GSTR 2003/D2 - Goods and Services Tax: payment on early termination of a lease of goods

This document has been finalised.
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Australian Taxation Office

Draft Goods and Services Tax Ruling
Goods and Services Tax: payment on early termination of a lease of goods

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Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxation officers, taxpayers and practitioners, as it is not a ruling or advice in terms of section 37 of the ***Taxation Administration Act 1953****. When officially released it will be a public ruling for the purposes of section 37 and may be relied upon by any person to whom it applies.*

What this Ruling is about

1. This Ruling considers the goods and services tax (GST) consequences resulting from a payment made on early termination of a lease of goods.[1] It examines payments made on early termination occurring as a result of:

- a mutual agreement;
- a default by the lessee;
- a casualty occurrence; or
- a statutory right to terminate early.[2]

2. This Ruling does not deal with:

- payments made on early termination of other types of leases or contractual agreements;
- payments made as a result of a court order;[3] or
- the GST consequences resulting from an insurance settlement.[4]

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[1] A lease of goods is also commonly referred to as a chattel lease. Reference to a lease in this Ruling includes reference to both a finance lease and an operating lease.
[2] See for example, section 157 of the Consumer Credit (Queensland) Code.
[3] This is covered in Goods and Services Tax Ruling GSTR 2001/4 which deals with the GST consequences of court orders and out-of-court settlements.
[4] This Ruling examines, in part, the application of monies after an insurance settlement has been reached.

3. The Ruling explains the circumstances in which the payment on termination represents consideration for a supply. It also considers whether there is a sufficient nexus between the payment and a supply. The Ruling does not examine the other requirements of a taxable supply.

4. Unless otherwise stated, all legislative references in this Ruling are to the *A New Tax System (Goods and Services Tax) Act 1999* (the 'GST Act').

Date of effect

5. This draft Ruling represents the preliminary, though considered, view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

6. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

7. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Background

8. A lease agreement is terminated when the agreement is brought to an end. Termination discharges the lessor and the lessee from the obligation to perform (or to be ready and willing to perform) their respective contractual duties under the lease.

9. A lease is terminated early where the agreement is brought to an end before the expiry of the contracted period. It may be terminated early by voluntary agreement of the lessor and the lessee, or it may be terminated involuntarily without either party's agreement.

10. In particular, early termination can occur as a result of:

- a mutual agreement by the parties to terminate the lease agreement early, whether under the terms of the contract or a separate agreement;
- a default by the lessee;
- a casualty occurrence; or
- the exercise of a statutory right to terminate early.[5]

11. A lease agreement may have clauses providing for automatic termination, or termination at one party's option, on the occurrence of specified default or casualty events. The lease may also provide for the lessee to be liable to make a termination payment, with a mechanism for calculating the payment amount also being included.[6]

12. A payment made on early termination may have more than one purpose. For example, part of the payment may be made in satisfaction of arrears of lease instalments due for the supply of the goods under the lease prior to early termination. Other parts of the payment may be attributable to compensating the lessor's loss of bargain or future profits. Where payment on early termination occurs, the payment needs to be apportioned as to its relevant parts.

13. The early termination of a lease may happen concurrently with the transfer of title to the goods. The parties may enter a separate agreement to transfer title to the goods to the lessee in return for payment of the residual value specified in the lease. Alternatively, the lessor may transfer title to the goods to a third party following early termination. Where this occurs, the lessee may be liable to pay the lessor the difference between the sale proceeds and the residual value of the goods. Where the sale proceeds exceed the residual value, the lessee may be entitled to the excess.[7]

Legislative context

What is a taxable supply?

14. A payment made on early termination of a lease of goods is consideration for a taxable supply where the requirements of section 9-5 of the GST Act are met.

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[5] See for example, section 157 of the Consumer Credit (Queensland) Code.

[6] References in this Ruling to 'payment' include monetary payments and non-monetary payments. Goods and Services Tax Ruling GSTR 2001/6, which deals with non-monetary consideration, provides guidance on the application of the GST Act to non-monetary consideration.

[7] This occurs mainly in relation to finance leases.

15. Section 9-5 of the GST Act provides:

> You make a taxable supply if:
>
> (a) you make the supply for consideration; and
>
> (b) the supply is made in the course or furtherance of an enterprise that you carry on; and
>
> (c) the supply is connected with Australia; and
>
> (d) you are registered or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

16. In considering the GST consequences of payments made on early termination, the main issue is whether there is a 'supply for consideration'. This Ruling considers this requirement only.

Is there a supply made for consideration?[8]

17. For there to be a supply for consideration, three fundamental criteria must be met:

(i) the supplier must make a supply; and

(ii) there must be a payment; and

(iii) there must be a sufficient nexus between the supply and the payment.

What is a 'supply'?

18. A 'supply' is defined in subsection 9-10(1) of the GST Act as 'any form of supply whatsoever'. Essentially, a supply is something that passes from one party to another.

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[8] The following analysis is based on Goods and Services Tax Ruling GSTR 2001/4 which deals with the GST consequences of court orders and out-of-court settlements, and draws on Goods and Services Tax Ruling GSTR 2000/11 which deals with grants of financial assistance.

19. Without limiting this general meaning, subsection 9-10(2) provides a non-exhaustive list of activities or occurrences that are included within the meaning of supply. The list includes:

> (a) a supply of goods; …
>
> (e) a creation, grant, transfer, assignment or surrender of any right; …
>
> (g) an entry into, or release from, an obligation:
>
> > (i) to do anything; or
> >
> > (ii) to refrain from an act; or
> >
> > (iii) to tolerate an act or situation.
>
> (h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).

What is 'consideration'?

20. 'Consideration' is defined in section 195-1 of the GST Act to mean 'any consideration, within the meaning given by section 9-15, in connection with the supply'. Subsection 9-15(1) states:

> Consideration includes:
>
> > (a) any payment, or any act or forbearance, in connection with a supply of anything; and
> >
> > (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

21. Therefore, consideration extends beyond monetary payments to include such things as acts and forbearances. Accordingly, consideration includes both monetary and non-monetary consideration. While the consideration given for early termination is usually monetary, non-monetary consideration is provided in some cases.

Is there a sufficient nexus?

22. Section 9-15 of the GST Act also provides that a payment is consideration for a supply if the payment is 'in connection with' a supply or 'in response to' or 'for the inducement' of a supply. Therefore, there must be a sufficient nexus between a supply and a payment, which is provided for that supply, for there to be a supply for consideration.[9]

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[9] See paragraph 75 of Goods and Services Tax Ruling GSTR 2001/4.

Ruling with explanation

23. In determining the GST consequences of a payment made on early termination of a lease, regard needs to be had to the true character of the transaction. An arrangement between the parties will be characterised not merely by the description the parties give to the arrangement, but by looking at the transactions entered into and the circumstances in which the transactions are made.[10] The character of a payment may not necessarily be determined by the description given to it by the parties to the lease. In *Radaich v. Smith* (1959) 101 CLR 209[11] McTiernan J said[12]:

> … the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it.

24. Further, in *Rotherwood Pty Ltd v. FC of T* (1996) 64 FCR 313[13] Lee J stated:

> The description of the payment in the contract may be only part of a matrix of facts from which the character of the payment, as paid or received, is to be determined: see *Reuter v. FCT* (1993) 27 ATR 256 at 261-2; 93 ATC 5030 at 5036; *FCT v. Cooling* (1990) 22 FCR 42 at 53 per Hill J.

Early termination and payment as a result of mutual agreement

25. Early termination as a result of a mutual agreement occurs where the lessor and the lessee terminate the lease early on a consensual basis.

26. For example, the lessee may want to terminate the lease early even though this is not provided for in the lease. As a result, the lessor agrees to early termination and releases the lessee from its obligations in return for a payment. The parties may execute a deed of variation, or other form of variation, to the lease providing an agreed process for termination and liability to pay a specified sum.

27. Alternatively, the original terms of the lease may provide for the lessee to apply for early termination, to be granted at the lessor's discretion and subject to payment. The lease may also provide a mechanism for calculating that payment amount.

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[10] *Marac Finance Ltd v. Virtue* (1981) 1 NZLR 586.
[11] [1959] ALR 1253; (1959) 33 ALJR 214.
[12] Adopting Lord Denning's comments in *Facchini v. Bryson* (1952) 1 T.L.R. 1386.
[13] (1996) ATR 276; 96 ATC 4203.

28. The payment received on early termination as a result of a mutual agreement is 'consideration for a supply' where it is given in return for releasing the lessee from its contractual obligations. The lessor supplies a release of the lessee's contractual obligations under the lease. This supply is made in return for payment. As such, a sufficient nexus exists between the payment and the supply. Therefore, the part of a payment given on early termination in return for this supply is subject to GST where the other requirements of a taxable supply are met.

29. In addition, the original terms of the lease may provide for the lessee to terminate the lease early by giving written notice and a termination payment to the lessor. Where this occurs, the lessor grants a release of the lessee's contractual obligations. This supply becomes operative only when notice is given by the lessee and consideration is paid in the form of a termination payment. Once operative, a supply for consideration arises. GST is payable on this supply, where the other requirements of a taxable supply are met.

30. Where payment is made on early termination as a result of a mutual agreement, the payment may be given for several purposes.

31. Part of the payment may be made in connection with other current or earlier taxable supplies between the parties.[14]

32. For example, part of the payment may be given in satisfaction of arrears of lease instalments due for the supply of the goods under the lease prior to early termination. This part of the payment is consideration for the earlier supply by way of lease. GST is payable on this supply where the other requirements of a taxable supply are met.

33. Part of the payment may also be given in return for transferring title to the goods to the lessee on termination. Any such sale of the goods is a new transaction separate from the earlier supply by way of lease. Payment given in return for a current supply of title to the goods is 'consideration for a supply'. GST is payable on this supply where the other requirements of a taxable supply are met.

34. Alternatively, where the goods are sold to a third party on termination, the lessee may be liable for, or entitled to, the difference between the net sale proceeds and the residual value of the goods (commonly adjusted to present values). This payment alters the amount of consideration for the earlier supply of the goods by way of lease.

[14] A more detailed explanation of the concept of an 'earlier supply' and a 'current supply' is contained in Goods and Services Tax Ruling GSTR 2001/4, particularly in paragraphs 45 to 49.

35. Where the lessee is required to make a shortfall payment because the sale proceeds are less than the residual value, an adjustment event arises for the lessor in relation to the supply of the goods by way of lease. This adjustment event gives rise to an increasing adjustment for the lessor where the supply by way of lease is a taxable supply. The lessor will be required to issue an adjustment note to the lessee. Similarly, there is an adjustment event for the lessee. Where the lessee's acquisition of the goods by way of lease was a creditable acquisition, a decreasing adjustment arises for the lessee.[15]

36. Where the sale proceeds exceed the residual value and the lessor pays the difference to the lessee, an adjustment event arises for the lessor in relation to the supply of goods by way of lease. This adjustment event gives rise to a decreasing adjustment for the lessor where the supply is a taxable supply. The lessor will be required to issue an adjustment note to the lessee. There is also an adjustment event for the lessee. Where the acquisition of the leased goods by the lessee was a creditable acquisition, an increasing adjustment arises.[16]

37. Examples 1, 2, 3, 4 and 8 illustrate the GST implications of early terminations by mutual agreement.

Early termination and payment as a result of a default by the lessee

38. Early termination as a result of a default by the lessee occurs where a lease is unilaterally terminated by the lessor due to the lessee's failure to properly perform (or to be ready and willing to perform) its contractual duties.

39. Early termination may flow from a default by the lessee, which results in the lessor exercising its common law right to terminate and recover damages.

40. Early termination and payment may also flow from a default which may not give rise to any such common law rights. The lease agreement may provide for early termination and payment on the occurrence of specified defaults. This may include default of a non-fundamental term in the lease, in addition to a breach of a fundamental term which is otherwise recognised at common law.

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[15] This is consistent with Goods and Services Tax Determination GSTD 2001/2, paragraph 9.

[16] The sale of goods by a lessor on expiry of a lease agreement is discussed further in Goods and Services Tax Determination GSTD 2001/2 which deals with whether the sale of goods by a lessor on expiry of a lease agreement is a separate supply to the lease of the goods. Goods and Services Tax Ruling GSTR 2000/19, which deals with making adjustments under Division 19 for adjustment events, provides further guidance on adjustments.

41. Therefore, early termination due to the lessee's default may arise from a breach or repudiation at common law, as well as a breach of a non-fundamental term as agreed by the parties.[17]

42. Examples of defaults by the lessee which may result in early termination include:

- the lessee defaults on the lease instalments;
- the lessee misuses the leased goods or fails to maintain them in good repair; or
- the lessee does not insure the leased goods in accordance with the terms of the lease agreement.

43. Where a lease is terminated early because of a default by the lessee, termination occurs without any voluntary agreement of the lessor.

44. As such, payment is often made to compensate the lessor for any loss of bargain or damage suffered because of the early termination. This loss or damage cannot be characterised as a supply made by the lessor, because the loss or damage does not in itself constitute a supply under section 9-10 of the GST Act.[18]

45. The payment received to compensate the lessor's loss or damage flowing from early termination as a result of a default by the lessee is not 'consideration for a supply'. There is no liability for GST because no supply is made in connection with the payment.

46. In determining whether a sufficient nexus exists between supply and consideration, regard needs to be had to the true character of the transaction. An arrangement between the parties will be characterised not merely by the description that parties give to the arrangement, but by looking at all of the transactions entered into and the circumstances in which the transactions are made.

47. Payment to remedy the loss or damage flowing from early termination due to a default is not given as consideration for supply of the goods by way of lease prior to early termination. In *O'Dea v. Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359[19], the High Court considered the character of a payment claimed on early termination of a lease due to the lessee's default in payment of the lease instalments. The payment claimed equated to the total rent payable under the lease less that already paid, together with interest. The case dealt with whether the additional payment was in

[17] See, for example, *AMEV-UDC Finance Ltd v. Austin* (1986) 162 CLR 170; (1986) 68 ALR 185; (1986) 60 ALJR 741.
[18] This includes any payment of penalties or punitive damages. The principles discussed in paragraphs 71 to 73 of Goods and Services Tax Ruling GSTR 2001/4, in relation to where the subject of a claim is not a supply, have application here.
[19] (1983) 45 ALR 632; (1983) 57 ALJR 172.

the nature of a penalty or damages. The majority held that the lessor was not entitled to recover the balance of the entire rent because the amount claimed constituted a penalty. Deane J commented:

> If any regard at all is had to substance, it would be a misuse of language to describe the obligation under cl 12 immediately to pay the 'moneys due for unexpired terms' as an obligation to pay rent. The obligation to pay those moneys without any entitlement to the possession or use of the machine was an obligation immediately to pay an amount of money upon default which was calculated and described by reference to, but was distinct and quite different in substance from, the amounts which would have been payable as rent if no default had occurred.[20]

48. This is further supported by the UK VAT Tribunal's decision in *Financial and General Print Ltd v. Commissioners of Customs and Excise* (1995) VAT Dec No 13795.[21] This case involved early termination and payment to the lessor following the appointment of a receiver to the lessee. In determining what, if anything, was supplied by the lessor in consideration of the payment, the Tribunal held:

> In summary and looking at 'the entire transaction' the position is this. While the lease is running, the lessee provides consideration in the form of rent for the quarter and in return the lessor supplies or continues to supply possession of the equipment. If the lessee fails to pay his quarter's rent (or commits any other act of 'default' ...) the lease may be terminated and the lessor may recoup possession. If so, the lessor's obligation to provide the service is spent and any termination payment compensates the lessor for the latter's loss of opportunity to provide that service …
>
> … the lessor's termination of the lease was not a supply of services. It was simply a unilateral act of the lessor. It terminated the lease and so terminated all further supplies of the services of granting possession of the equipment to the lessee ... There was no relevant service to which the compensation payment could be directly linked. The termination can not, therefore, be properly described as a supply of services effected for consideration …

49. In the *Financial and General Print* case, the Tribunal was also of the view that a payment to remedy early termination was not part of the consideration for the supply of the goods by way of lease. The Tribunal stated:

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[20] (1983) 152 CLR 359 at 396.

[21] The principles in the *Financial and General Print* case have also been applied in the following decisions: *Lloyds Bank Plc v. Commissioners of Customs and Excise* (1996) VAT Decision No. 14181, *Croydon Hotel & Leisure Company Limited v. Commissioners of Customs and Excise* [1997] VAT Decision No. 14920.

> And the fact the liability to make the compensation payment was a contingent obligation assumed by F&G from the time it first entered into the lease and took possession of the equipment does not make the compensation payment consideration for the supply of possession.

50. Interest paid by the lessee as a consequence of default in the payment of lease instalments is not 'consideration for a supply'. There is no liability for GST because no supply is made in connection with the payment of the interest.

51. After a default termination, a separate agreement may be made for the payment of damages (as opposed to being specified in a liquidated damages clause in the original lease agreement). The fact that a payment is made under such an agreement does not, in itself, mean that it is consideration for a taxable supply. A separate agreement as to damages payable has a different character to a mutual agreement for early termination. As previously mentioned, a mutual agreement for early termination involves a supply which is characterised as a release from an obligation. In contrast, a separate agreement for damages records the terms upon which compensation is paid following an early termination as a result of a default.[22]

52. A payment made on early termination due to the lessee's default, may have more than one purpose. For example, in the context of a finance lease, part of the payment may be made in connection with an earlier or current taxable supply between the parties (as discussed in paragraphs 30 to 36).[23]

53. Where the payment has a sufficient nexus with one or more taxable supplies, and is also partly for a purpose not connected with any supply, the payment must be apportioned between those parts and the GST payable or input tax credits attributed to the relevant tax period.[24]

54. Examples 5, 6 and 9 illustrate the GST implications of early terminations arising out of default by the lessee.

Early termination and payment as a result of a casualty occurrence

55. Early termination as a result of a casualty occurrence occurs where an external event frustrates proper performance of the parties' contractual duties.

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[22] This principle is considered in *Themis FTSE Fledgling Index Trust PLC v. Commissioners of Customs and Excise* (2001) VAT Dec No. 17039.
[23] The concept of 'earlier' and 'current' taxable supplies is discussed in Goods and Services Tax Ruling GSTR 2001/4, particularly at paragraphs 45 to 49.
[24] Further discussion on apportionment in these circumstances can be found in Goods and Services Tax Ruling GSTR 2001/4, paragraphs 115 to 125.

56. A casualty occurrence is usually beyond the parties' control. For example, where the leased goods are:

- stolen by a third party and not recovered;
- totally destroyed as a result of a natural disaster, such as fire; or
- compulsorily acquired by a government agency.

57. The lessee is usually liable to pay an amount to the lessor on early termination resulting from a casualty occurrence. For example, the lease may require the lessee to pay to the lessor the full insurable value of the goods or, if the lessor requires, an amount equivalent to the remaining lease payments and the specified residual value of the goods, both adjusted to present values.

58. As such, payment may be made to compensate the lessor for its loss of bargain or damage suffered because of the early termination. This loss or damage cannot in itself be characterised as a supply made by the lessor.

59. The payment received to compensate the lessor for its loss or damage flowing from early termination as a result of a casualty occurrence is not 'consideration for a supply'. There is no GST liability because no supply is made in connection with the payment.

60. This outcome is not altered by the inclusion or omission in the lease of a mechanism for calculating the amount payable on early termination.

61. However, a payment made on early termination as a result of a casualty occurrence may have more than one purpose.

62. Therefore, where the payment made on early termination has more than one purpose, it must be apportioned as to its relevant parts (as discussed in paragraphs 52 to 53). For example, part of the amount paid on termination may be rent relating to a period prior to the casualty occurrence. That part has a sufficient nexus with an earlier taxable supply and GST is payable on the supply.

63. Examples 7 and 10 illustrate the GST implications of early termination resulting from a casualty occurrence.

Termination pursuant to a statutory right under State or Territory consumer credit legislation

64. The Consumer Credit Code ('Code')[25] regulates certain consumer leases relating to goods. The Code confers statutory rights on the lessee which cannot be excluded by agreement between parties. It also contains procedural requirements.

65. Part 10 of the Code regulates certain leases where a natural person or strata corporation hires goods and does not have a right or obligation to purchase those goods.

66. Where a lease is covered by Part 10 of the Code, a statutory right is conferred on the lessee, which may be exercised at any time, to terminate the lease early by returning the goods.[26]

67. The amount payable by a lessee on exercising this statutory right, is the lesser of:

a. the amount payable under the lease on such a termination; or

b. the amount determined in accordance with the principles (if any) set out in the regulations.[27]

68. Any part of the payment given in satisfaction of arrears of lease instalments is consideration for the supply of the goods by way of lease. This supply is subject to GST where the other requirements of a taxable supply are met.

69. Interest paid by the lessee as a consequence of default in the payment of lease instalments is not consideration for a supply.

70. An adjustment event arises where the goods are sold to a third party on termination and the lessee is liable for, or entitled to, the difference between the net sale proceeds and the residual value of the goods. Payment of the shortfall or excess alters the amount of consideration for the earlier supply of the goods by way of lease.

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[25] The Consumer Credit (Queensland) Code ('Code') is set out in the Appendix to the *Consumer Credit (Queensland) Act 1994*. Part 10 of the Code in Queensland is mirrored in Part 10 of the Consumer Credit (Western Australia) Code, which is set out in the Appendix to the *Consumer Credit (Western Australia) Act 1996*. All the other States and Territories have adopted the Queensland Code; see section 5 *Consumer Credit (New South Wales) Act 1995*; section 5 *Consumer Credit (Victoria) Act 1995*; section 4 *Consumer Credit (Australian Capital Territory) Act 1995*; section 5 *Consumer Credit (South Australia) Act 1995*; section 4 *Consumer Credit (Northern Territory) Act 1995*; and section 5 *Consumer Credit (Tasmania) Act 1996*. Accordingly, the present discussion refers to the Code in Queensland.
[26] See subsection 157(1) of the Code.
[27] See subsection 157(2) of the Code.

71. The balance of the payment on early termination is not consideration for a supply. No supply is made by the lessor because the lease is terminated pursuant to the exercise of a statutory right by the lessee, and not by any act of the lessor. This outcome is not altered by the inclusion in the lease of a right to apply for early termination or an absolute right to terminate early. The purported grant of a right to terminate early is superfluous where a statutory right to terminate early exists.

Alternative view - Payments made on early termination alter the consideration for the supply under the lease

72. There is an alternative view that all amounts payable under a lease are consideration for the supply of the lease. GST is payable on this supply where the other requirements of a taxable supply are met.

73. This view is based on the reasoning that a lease of goods involves the lessor making a single supply in return for consideration attributed on a progressive basis. The amount of consideration payable in return for this supply is determined according to various contingencies covered by the terms of the lease.

74. Therefore, where a lease is terminated early and a payment is made in accordance with the terms of the lease, the payment is consideration for the earlier supply under the lease.

75. As an example, a lease may provide that on early termination the lessee is liable to pay the present value of all rent not yet due at the termination date plus the present value of the residual value. Under these terms, where a five year lease is terminated early after only two months, the lessee is liable to pay the present value of the residual value and rent that would have been payable over the next four years and ten months. For the alternative view to be correct, the future rental component of the payment must be paid in return for the supply under the lease which the lessee only benefited from for two months. We think it is unlikely that a Court would adopt that characterisation bearing in mind the relatively short period of possession of the goods in this example.

76. Therefore, the Commissioner considers the better view is that a release of contractual obligations is supplied where a lease is terminated early as a result of a mutual agreement. However, a sufficient nexus to a supply does not exist where the lessor is compensated for its loss flowing from early termination due to either a default by the lessee or a casualty occurrence.

Alternative view - Payments made on early termination by the lessee under the original terms of the lease are not consideration for a supply

77. A further alternative view is that where the original terms of a lease provide for the lessee to terminate the lease early and pay the lessor on early termination, there is no supply made in connection with that termination payment. As such, there is no liability for GST where this occurs.

78. The alternative view reasons that where the original terms of the lease provide for the lessee to terminate the lease early, this provision is made in return for agreeing to the other terms contained within the lease. Therefore, if the lessee subsequently terminates the lease early and makes a payment in accordance with the original terms of the lease, the lease is brought to an end without the lessor making any further supply. As such, there is no liability for GST as no supply is made by the lessor in return for the termination payment.

79. The Commissioner considers the better view is that on entering the lease, the lessor grants a release of the lessee's contractual obligations. This supply becomes operative only when the lessee terminates the lease early and pays the lessor, as discussed earlier in paragraph 29.

Alternative view - Payment made on early termination are compensatory and do not have a sufficient nexus with a supply

80. Another alternative view is that where a lease is terminated early as a result of a mutual agreement, any part of the termination payment representing the present value of future rentals is not consideration for a supply. This part of the payment is made to compensate the lessor for the loss of bargain suffered because of the early termination. This loss cannot be characterised as a supply made by the lessor, because the loss does not in itself constitute a supply under section 9-10 of the GST Act.

81. A sufficient nexus does not exist between a supply and any part of the payment given to compensate the lessor for its loss of bargain as a result of the early termination by mutual agreement. As such, there is no liability for GST because there because there is no payment in connection with the supply.

82. The Commissioner considers the better view is that a release of contractual obligations is supplied where early termination results from a mutual agreement. Where a termination payment is given in return for this supply, a supply for consideration exists for the reasons discussed earlier in paragraphs 25 to 37.

Attribution

83. 'Attribution' is the term used in the GST law to describe when you account for GST payable, input tax credits and adjustments in order to work out your net amount of GST for a tax period. GST payable and input tax credits are attributed to particular tax periods rather than being remitted or refunded, as the case may be, each time a taxable supply or creditable acquisition is made. Adjustments are also attributed to a particular tax period.

84. Attribution in relation to GST payable, input tax credits or adjustments is not required on a supply where any part of a payment on early termination is not consideration for a supply.

85. However, attribution is required on a supply for the GST payable, input tax credits or adjustments relating to the part or parts of a termination payment which are consideration for an earlier or current taxable supply.

86. The basic attribution rules, which differ depending on whether you account for GST on a cash basis, are set out in Division 29 of Part 2-6 of the GST Act. Where you do not account for GST on a cash basis, special rules for the attribution of GST and input tax credits in relation to progressive supplies, such as leases, are set out in Division 156.

Attribution where you account for GST on a cash basis

87. If you account for GST on a cash basis, you attribute GST payable on a taxable supply to the tax period when the consideration for the supply is received, but only to the extent the consideration is received in that tax period.

88. Provided you have a tax invoice at the required time, you attribute an input tax credit for a creditable acquisition to the tax period in which you provide consideration for that acquisition, but only to the extent of the consideration you provided in that tax period.

89. For example, a lease may be terminated early as a result of the lessee's default on payment of the lease instalments. Where the lessee makes a termination payment to the lessor, the payment may be for several purposes. Part of the payment may be to compensate the lessor for its loss of bargain resulting from early termination due to the lessee's default. There is no attribution required for this part of the payment, as it is not consideration for a supply.

90. However, part of the payment may be in satisfaction of the lease instalments due for the supply of the goods under the lease prior to the early termination. This part of the payment is consideration for a supply, and GST is payable on the supply where the other requirements of a taxable supply are met. Therefore, if the lessor accounts for GST on a cash basis, the GST payable on this supply is attributed to the tax period in which the payment is received by the lessor. If the lessee accounts for GST on a cash basis and makes a creditable acquisition by way of the lease, the input tax credits relating to the arrears component of the termination payment is attributed to the tax period in which the lessee provides the payment.

Attribution where you do not account for GST on a cash basis

91. Where you do not account for GST on a cash basis, special rules dealing with the attribution of GST and input tax credits in relation to progressive supplies, such as leases, are set out in Division 156.

92. Under Division 156, each periodic or progressive component of the supply is treated as a separate supply for attribution purposes.

93. Therefore, if the lessor does not account for GST on a cash basis, the lessor attributes all the GST payable, on each periodic or progressive component, to the earlier of the tax period when:

- any of the consideration for that component of the supply is received; or
- an invoice is issued for that component of the supply.

94. Provided you have a tax invoice at the required time, the input tax credit to which a lessee, who does not account on a cash basis, is entitled, for a creditable acquisition, is attributable to:

- the tax period in which the lessee provides any of the consideration for that component of the acquisition; or
- if, before the lessee provides any of the consideration, an invoice is issued relating to that component of the acquisition, the tax period in which the invoice is issued.

95. An invoice is defined in section 195-1 as 'a document notifying an obligation to make a payment'. This definition is designed to capture the essence of a commercial invoice. Consistent with commercial practice, the issue of an invoice is likely to be proximate to or after the supplier's completion of all it is required to do to become entitled to payment.[28]

96. A standard lease agreement does not usually capture the essence of a commercial invoice as described above. It does not usually notify an obligation to make a payment in the sense that a commercial invoice does.

97. However, a lease agreement may provide a method of early termination which includes execution of a document that does constitute an invoice. For example, a lease may provide for the lessee to apply for early termination, to be allowed at the lessor's discretion and subject to payment of a calculable sum. Where the lessor consents, the lease may provide for the lessor to give the lessee written notice of the early termination and liability for payment. This document is an invoice for GST purposes where it notifies the lessee that the lessee has an obligation to make the payment to the lessor.

98. Accordingly, if the lessor does not account for GST on a cash basis, and assuming the notice is issued before the lessee makes any payment, the GST payable on the supply of the release by the lessor is attributable to the tax period in which the written notice is issued. Similarly, where this is a creditable acquisition for the lessee, the input tax credit is also attributable to the tax period in which the written notice is issued.

Examples

Examples - A finance lease

99. *The following facts are relevant to each of the examples 1 to 7 below:*

Lessor: *Finco Ltd*

Lessee: *Dustin McArby*

Leased goods: *one light truck*

Lease rental amounts: *$ 770 per month*

Term of lease: *48 months*

[28] Refer to the discussion on invoices for attribution purposes in Goods and Services Tax Ruling GSTR 2000/34, which deals with what is an invoice for the purposes of the purposes of the GST Act, particularly at paragraphs 53 to 55.

Agreed damages: *Where:*

(a) a default event occurs; and

(b) the owner subsequently takes possession of the goods, the lessor will sell the goods and, in addition to any arrears, if the termination amount exceeds the sale price of the goods, the lessee must pay the difference to the lessor. If the sale price of the goods exceeds the termination amount, the lessor will pay the difference to the lessee.

Casualty occurrence: *in respect of the leased goods, their total loss, destruction or damage beyond repair, theft or disappearance. On the happening of a casualty occurrence, the lessee must pay the termination amount to the lessor.*

Default events: *Where:*

(a) failure to pay rent by the due date occurs on 2 or more occasions the lessor may terminate the lease – in which case the lessee will provide the lessor with possession of the leased goods.

Termination amount: *the present value of the residual value plus the present value of all rent not yet due at the termination date.*

Termination date:

(a) date of voluntary termination;

(b) date on which a casualty occurrence occurs; and

(c) date on which the lessor terminates the lease on the happening of a default event.

Voluntary termination: *Where the lessee volunteers to terminate the lease and the lessor agrees to this:*

(a) the lessee will provide possession of the goods to the lessor;

(b) the lessee will pay the termination amount;

(c) the lessor will sell the goods; and

(d) the lessor will pay to the lessee the sale proceeds.

All amounts are GST-inclusive. Dustin uses the truck solely for a creditable purpose. Finco and Dustin are registered for GST.

Example 1 – mutual agreement – shortfall between termination amount and sale proceeds

100. *Dustin seeks a voluntary early termination of his lease and Finco agrees to this. At the termination date, the termination amount is $25,000. This amount comprises $15,000 for the present value of the future lease payments and $10,000 for the present value of the residual.*

101. *Finco obtains possession of the truck and sells it for $20,000. Therefore, Dustin must make a payment of $5,000 (being the difference between the termination amount and the sale price) to Finco.*

102. *The $5,000 is consideration in respect of 2 supplies:*

- *the original supply of the truck by way of lease; and*
- *the release of Dustin from his obligations to Finco under the lease.*

103. ***Step 1** – Finco works out the amount of the residual shortfall by making the following apportionment:*

Residual shortfall:

$$= \text{total shortfall payment} \quad x \quad \frac{\text{residual value}}{\text{total termination amount}}$$

$$= \$5{,}000 \quad x \quad \frac{\$10{,}000}{\$25{,}000}$$

$$= \$2{,}000$$

104. *In respect of the residual shortfall, an adjustment event arises for Finco in relation to the supply of the truck under the lease. This adjustment event gives rise to an increasing adjustment for Finco of $2,000 x 1/11 ($181.82). Finco will be required to issue an adjustment note to Dustin. Dustin will also have an adjustment event and will be entitled to a decreasing adjustment of $2,000 x 1/11 ($181.82).*

105. ***Step 2** – Finco subtracts the amount of the residual shortfall from the total consideration on termination so as to calculate the value of the release.*

Value of release:

= total consideration - residual shortfall amount

= $5,000 - $2,000

= $3,000.

106. *Finco makes a taxable supply of a release of obligation to Dustin for $3,000 and is liable for GST of 1/11 of that amount (for example $272.73).*

Example 2 – mutual agreement – sale proceeds exceed termination amount

107. *Dustin seeks a voluntary early termination of his lease and Finco agrees to this. At the termination date the termination amount is $25,000. This amount comprises $15,000 for the present value of the future lease payments and $10,000 for the present value of the residual.*

108. *Finco obtains possession of the truck and sells it for $30,000. Therefore, under the terms of their lease agreement, Dustin will be entitled to receive $5,000.*

109. *The $5,000 payment by Finco represents the excess over the value of the residual and is connected with the original supply of the truck by way of lease.*

110. *An adjustment event arises for Finco in relation to the supply of the truck under the lease. This adjustment event gives rise to a decreasing adjustment for Finco of $5,000 x 1/11 ($454.55). Finco will be required to issue an adjustment note to Dustin. Dustin will also have an adjustment event and will have an increasing adjustment of $5,000 x 1/11 ($454.55).*

Example 3 – mutual agreement – no early termination clause

111. *For this example ignore the clauses in the lease on voluntary termination and termination amount.*

112. *Dustin seeks a voluntary early termination of his lease and Finco agrees to this. As there is no provision in the lease for voluntary termination, the parties enter into a separate agreement.*

113. *Under the agreement:*

- *Finco agrees to take possession of the truck and sell it for its market value;*
- *Dustin will be liable for the amount by which the sale proceeds fall short of $25,000; and*
- *Dustin is released from all obligations to Finco.*

114. *Finco obtains possession of the truck and sells it for $20,000. Therefore, Dustin must make a payment of $5,000.*

115. *The $5,000 is consideration for the release of Dustin from his obligations to Finco under the lease. Accordingly, there is a taxable supply by Finco to Dustin. Finco is liable for GST on $5000 x 1/11 ($454.55) and Dustin has a corresponding input tax credit.*

Example 4 - mutual agreement – no early termination clause

116. *For this example ignore the clauses in the lease on voluntary termination and termination amount.*

117. *Dustin seeks a voluntary early termination of his lease. He also seeks to purchase the truck from Finco. Finco agrees to these requests and the parties make the following agreement:*

- *Dustin pays $15,000 (which represents the present value of the future lease payments) to be released from his obligations to Finco under the lease; and*
- *Dustin pays $10,000 (which represents the present value of the residual) for the transfer of ownership of the truck.*

118. *Two taxable supplies are made by Finco to Dustin:*

- *Early release of obligation for $15,000; and*
- *Transfer of ownership for $10,000.*

Example 5 – default – residual shortfall

119. *Dustin is in arrears for 4 lease payments when Finco terminates the lease because of Dustin's default. Finco takes possession of the truck and sells it for $20,000. At the termination date, the termination amount is $25,000 which is comprised of $15,000 for the present value of the future lease payments and $10,000 for the present value of the residual.*

120. *Under the agreed damages clause the following amounts are payable:*

- *arrears of 4 x $770 = $3,080; and*
- *amount by which the termination amount exceeds the sale price = $5,000.*

121. *The arrears of $3,080 are in respect of the earlier taxable supply of the truck under the lease.*

122. *The amount of $5,000 is apportioned for the following purposes:*

- *to the extent that the payment is to be apportioned against the residual, it represents the residual shortfall and is connected with the original taxable supply of the truck by way of lease; and*
- *for an amount in respect of future lease payments which is in the nature of damages for a loss of bargain which is not connected with any taxable supply.*

123. ***Step 1** – Finco works out the amount of the residual shortfall by making the following apportionment:*

Residual shortfall:

$$= \text{total shortfall payment} \quad \times \quad \frac{\text{residual value}}{\text{total termination amount}}$$

$$= \$5{,}000 \quad \times \quad \frac{\$10{,}000}{\$25{,}000}$$

$$= \$2{,}000.$$

124. *In respect of the residual shortfall, an adjustment event arises for Finco in relation to the supply of the truck under the lease. This adjustment event gives rise to an increasing adjustment for Finco of $2,000 x 1/11 ($181.82). Finco will be required to issue an adjustment note to Dustin. Dustin will also have an adjustment event and will be entitled to a decreasing adjustment of $2,000 x 1/11 ($181.82).*

125. ***Step 2** – Finco subtracts the amount of the residual shortfall from the termination shortfall amount so as to calculate the amount of damages for its loss of bargain.*

Loss of bargain:

= termination shortfall amount - residual shortfall amount

= $5,000 - $2,000

= $3,000 (this amount is not connected with any taxable supply).

Example 6 - default – sale proceeds exceed termination amount

126. *Dustin is in arrears for 4 lease payments when Finco terminates the lease because of Dustin's default. Finco takes possession of the truck and sells it for $30,000. At the termination date, the termination amount is $25,000 which is comprised of $15,000 for the present value of the future lease payments and $10,000 for the present value of the residual.*

127. *Finco is entitled to the arrears of 4 x $770 = $3,080. The arrears of $3,080 are in respect of the earlier taxable supply by Finco to Dustin of the truck under the lease.*

128. *Dustin is entitled under the lease to receive the amount of $5,000 from Finco. This amount represents the excess of the sale proceeds over the residual and is connected with the original supply of the truck by way of lease.*

129. *An adjustment event arises for Finco in relation to the supply of the truck under the lease. This adjustment event gives rise to a decreasing adjustment for Finco of $5,000 x 1/11 ($454.55). Finco will be required to issue an adjustment note to Dustin. Dustin will also have an adjustment event and will have an increasing adjustment of $5,000 x 1/11 ($454.55).*

Example 7 – casualty occurrence

130. *The truck leased by Dustin is stolen and is not recovered. At the termination date, the termination amount is $25,000. Dustin receives $22,000 insurance proceeds from his insurer and he passes this amount on to Finco. Under the terms of the lease, he is also required to pay another $3,000.*

131. *Neither of the above payments is connected with a taxable supply.*

Examples - An operating lease

132. *The following facts are relevant to each of the examples below:*

Lessor: *Fish Fleet Ltd*

Lessee: *Tuna Processing Pty Ltd*

Leased goods: *one van*

Lease rental amounts: *$ 800 per month*

Term of lease: *36 months*

Agreed damages: *Where:*

(a) *a default event occurs;*

(b) *the owner subsequently takes possession of the goods; and*

(c) *the termination amount will immediately become payable by the lessee.*

Casualty occurrence: *in respect of the leased goods, their total loss, destruction or damage beyond repair, theft or disappearance. On the happening of a casualty occurrence, the lessee must pay the termination amount plus the market value to the lessor.*

Default events: *Where:*

(a) *failure to pay rent by the due date occurs on 2 or more occasions, the lessor may terminate this lease – in which case the lessee will provide the lessor with possession of the leased goods.*

Market value: *with respect to the leased goods at any time, the market value of the leased goods as at that time as assessed by the lessor on the basis that the goods are in satisfactory condition reasonably corresponding with careful use and maintenance having regard to age, fair wear and tear.*

Termination amount: *the amount which, when added to the market value of the goods at that time, will provide the lessor with the same rate of return on its investment which the lessor would have received if this goods lease had continued pursuant to its terms. The termination amount will be calculated on the assumption that:*

(a) *all amounts outstanding under this lease have been paid; and*

(b) *the lessor receives the market value on a sale of the goods.*

Termination date:

(a) *date of voluntary termination;*

(b) *date on which a casualty occurrence occurs; and*

(c) *date on which the lessor terminates the lease on the happening of a default event.*

Voluntary termination: *Where the lessee volunteers to terminate the lease and the lessor agrees to this:*

(a) *the lessee will provide possession of the goods to the lessor; and*

(b) *the lessee will pay the termination amount.*

All amounts are GST-inclusive. Tuna uses the van solely for a creditable purpose. Fish Fleet Ltd and Tuna are registered for GST.

Example 8 – mutual agreement

133. *Tuna seeks a voluntary early termination of its lease and Fish Fleet agrees to this. At the termination date the termination amount is $5,000.*

134. *The amount of $5,000 is consideration for the release of Tuna from its obligations to Fish Fleet under the lease. The release of obligations by Fish Fleet is a taxable supply. Fish Fleet has a GST liability of $5000 x 1/11 ($454.55) and Tuna has a corresponding input tax credit.*

Example 9 – default

135. *Tuna is in arrears for 4 lease payments when Fish Fleet terminates the lease because of Tuna's default. Fish Fleet takes possession of the van and sells it for the market value. At the termination date, the termination amount is $5,000 and the arrears are $3,200.*

136. *The arrears of $3,200 are in respect of the earlier taxable supply of the van under the lease and GST of $290.90 ($3200 x 1/11) is attributable to the earlier supply.*

137. *The amount of $5,000 is for an amount in respect of future lease payments which is in the nature of damages for a loss of bargain and this amount is not connected with any taxable supply.*

Example 10 – casualty occurrence

138. *While fish is being loaded down at the dock one day, the handbrake malfunctions and the van rolls into the ocean. The van is a complete write-off. At the termination date, the termination amount is $5,000 and the market value of the van is $10,000. Tuna receives $10,000 insurance proceeds from its insurer and passes this amount on to Fish Fleet. Under the terms of the lease, Tuna is also required to pay another $5,000.*

139. *Neither of the above payments is connected with a taxable supply.*

Detailed contents list

140. Below is a detailed contents list for this draft Goods and Services Tax Ruling:

Your comments

141. We invite you to comment on this draft Goods and Services Tax Ruling. Please forward your comments to the contact officers by the due date.

Comments by Date: 9 May 2003

Contact Officers: **Rachel Cox / Rod Profke**

E-mail address: rachel.cox@ato.gov.au / rod.profke@ato.gov.au

Telephone: **(07) 321 38354 / (07) 321 35789**

Facsimile: **(07) 321 38465 / (07) 321 35055**

Address: **Australian Taxation Office**
10 Banfield Street
Chermside 4032 Queensland

Commissioner of Taxation
19 March 2003

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Related Rulings/Determinations:
GSTR 1999/1; GSTR 2000/19;
GSTR 2000/11; GSTR 2000/34;

GSTR 2001/4; GSTR 2001/6;
GSTD 2001/2

***Subject references*:**
- acquisitions
- attribution
- adjustment events
- adjustment notes
- conditional contracts
- consideration
- contracts
- creditable acquisition
- goods and services tax
- GST
- GST consideration
- GST payable
- GST supply
- in connection with
- input tax credit
- taxable supply

***Legislative references*:**
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- ANTS(GST)A99 9-10(2)
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- Consumer Credit (Qld) Code 157
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- Consumer Credit (Tas) A96 5
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- *Croydon Hotel & Leisure Company Limited v. Commissioners of Customs and Excise* [1997] VAT Decision No. 14920
- *Facchini v. Bryson* (1952)1 T.L.R. 1386
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- *Radaich v. Smith* (1959)101 CLR 209
- *Rotherwood Pty Ltd v. FCofT* (1996)64 FCR 313
- *Themis FTSE Fledgling Index Trust PLC v. Commissioners of Customs and Excise* (2001) VAT Dec No. 17039

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