

# ***GSTR 2002/2EC - Addendum Compendium***

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The edited version of the Compendium of Comments is an ATO communication that is not intended to be relied upon as it provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law. In accordance with PS LA 2008/3 it only affords level 3 protection.

Page status: **not legally binding**

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## **Ruling Compendium – GSTR 2002/2A**

This is a compendium of responses to the issues raised by external parties to draft GSTR 2002/2DA – GST treatment of financial supplies and related supplies and acquisitions

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

### **Summary of issues raised and responses**

<b>Issue No.</b>	<b>Issue raised</b>	<b>ATO Response/Action taken</b>
1	<p>Regarding a supply that is made in relation to rights, where the rights are ‘for use’ outside Australia, ‘for use’ should not be interpreted as being the subjective intention of the purchaser.</p> <p>Particular concern is expressed about the differing interpretation of the terms ‘are to be used’ in the context of item 4 of the table in subsection 38-190 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (the GST Act), and, ‘intended to be occupied’ in the context of the definition of ‘residential premises’ in section 195-1 of the GST Act. In respect of the latter it is noted that in <i>Sunchen</i><sup>1</sup> the subjective intention of the purchaser was rejected, but the opposite view is now being taken regarding ‘rights for use’.</p>	<p>GSTR 2003/8, which is about the supply of rights for use outside Australia, provides the ATO view on this point. Paragraph 36 of GSTR 2003/8 states:</p> <p style="padding-left: 20px;">The requirement that ‘the rights are for use outside Australia’ in paragraph (a) of item 4 is an intention test.</p> <p>The High Court observed in <i>Travelex</i> (in the context of the supply of foreign currency banknotes).<sup>2</sup></p> <p style="padding-left: 20px;">It may be accepted that, as the Solicitor-General submitted, there may be practical difficulties in administering the relevant provisions of the Act <i>where the use to be made of the rights turns on the recipient’s intention</i>. Those difficulties, however, do not provide any basis for reading down those provisions, or for reading the connecting expression ‘in relation to’ in a way that departs from the construction which has been identified. Difficulties in deciding whether the supply is ‘for use outside Australia’ do not bear upon what is meant by a supply ‘in relation to’ rights.<sup>3</sup> (emphasis added)</p> <p>We propose to maintain the draft position in the final addendum as this is consistent with the ATO view in GSTR 2003/8, and in our opinion is supported by the decision of the High Court in <i>Travelex</i>.</p>

<sup>1</sup> *Sunchen Pty Ltd v Commissioner of Taxation* [2010] FCAFC 138.

<sup>2</sup> *Travelex Ltd v FC of T* 2010 ATC 20-214 (*Travelex*)

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2	<p>It is submitted that an inconsistency arises between the meaning of 'rights for use' in the addendum and the explanation contained in ATO ID 2012/1. The ATO ID is said to focus on the objective attributes of the shares and not on the subjective intention of the supplier or acquirer.</p>	<p>The addendum refers to intended use as being relevant to determining whether certain supplies are to some extent, GST-free in accordance with item 4 of the table in subsection 38-190(1) of the GST Act.</p> <p>As ATO ID 2012/1 states:</p> <p style="padding-left: 40px;">It is the intended use of the rights attached to the shares that is relevant in assessing the application of paragraph (a) of Item 4 to the supply of the brokerage services to buy or sell shares.</p> <p>we consider there to be no inconsistency between this statement and the meaning of 'rights for use' in the addendum.</p>
3	<p>Schedule 2, Line no. B41 of the Addendum states:</p> <p style="padding-left: 40px;">The annual fee will be consideration for a GST-free supply under item 4 of subsection 38-190(1) to the extent that the cardholder intends using the credit card facility when the cardholder is outside Australia</p> <p>The view is expressed that the same statement should apply to Line B34 and Line B35, which are about additional card fees. There is said to be no support for different treatments between an annual credit card fee and additional card fees.</p>	<p>The Addendum inserts a new explanatory note (Note 4A) into the boxed text at the commencement of Schedule 2 of GSTR 2002/2. Note 4A explains that the fact that something is not specifically mentioned in Schedule 2 as being GST-free wholly or in part under subsection 38-190(1) of the GST Act does not mean it is not, or cannot be covered by that provision. The Addendum also inserts new paragraph 288A into the Ruling to explain that a financial supply will not be input taxed to the extent it is GST-free, but notes that unless referred to at a specific item in Schedule 2, the Schedule does not discuss in what circumstances a particular supply may be GST-free.</p> <p>The possibility of a relevant supply under Lines B34 or B35 being wholly or partly GST-free under subsection 38-190(1) of the GST Act should therefore not be disregarded simply because the lines make no specific mention of that provision. However, whether the relevant supply is wholly or partly GST-free will depend on an appropriate analysis of the facts of the case.</p>

<sup>3</sup> *Travelex* [36]

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4	<p>Schedule 2, Line no. F4 of the Addendum states:</p> <p>If the recipient of the notes intends to use the notes in Australia, e.g. to supply the notes to another entity in Australia, the supply of the notes to the recipient will not be GST-free, but will be input taxed under Item 9 of subregulation 40-5.09(3).</p> <p>The view is expressed that the <i>Travellex</i> decision may have a wider application and that a similar statement could apply to supplies of currency in a non-physical medium.</p>	<p>We recognise that the <i>Travellex</i> decision will apply more broadly than simply to exchanges of banknotes. This is already acknowledged in the Addendum in new Line items B44 and F16.</p>
5	<p>The concern is expressed that the draft Addendum could be misleading, as if GSTR 2002/2 is quiet on the potential impact of the <i>Travellex</i> decision for a set of supplies, the inference is that the decision would not apply.</p> <p>The suggestion is made that either a detailed review of all of the supplies listed in Schedule 2 of GSTR 2002/2 is conducted to ensure that all consequences of the decision are taken into account, or that a paragraph is inserted to expressly state that GSTR 2002/2 needs to be read in accordance with GSTR 2003/8 in determining any possible GST-free treatment when a supply is a financial supply made in relation to rights.</p>	<p>We acknowledge the concern submitted.</p> <p>See Issue 3 above – All supplies listed in Schedule 2 are subject to new paragraph 288A and new explanatory note 4A in the boxed text at the commencement of the Schedule.</p> <p>The new paragraph and the new explanatory note inform readers that the fact that a line makes no specific mention of a possible application of subsection 38-190(1) of the GST Act does not mean the relevant supply is not, or cannot be covered by that provision.</p> <p>Additionally new paragraph 288A refers readers to paragraphs 144 to 170 of GSTR 2002/2 for guidance on application of subsection 38-190(1) of the GST Act to financial supplies. In discussing item 4 to the table in subsection 38-190(1) of the GST Act, footnote F68A at paragraph 158 of GSTR 2002/2 refers readers to GSTR 2003/8. Hence, GSTR 2002/2 already refers readers to GSTR 2008/3 for the purposes of obtaining guidance on whether rights are for use outside Australia.</p>