law

relating to foreign losses has required examination on a couple of occasions. The *Tax Laws Amendment (2007 Measures No. 4) Act 2007* became operative on 1 July 2008 and allows foreign losses to be applied against domestic income and excess foreign tax credits to be applied against that foreign income.

- Share ownership plans under Division 13A of the *Income Tax Assessment Act 1936* are called for advice quite regularly by smaller operators and instantly dismissed when they realise how restrictive they are
- Corporate reconstruction relief for stamp duty purposes.
- Roll-over relief of assets between corporate groups and anti avoidance
- Capital streaming (ss 45 onwards) and Part IVA dividend streaming/ anti avoidance.

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