

## ***In-specie distribution -***

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## Representatives of Incapacitated Entities

### In-specie distribution

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This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

#### Is an in-specie distribution made from a representative to a shareholder a taxable supply?

1. As part of the winding up of a company, the liquidator may distribute assets of the company *in-specie* to members of the company. This commonly happens in members' voluntary liquidations.
2. One of the requirements for a taxable supply is that there is a supply for consideration.<sup>1</sup> In the case of an *in-specie* distribution by a liquidator to the shareholders of the company, there is no consideration for the supply. A shareholder is entitled to the shareholder's share of the company's surplus property after the liabilities of the company have been satisfied, unless the company's constitution provides otherwise.<sup>2</sup> While a share may have associated rights to receive distributions on winding up, a shareholder does not provide consideration in the form of a release or surrender of those rights in return for a liquidator's distribution, whether the distribution is in cash or an *in-specie* distribution. No consideration is provided by the shareholder in those circumstances.
3. Although the *in-specie* distribution of assets by a liquidator to the shareholder is not for consideration, it may still be a taxable supply where Division 72 of the GST Act applies and the other requirements of a taxable supply are met.<sup>3</sup> Division 72 removes the requirement for consideration for a taxable supply in certain circumstances where the recipient is an associate. The meaning of an associate is defined in section 318 of the ITAA 1936.
4. Under subsection 58-5(1) any supply, acquisition or importation by an entity in the capacity of a representative is taken to be a supply, acquisition or importation by the incapacitated entity. Under subsection 58-5, an *in-specie* distribution by a liquidator to a shareholder is deemed to be a supply made by the company in liquidation to the shareholder. Therefore, an *in-specie* distribution to a shareholder may be a supply to an associate if the shareholder is an associate of the company in liquidation pursuant to section 318 of the ITAA 1936. For example, a shareholder that holds a majority voting interest in the company is an associate for the purposes of section 318 of the ITAA 1936.

<sup>1</sup> Paragraph 9-5(a) of the *A New Tax System (Goods and Services Tax) Act 1999*.

<sup>2</sup> Section 501 of the *Corporations Act 2001*.

<sup>3</sup> The requirements of a taxable supply are set out in section 9-5 of the GST Act.

5. Under section 72-5 a supply to an associate for no consideration, does not stop the supply from being a taxable supply if:

- the associate is not registered or required to be registered, or
- the associate acquires the thing supplied otherwise than solely for a creditable purpose.

6. Therefore, the liquidator who makes an *in-specie* distribution to a shareholder who is an associate (as defined under section 318 of the ITAA 1936) of the company is liable for GST calculated on the GST exclusive market value of the asset/s if:

- the associate is not registered or required to be registered or the associate acquires the thing supplied otherwise than solely for a creditable purpose
- the other requirements of a taxable supply are satisfied; and
- the distribution is neither GST-free or input taxed supply for the purposes of the GST Act.

7. Transitional provisions (Item 50 of *Tax Law Amendment (2009 Measures No 5) Act 2009*) will prevent Division 72 from applying to past supplies by representatives to associates of incapacitated entities for no consideration or inadequate consideration. The new provisions apply in respect of any such supplies made on or after 4 December 2009.

8. Further, in the case of members' voluntary liquidations, Division 72 will not apply to any supplies by representatives to associates of incapacitated entities where the members' voluntary liquidation commenced before 16 September 2009 (the date the Amending Act was introduced in Parliament).