

***GSTR 2005/4 - Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises***

⚠ This cover sheet is provided for information only. It does not form part of *GSTR 2005/4 - Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises*

⚠ This ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statement: [Commissioner of Taxation v Unit Trend Services Pty Ltd \(Published 26 June 2013\)](#).

⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *31 October 2012*



- whether the intra-group sale of completed premises is the first sale of residential premises for the purposes of Subdivision 40-C of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act);
  - whether the acquiring GST group member can apply the margin scheme under Division 75 of the GST Act on the first supply of the new residential premises to third parties;
  - the GST effect of the intra-group transfer of substantially completed premises within a GST group;
  - whether the representative member of the GST group is entitled to input tax credits on the costs of construction and/or the acquisition of the land; and
  - whether the general anti-avoidance provisions in Division 165 of the GST Act may apply to the arrangements in the Taxpayer Alerts.
3. Unless otherwise stated, all legislative references in this Ruling are to the GST Act.

## Date of effect

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4. This Ruling applies [to tax periods commencing] both before and after its date of issue. However, this 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 date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

5. [Omitted.]

6. [Omitted.]

## Background

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7. Taxpayer Alert TA 2004/6 was issued on 7 April 2004. It describes arrangements using the grouping provisions of the GST Act that purport to avoid GST on the supply of new residential premises.

8. The parties to the arrangements in TA 2004/6 use a GST group structure where one group member supplies the completed premises to another group member. It is argued that:

- (a) the interposing of a group member is to reduce the commercial risk of the construction activity;
- (b) the intra-group transaction is the first sale of 'new residential premises';























look at the creditable purpose of the group, as a whole, in making the acquisition to determine the extent to which it is creditable.<sup>13</sup>

55. In respect of the arrangements outlined in paragraphs 8, 10 and 13, the Commissioner considers the overall creditable purpose of the group, in constructing the residential premises, was to sell them to third parties. In the Commissioner's view the supply to third parties is a supply of new residential premises which is a taxable supply provided the requirements of section 9-5 are met. Therefore, the representative member is entitled to the input tax credits in respect of acquisition of land and the construction costs of the premises. This is so whether or not the intra-group sale was of completed or substantially completed premises.

### **Alternative view – completed residential premises**

56. If, contrary to the Commissioner's view, the intra-group sale of completed premises is a supply of new residential premises and the subsequent sale to a third party is input taxed, the representative member would not be entitled to input tax credits for the supplying group member's acquisition of the land and construction of the premises. The acquisitions would not be creditable acquisitions under Division 11. The group member cannot acquire a thing for a creditable purpose if the acquisition relates to making supplies that are input taxed. The group, treated as a single entity for this purpose, would not have a creditable purpose if, contrary to the Commissioner's view, the supply to the third party is input taxed.

57. Further, where as part of the arrangements an entity becomes a member of a GST group or an existing GST group admits a new member, an adjustment under Division 129 may be required. A change in a group structure may be a later event that changes the extent of creditable purpose of an acquisition which results in an adjustment of input tax credits.<sup>14</sup>

### **General anti-avoidance – Division 165**

58. If, contrary to the Commissioner's views, the supply of residential premises to a third party in the circumstances outlined in paragraphs 8 and 13 is an input taxed supply, or the arrangements in paragraphs 10 and 13 do have the effect of reducing the margin for the sale to a third party, the Commissioner will consider the application of the general anti-avoidance provisions in Division 165 on a case by case basis.

59. Under Division 165, the Commissioner may negate a GST benefit an entity gets from a scheme if it is reasonable to conclude that the dominant purpose or principal effect of the scheme is to secure such a benefit.<sup>15</sup>

<sup>13</sup> See sections 48-45, 48-50 and 48-55.

<sup>14</sup> See sections 48-45, 48-50 and 48-55.

<sup>15</sup> Section 165-40.



group member would or could reasonably have been expected to have fully completed the residential premises itself and then sold them directly to third parties.

66. Division 165 must be considered on a case by case basis to determine whether it would be concluded that the dominant purpose or principal effect of the scheme would be to get a GST benefit. This requires an assessment of the scheme against the twelve matters set out in subsection 165-15(1). The references to the particular matters in this Ruling should not be regarded as exhaustive or limiting the Commissioner in the application of Division 165 in other cases.

67. Consideration of some of the matters in subsection 165-15(1) may point in the direction of a tax avoidance purpose or effect, others may point in the opposite direction, and some may be neutral. It is the evaluation of these matters, alone or in combination, some for, some against, that section 165-15 requires in order to reach the conclusion to which section 165-5 refers.<sup>18</sup>

### **Application of Division 165 to the arrangement**

#### ***Paragraph 165-15(1)(a) – the manner in which the scheme was entered into or carried out***

68. Even if the transfer of the completed premises or substantially completed premises were carried out for commercial purposes, the manner in which they were carried out suggests the dominant purpose is to obtain a GST benefit.

69. In particular, the structured way the scheme was entered into and carried out suggests careful planning to get a GST benefit.

70. In particular, the application for approval as a GST group, sale of completed or substantially completed residential premises within the GST group, completion of the substantially completed residential premises, and then the on-sale of the completed premises to third parties are indicative of the structured way the scheme was entered into.

71. The manner in which the arrangement is entered into follows the advice of advisers promoting the GST benefits of the arrangements.

72. These factors suggest that the particular way in which the scheme is entered into is explicable only or predominantly by the taxation consequences.<sup>19</sup>

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<sup>18</sup> Cases concerning Part IVA of the *Income Tax Assessment Act 1936*, such as *Commissioner of Taxation v. Hart and Anor* [2004] HCA 26; 2004 ATC 4599; 55 ATR 712, *FC of T v. Consolidated Press Holdings Ltd (No. 1)* [1999] FCA 1199; 99 ATC 4945; 42 ATR 575 and *C of T v. Spotless Services Ltd* (1996) 186 CLR 404, provide guidance to the Commissioner in considering the Division 165 matters.

<sup>19</sup> *C of T v. Spotless Services Ltd* (1996) 186 CLR 404 at 420 and 423; 96 ATC 5201 at 5209 to 5210; 34 ATR 183 at 191 to 193.



with the provisions in Division 48, as a means of reducing the margin on which GST is calculated under the margin scheme.

79. It would be contrary to the above purposes for an entity to obtain a GST benefit where GST on the value added after the commencement of the GST is avoided or reduced.

80. The Commissioner considers this matter points to a dominant purpose or principal effect of obtaining a GST benefit.

***Paragraph 165-15(1)(d) – the timing of the scheme***

81. Key steps in the arrangement occur either immediately or shortly after one another.

82. The careful attention to timing points to the scheme being for the dominant purpose or principal effect of obtaining a GST benefit.

***Paragraph 165-15(1)(e) – the period over which the scheme was entered into and carried out***

83. The period over which the scheme was carried out is relatively short especially the period between the sale from the supplying group member to the acquiring group member and the on-sale of the completed residential premises to third parties.

84. This points to a dominant purpose or principal effect of obtaining a GST benefit.

***Paragraph 165-15(1)(f) – the effect that [the GST Act] would have in relation to the scheme apart from this Division***

85. Apart from Division 165, in relation to the sale of completed residential premises from the supplying group member to the acquiring group member and the sale to third parties, it is argued that there is no GST on either of these sales.

86. Apart from Division 165, in relation to the sale of substantially completed residential premises from the supplying group member to the acquiring group member, followed by sale of the completed premises to third parties, it is argued that the margin on which GST is calculated on the sale by the acquiring group member to third parties is reduced.

87. The Commissioner considers these to be matters pointing to a dominant purpose or principal effect of obtaining a GST benefit.











