


# ***SST 10 - Sales tax: authorities and public authorities for the purposes of Items 126 and 127***

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## **Taxation Ruling**

### **Sales tax: authorities and public authorities for the purposes of Items 126 and 127**

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*This document is a public Ruling for the purposes of section 77 of the Sales Tax Assessment Act 1992 and may be relied upon as if it had the force of law.*

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## Chapter 1: What this Ruling is about

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- 1.1 This Ruling sets out the ATO view on what is an *authority* for the purposes of Item 126 in Schedule 1 to the *Sales Tax (Exemptions and Classifications) Act 1992* (ST(E&C) Act) and a *public authority* for the purposes of Item 127 in that Schedule.
  - 1.2 Government entities can take a number of legal forms including departments, commissions, boards, statutory authorities, statutory corporations, and companies incorporated under the Corporations Law. This Ruling explains the terms 'authorities' and 'public authorities' and enables bodies to determine whether they satisfy the requirements of paragraphs (b) or (c) of subitem 126(1) or paragraph (b) of subitem 127(1).
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## Chapter 2: Date of effect

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- 2.1 This Ruling is effective immediately. It replaces any other public or private rulings to the extent that they are inconsistent with this Ruling from 10 June 1998.

However, if a person will pay less sales tax because of this Ruling, it can be acted upon immediately.

### *Withdrawal of ST 2000 series ruling*

- 2.2 This Ruling covers the information given in Sales Tax Ruling ST 2076 - 'Public Authorities', which is now withdrawn.

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## **Chapter 3: Interpretation of paragraphs (b) and (c) of subitem 126(1)**

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- 3.1 Paragraph (b) of subitem 126(1) provides exemption for goods for use by an authority:

- that is completely controlled by an Australian government; and
- whose expenditure is exclusively borne by that government.

- 3.2 Paragraph (c) of subitem 126(1) provides exemption for goods for use by an authority:

- that is completely controlled by two or more Australian governments; and
- whose expenditure is exclusively borne by those governments.

An 'Australian government' for the purposes of Item 126 is defined in subitem 126(3) to mean the Commonwealth, a State, the Australian Capital Territory or the Northern Territory.<sup>1</sup>

- 3.3 Item 126 **does not cover** goods for use by:

- State or Territory owned bodies as defined in section 3D of the ST(E&C) Act;

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<sup>1</sup> Therefore, an Australian government would not include, for example, a public corporation or an unincorporated agency or an office outside the departments of government, irrespective of whether the body in question is an agent of the Crown.

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- local government bodies covered by Item 127; or
- certain Commonwealth-controlled authorities that may have claimed exemption under an exemption provision in their own legislation.<sup>2</sup>

## *What is an authority?*

3.4 The word 'authority' is an ordinary English word and it signifies a body that has the right or power to exercise authority or command.<sup>3</sup> *The Macquarie Dictionary* (3rd ed) defines the word 'authority' to mean:

*'1. The right to determine, adjudicate, or otherwise settle issues or disputes; the right to control, command, or determine. 2. a person or body with such rights.'*

3.5 While the courts have, on a number of occasions, determined whether or not particular bodies are authorities or public authorities, no single test has emerged.<sup>4</sup>

3.6 When considering whether or not a body is an authority for the purposes of the subitem, usually no one factor is determinative.<sup>5</sup> Rather, there is a range of considerations that must be taken into account in order to determine the character of the body in question. Ultimately, the decision about the status of a particular body is a question of fact and degree depending upon the particular circumstances of that case.

3.7 A number of propositions have been derived from the courts. These were summarised by Hill J in the *Bank of WA* case:<sup>6</sup>

- a private body, corporate or unincorporated, established for profit is not an authority;
- for a body to be an authority of a State or of the Commonwealth, the body in question must be an agency or instrument of government set up to exercise control or execute a function in the public interest. It must be an instrument of government existing to achieve a government purpose;

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<sup>2</sup> Under section 130 of the *Sales Tax Assessment Act 1992*, such bodies established by legislation enacted before 13 May 1987 have had those exemptions cancelled. Item 126 does not provide a new exemption for those bodies.

<sup>3</sup> See *FC of T v. Bank of WA Ltd*; *FC of T v. State Bank of NSW Ltd* 96 ATC 4009; (1995) 32 ATR 380 (*Bank of WA* case) per Hill J.

<sup>4</sup> Ibid.

<sup>5</sup> Unless an express indication to the contrary exists.

<sup>6</sup> See footnote 3.

- the body in question must perform a traditional or inalienable function of government and have governmental authority for doing so;
- for a body to be an authority, it is not necessary that it has coercive powers and the possession of coercive powers does not **of itself** characterise a body as an authority;
- as a minimum, a body is required to possess exceptional powers. However, the possession of exceptional powers is not **of itself** sufficient to characterise a body as an authority. For example, a private utility that may have the legal right to enter premises would not be an authority solely because of that power; and
- incorporation by legislation is not a requirement for a body to be classed as an authority.

### **Completely controlled by an Australian government**

3.8 The prominent features of a body (depending on its structure) completely controlled by an Australian government may include the following:<sup>7</sup>

- it is governed by a board of directors and the composition of the board is controlled by the government;
- the board of directors is required to consult with the Minister;
- the content of the Memorandum and Articles of Association is controlled by the Minister;
- voting shareholders are eligible Ministers or other government representatives who hold their shares on behalf of the State;
- the obligations of the body are guaranteed by the government; and
- the board of directors is required to provide a written statement of corporate intent to its voting shareholders who are entitled to vary, from time to time, the statement of corporate intent initially agreed to by the board and the voting shareholders.

### **Whose expenditure is exclusively borne by that government**

3.9 The phrase 'expenditure exclusively borne by that government' was considered by the Full Federal Court in *Totalizator Agency Board v. FC of T*.<sup>8</sup> The majority of the

<sup>7</sup> This is illustrated by the characteristics of the four banks in *Bank of WA* case. The banks were accepted as being controlled by their respective States.

<sup>8</sup> 96 ATC 4782; (1996) 33 ATR 413.

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Court held that Item 126 should be interpreted narrowly and, in line with this intention, made the following observations:

- a reference to the word 'exclusively' means that if any expenditure at all is not 'borne' by the State then the requirements of the section are not met;
- the government bears the expenditure exclusively when it alone provides the money; and
- if the body uses money of its own (perhaps generated by fees and charges) in addition to funds provided by a government, the government does not bear the expenditure exclusively.

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## Chapter 4: Interpretation of paragraph (b) of subitem 127(1)

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4.1 Paragraph (b) of subitem 127(1) provides exemption for goods for use by a public authority that is:

- constituted by a law of the Commonwealth or of a State or Territory; and
- constituted for the purpose of carrying out some or all of the functions that are ordinarily carried out by a municipal, shire or district council that is constituted for general purposes of local government.

### *What is a public authority?*

4.2 Many of the decided cases have considered the meaning of the word 'authority' in the context of the expression 'public authority'. Hill J in the *Bank of WA* case commented on the distinction between an 'authority' and a 'public authority':<sup>9</sup>

'It is difficult, however, to see that the addition of the word "public" significantly alters the meaning of the word "authority", particularly where it is used, as in the present context, in relation to governmental authorities. To the extent that the word "public" does affect the meaning of the word "authority" it can only be in

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<sup>9</sup> *Bank of WA* case at ATC 4025; ATR 396.

the emphasis upon the public character of the body, or the public nature of the activity with which the body is concerned rather than the intrinsic characteristics of the body itself.'

- 4.3 To be a public authority, the body in question should exercise control, power or command in its undertaking of a public nature for the benefit of the community or of some section or geographical division of the community and it should have governmental authority to do so.<sup>10</sup>
- 4.4 Where a body has a variety of functions, the question of whether it is a public authority for the purposes of paragraph (b) of the subitem is one of fact and degree that often requires a balancing of the various features of the body concerned. This question should be approached by looking for features that are alien to the concept of what is a public authority and determining the importance of those factors to that body.<sup>11</sup> It is the ATO's considered view that a body is not usually a public authority where:
- individuals have a financial interest in its profits or assets;
  - its public functions are merely incidental or subordinate to its private pursuits; or
  - its powers derive from a private or non-statutory source.

#### **Constituted by a law of the Commonwealth or of a State or Territory**

- 4.5 There are two essential principles from the decided cases<sup>12</sup> in relation to the phrase 'constituted by an Act of Parliament':<sup>13</sup>
- the body must be both established and constituted by an Act or Acts; and
  - it is not required that the Act or Acts should relate to the particular entity exclusively. All that is necessary is that the body should be constituted by some Act or Acts for the purpose mentioned.

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<sup>10</sup> See comments of Rich J in *Renmark Hotel Incorporated v. FC of T* (1949) 79 CLR 10 at 18.

<sup>11</sup> As in *The Western Australian Turf Club v. FC of T* (1978) 139 CLR 288 (*WA Turf Club* case) per Stephen J.

<sup>12</sup> Primarily from *In re East and West India Dock Company* [1888] 38 Ch D 576. Stephen J (with Barwick CJ and Jacobs J concurring) in the *WA Turf Club* case endorsed the views expressed by the English Court of Appeal.

<sup>13</sup> It is considered that, for the purposes of this Ruling, the phrase 'constituted by a law of the Commonwealth or of a State or Territory' includes a reference to the phrase 'constituted by an Act of Parliament'.



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## **Constituted for the purpose of local government or a local council**

- 4.6 To determine whether or not a body is constituted for a particular purpose, reference must be made to the governing documents of the body, and in particular the objects of an unincorporated body and the Memorandum and Articles of Association of an incorporated body.
- 4.7 Clear evidence, in the form of an express pronouncement, should be available, if requested, to demonstrate that the public authority has been formed for the purpose of carrying out some or all of the functions that are ordinarily carried out by a local government body. The mere fact that a public authority has been invested with the power to perform functions ordinarily carried out by a council, does not necessarily mean that the public authority has been constituted for that purpose or purposes.

## **Carrying out some or all of the functions that are ordinarily carried out by a municipal, shire or district council**

- 4.8 To qualify as a public authority for the purposes of paragraph (b) of subitem 127(1), a body must perform one or more of the functions ordinarily carried out by a municipal, shire or district council constituted for general purposes of local government.
- 4.9 Councils in different jurisdictions may be invested with different authorised functions and, therefore, it is not possible to list all functions that are classified as authorised functions for the purposes of determining whether or not the public authority satisfies the requirements of paragraph (b) of subitem 127(1).
- 4.10 The following tests may apply:
- the council must be authorised by law to perform the function;
  - the function must be carried out for a public purpose; and
  - the function must not result in a profit that is distributable either directly or indirectly to an individual.

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- ST(E&C)A Sched 1 para 126(1)(c)
- ST(E&C)A Sched 1 Item 127
- ST(E&C)A Sched 1 subitem 127(1)
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*case references*

- FC of T v. Bank of WA Ltd; FC of T v. State Bank of NSW Ltd 96 ATC 4009; (1995) 32 ATR 380
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