Ashurst Australia

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GST Bulletin

June 2015 GST developments

WHAT YOU NEED TO KNOW

This Bulletin outlines Australian GST developments in June 2015, which may impact your business, including:

Relevant area	At a glance	Relevant to
Division 29 – what is attributable to tax periods	GST Ruling 2015/2 - development lease arrangements with government agencies- the Ruling explains the GST treatment of particular transactions arising in the context of development lease arrangements entered into between government agencies and private developers.	Government agencies and private developers
Division 38 – GST-free supplies	GST Ruling 2002/5A4 –Addendum to GST Ruling 2002/5 - when is a "supply of a going concern" GST-free? – the Commissioner issued an addendum to GST Ruling 2002/5 to include an additional example which further illustrates, for the purpose of section 38-325 of the GST Act, those things that are necessary for the continued operation of an enterprise of leasing commercial property. The GST Ruling also makes reference to the High Court's decision in *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49 regarding "a going concern".	Real property industry/tenants
Division 70 – financial supplies	GST Ruling 2004/1A7 – Addendum to GST Ruling 2004/1 - reduced credit acquisitions - the Commissioner issued an addendum to GST Ruling 2004/1 in order to refer to the decision in *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49 and clarify that the acquisitions that a recognised trust scheme makes by way of lease can in certain cases include acquisitions made under a lease granted before 1 July 2012.	Real property industry/tenants
VAT	*The Commissioners for Her Majesty's Revenue and Customs v The Chancellor, Masters and Scholars of the University of Cambridge* [2015] UKUT 0305 TCC – the Upper Tribunal has held that input tax (ie VAT) on investment management fees paid to those managing the University of Cambridge and its Colleges' endowment fund, which involved work making taxable and exempt supplies, could be partially deducted as an overhead cost.	All taxpayers

GST Ruling 2015/2 - development lease arrangements with government agencies

The Commissioner has released GST Ruling GSTR 2015/2 to explain the GST treatment of particular transactions arising in the context of development lease arrangements entered into between government agencies and private developers.

These arrangements typically have the following features:

1. the private developer (**Developer**) undertaking a development on land owned by a government agency in accordance with the terms of a written agreement between the developer and the government agency; and

2. the government agency supplying the land by way of freehold or grant of a long-term lease to the developer subject to the developer undertaking the development in accordance with the terms of the written agreement. That is, the Developer becomes entitled to a transfer of the freehold or grant of a long-term lease when the development is completed.

In particular, this Ruling considers:

1. the relevant principles for identifying and characterising the various supplies that are made for consideration under a development lease arrangement, including:

    a. whether the grant of a short-term lease or licence (**Development Lease**) by the government agency to allow the Developer to undertake the development on the land is a supply for consideration;

    b. whether, in completing the works on land owned by the government agency, the Developer makes a supply of development services to the government agency for consideration; and

    c. whether the sale of the freehold or grant of the long-term lease of the land by the government agency is a supply for consideration, and whether any consideration the Developer provides for supply of the land includes undertaking of the development works on land owned by the government agency.

2. the extent to which the consideration for particular supplies made under a Development Lease arrangement includes consideration that is not expressed as an amount of money, that is, non-monetary consideration

3. how the value of any non-monetary consideration provided for supplies made in the context of a Development Lease arrangement may be determined; and

4. the attribution, under Division 29 of the GST Act, of the GST liabilities and input tax credit entitlements that may arise under Development Lease arrangements.

In relation to supplies made under a Development Lease arrangement, the Commissioner's view is that where a government agency grants a Development Lease to allow a Developer to undertake development works on the land, the government agency makes a supply of land to the Developer by way of lease or licence. The Developer also makes a corresponding acquisition of land by way of lease

or licence. The Commissioner states that in completing the development works on the land, in accordance with the terms of a Development Lease, the developer makes a supply of development services to the government agency.t agency.

The Commissioner also discusses the situation where supplies are made for consideration under a Development Lease arrangement. The Commissioner notes that where the terms of the development lease arrangement makes the supply of the land subject to or conditional on the Developer completing specified development works, supply of the land by the government agency is consideration for the Developer's supply of development services. The supply of development services by the Developer is, in turn, consideration for the supply of land by the government agency.

Further, where the Developer completes additional works on land retained by the government agency, the Developer makes a supply of development services to the government agency. The supply of the land by the government agency is consideration for this supply of development services by the Developer if:

1. the terms of the Development Lease arrangement make the government agency's supply of land subject to or conditional upon the Developer completing the additional works, and

2. Division 82 of the GST Act does not apply.

The Ruling does not apply to development lease arrangements that do not involve a government agency.

The Ruling applies on and from the 3 June 2015. However, the 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 3 June 2015.

GST Ruling 2002/5A4 – Addendum to GST Ruling 2002/5 - when is a "supply of a going concern" GST-free?

The Commissioner has issued an addendum to GST Ruling 2002/5 to include an additional example that illustrates, for the purpose of section 38-325 of the GST Act, those things that are necessary for the continued operation of an enterprise of leasing commercial property. The Addendum also makes reference to the High Court's decision in *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49 regarding the application of Division 135 of the GST Act following the sale of leased residential premises as a going concern.

The Addendum provides an additional example in respect of management and services contracts relating to the lease of a property. The Commissioner notes that an identified enterprise may consist solely of the leasing of a property to a tenant or tenants. Such an activity is an enterprise under section 9-20(1)(c). This is the case even though the leasing of the property may be carried on as part of the supplier's broader enterprise. Where the identified enterprise consists solely of leasing a property, management and services contracts related to the lease are not things necessary for the continued operation of that enterprise. That is, where the identified enterprise is one of leasing, the supply of the property subject to the existing leases to the tenant or tenants is all that is required to satisfy section

38-325(2)(a).

The Addendum also provides an additional example in respect of management and services contracts relating to an enterprise of leasing. The Commissioner suggests that while management or services contracts may be not necessary for the continued operation of a leasing enterprise, any services contracts that are assigned or novated to the acquirer are transferred as part of the leasing enterprise, and can also be included as part of the "supply of a going concern".

GST Ruling 2004/1A7 – Addendum to GST Ruling 2004/1 - reduced credit acquisitions

The Commissioner has issued an addendum to update GST Ruling GSTR 2004/1 in light of the decision in *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49. The decision in *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49 was covered in our November 2014 GST Bulletin and December 2014/January 2015 GST Bulletin (Commissioner's Decision Impact Statement).

The Addendum clarifies that acquisitions made by a recognised trust scheme by way of lease can in certain cases include acquisitions made under a lease granted before 1 July 2012. This clarification is relevant to the application of item 32 of the table in regulation 70-5.02(2) of the GST Regulations, which sets out what supplies acquired by a recognised trust scheme are reduced credit acquisitions.

The Commissioners for Her Majesty's Revenue and Customs v The Chancellor, Masters and Scholars of the University of Cambridge [2015] UKUT 0305 TCC

The Upper Tribunal (the **Tribunal**) in *The Commissioners for Her Majesty's Revenue and Customs v The Chancellor, Masters and Scholars of the University of Cambridge* [2015] UKUT 0305 TCC confirmed the decision reached at first instance, holding that input tax (ie VAT) paid by the University of Cambridge and its Colleges (**Cambridge**) on investment management fees to those managing its endowment fund could be partially deducted as an overhead cost.

Facts

The case concerned a dispute between Cambridge and Her Majesty's Revenue and Customs (**HMRC**) regarding the characterisation of fund management fees paid to Cambridge University Endowment Fund (the **Fund**), which were incurred in respect of investments that made taxable and exempt supplies.

Cambridge is a charity whose main activity is the provision of education, which is an exempt supply for VAT purposes. Cambridge also makes taxable supplies including commercial research, sales of publications, services to colleges, consultant services, catering, accommodation, etc. Cambridge receives donations and endowments that are invested in the Fund. The Fund invests in a range of securities including equities, property bonds and other investments in the UK. The Fund generates incomer which Cambridge used to fund all of its activities. Both parties agreed that operating the Fund was not an economic activity in its own right and so was outside the scope of VAT.

The parties agreed that the only issue for determination was whether the fees charged by the Fund to

Cambridge should be characterised as overhead expenditure (ie general costs) and attributable to Cambridge's economic activity as a whole (ie attributable to a taxed transaction), so as to allow Cambridge to deduct a portion of the VAT.

Cambridge argued that the fees were overhead costs and so the VAT incurred on supplies of goods and services should be apportioned between exempt and taxable supplies.

HMRC argued that the VAT on investment management fees could not be deducted, claiming that managing the fund was a non-economic (ie non-business) activity of Cambridge that had no direct and immediate link to Cambridge's taxable supplies. In effect, HMRC argued that the fees did not "burden" the cost of Cambridge's economic activity as a whole and could not be deducted.

Held

The Tribunal held that the investment activity of the Fund was not an activity carried out for its own sake but for the benefit of Cambridge's economic activity in general. The fees were thus overheads, and so to the extent that the fees were relevant to the taxable supplies of Cambridge they were deductible.

In reaching this determination, the Tribunal stated that the question to be asked was whether Cambridge's investment activity through the Fund was carried out for the benefit of Cambridge's economic activity in general. If so, the costs of that activity would form part of Cambridge's overheads and would therefore form part of the price of its products.

The Tribunal noted that in order to be able to deduct input tax, there must be a clear and immediate link between the goods or services in respect of which VAT was incurred and the supplies that give rise to the right to deduct (for example, taxable supplies). In both cases, the link is that the costs of the input transaction are components of the cost or price of supplies by the taxable person that give rise to the right to deduct.

The Tribunal agreed with that parties that the fees could not be directly and immediately linked to a specific taxable supply, given the investment activities were exempt transactions. Nevertheless the Tribunal found as a matter of fact that the investment activity was not undertaken for its own sake but for the benefit of Cambridge's other economic activities. As the relevant purpose was to benefit the economic activities of Cambridge as a whole, the costs associated with the Fund's investment activity formed part of Cambridge's overheads. Further, to the extent that the investment management fees formed part of Cambridge's overheads as economic and taxable activity, they were held to be deductible.

The approach of the Upper Tribunal can be contrasted with the decision in *Rio Tinto Services Ltd v Commissioner of Taxation* [2015] FCA (**Rio**) discussed in our February 2015 GST Bulletin and March 2015 GST Bulletin, now subject to an appeal to the Full Court of the Federal Court. In Rio, the Federal Court held that the taxpayer was not entitled to GST input tax credits for certain acquisitions relating to residential accommodation provided in connection with its mining operations in Western Australia as the acquisitions fell within the scope of section 11-15(2)(a) of the GST Act. The Court noted that the acquisitions were not made for a "creditable purpose" as it merely "related" to making supplies that were input taxed, being the residential accommodation, even though the underlying purpose was the

creditable mining activities. The Federal Court considered that as the acquisitions were not made for a "creditable purpose", in the circumstances, the question of apportionment did not arise.

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