GSTR 2002/5EC - Draft Addendum Compendium

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Ruling Compendium – Addendum to GSTR 2002/5

This is a compendium of responses to the issues raised by external parties to draft Addendum to GSTR 2002/5 – Goods and services tax: when is a 'supply of a going concern' GST-free?

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

Issue No.	Issue raised	Tax Office Response/Action taken
1.	General comment.	Following a review of comments received on the draft Addendum to Goods and Services Tax Ruling GSTR 2002/5, the Tax Office has reviewed its position in relation to agreements to lease and actual leases. The Tax Office accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) of the *A New Tax System (Goods and Services Tax) Act 1999*[1] commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy agreement.
2.	It appears to be beyond doubt that a leasing enterprise is being carried on prior to the conclusion of an actual lease (based on the definitions of 'enterprise' and 'carrying on an enterprise' and paragraphs 124 and 125 of Miscellaneous Tax Ruling MT 2006/1: the New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number). It appears that the draft Addendum is attempting to make a distinction between the 'carrying on' on an enterprise and the 'operation' of an enterprise. It is not clear why this distinction is necessary nor why the Commissioner has sought to make this distinction in relation to a leasing enterprise but not in relation to any	It is agreed that an enterprise of leasing pursuant to paragraph 9-20(1)(c) can be being carried on prior to the conclusion of an actual lease, due to the extended definition in section 195-1 which provides that 'carrying on' and enterprise includes doing anything in the course of the commencement or termination of the enterprise. However the term of 'operation of an enterprise' is different to that of 'carrying on an enterprise, and requires something more than things done in the course of the commencement or termination of an enterprise. In order for a supply to be a supply of a going concern for the

[1] All subsequent legislative references in this Compendium are to the *A New Tax System (Goods and Services Tax) Act 1999.*

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	other type of enterprise. Further, this distinction is simply not supported by the language of the legislation. The act of entering into an agreement for lease is more than a preliminary activity. It is a core component of a leasing enterprise. The activities that precede a tenant entering into a lease are not minor and preliminary. These activities constitute 'leasing' in the true sense of the word. It seems counter intuitive to suggest that an enterprise consisting of one lease on a small retail space in an otherwise vacant building is 'operating', whilst an enterprise consisting of negotiations and fit out of an entire high rise commercial building pursuant to an agreement for lease is not operating. An entity grants an equitable lease when it enters into an agreement for lease with a prospective tenant. It is difficult to argue that an entity is not operating a leasing enterprise where it has entered into an agreement for lease with at least one prospective tenant on the basis there is no 'actual lease'. This is supported by *Walsh v. Lonsdale* (1882) 21 Ch D 9 where the English Court of Chancery elevated an agreement for lease to a 'lease in equity' by holding that there was no need for any actual order for specific performance of an agreement to grant a lease (the court held it was sufficient that the parties were entitled to such an order). It is not clear whether the meaning of operation of an enterprise is limited to a leasing enterprise or whether this is an example of a principle that is to be applied to other activities. If this analysis is applied to an enterprise of selling furniture, then is the enterprise not operating until the first 'actual sale'? Does this mean that a contract for the sale of goods is not enough to constitute the operation of a sales enterprise until at least one 'actual sale'? For an enterprise that constitutes the provision of services, is an enterprise operating when the engagement letter (or similar contract) is entered into or does it begin to operate only when the services are performed?	purposes of Subdivision 38-J the Tax Office is of the view that the relevant enterprise must not only be being 'carried on' but must also be operating. This is because paragraph 38-325(2)(a) requires that the supplier supplies to the recipient all of the things necessary for the **continued operation** of an enterprise [emphasis added]. The Tax Office applies this view in relation to all enterprise types in the context of the going concern provisions and the view is not restricted to enterprises comprising leasing activities. For example, see paragraphs 31 to 35 of Goods and Services Tax Ruling GSTR 2005/5 which considers the operation of an enterprise in the context of an enterprise involving property development and construction activities. Notwithstanding the Tax Office's view on the distinction between the 'carrying on' of an enterprise and the 'operation' of an enterprise, following a review of the comments on the draft Addendum, the Tax Office has reviewed its position in relation to agreements to lease and actual leases. The Tax Office will not proceed with the view expressed in the draft Addendum to the extent that it specified, in the absence of a tenant occupying the building, an actual lease must be entered into before it is considered that the activity of leasing has commenced, and that an enterprise comprising leasing activities is operating. That is, in light of the comments received in relation to the draft Addendum, the Tax Office accepts that in accordance with current paragraph 151 of GSTR 2002/5 that a leasing enterprise commences operating when at least one tenant enters into an *agreement for lease* or occupies the building.

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	Is 'performance' the delivery of advice or the activities that precede the delivery of the advice? If this analysis is restricted to a leasing enterprise, then it is difficult to see how this approach can be justified based on the law?	
3.	It is considered that if the draft Addendum is to proceed, further explanation is required to avoid confusion in the mind of the average reader. The going concern concession is available to anyone who deals in real property and the public ruling and any amendments thereto should, if possible, be directed at and capable of being readily understood by the average business person. According to revised paragraph 151 of the draft Addendum the 'activity of leasing commences and operates on and from the day that at least one tenant enters into an **actual lease**, or occupies the building under a periodic tenancy arrangement.' (emphasis added) Paragraph 151 in its present form accepts that in relation to a new building 'the activity of leasing commences when at least one tenant enters into an **agreement to lease** or occupies the building.' (emphasis added). Three new paragraphs, paragraphs 151A, 151B and 151C are then proposed. Paragraph 151A emphasises the point proposed to be made in revised paragraph 151 by explaining that active attempts to lease a new building are insufficient to constitute a leasing enterprise, even if one or more '**agreements for lease**' have been entered into. The distinction, if one is intended, between an agreement to (or for) lease and an actual lease is neither highlighted nor explained in the draft Addendum. In this regard, Butterworths Australian Legal Dictionary defines an 'agreement for lease' as 'an agreement enforceable in equity, but not in law, as an obligation to grant a lease.' It is recommended that further amendments to paragraphs 151 and 151A be considered with a view to highlighting the change in	See the Tax Office's General Comment at Issue No. 1 of this Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the draft Addendum and accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement.

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	policy, and in particular drawing attention to the distinction between an agreement to (or for) lease and an actual lease and the significance of the difference in the context of GSTR 2002/5.	
4.	GSTR 2002/5 asserts that an enterprise of leasing does not commence and operate until the day that at least one tenant enters into an actual lease or occupies the building under a periodic tenancy arrangement. This approach is unnecessarily restrictive (and most likely incorrect) interpretation and application of the 'enterprise' concept. This appears inconsistent with Treasury's proposed approach to the treatment of going concerns going forward as outlined in Treasury's Discussion Paper (12 May 2009) which envisages a broadened scope.	See the Tax Office's General Comment under Issue No. 1 of this Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the draft Addendum and accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement. Refer to Issue No. 2 of this Compendium.
5.	The final sentence in paragraph 151 of GSTR 2002/5 states: > The activity of leasing commences when at least one tenant enters into an agreement to lease or occupies the building. The final sentence in substitute paragraph 151 in draft addendum GSTR 2002/5A1 states: > The activity of leasing commences and operates on and from the day that at least one tenant enters into an actual lease, or occupies the building under a periodic tenancy arrangement. It appears the ATO is attempting to limit the GST-free supply of a going concern concession in that it no longer accepts that an agreement for lease constitutes the commencement of the activity of leasing. What has caused the ATO to change its view from the policy originally stated in GSTR 2002/5?	See the Tax Office's General Comment under Issue No. 1 of this Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the draft Addendum and accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement.
6.	The going concern exemption should be available where a developer has completed construction of new premises and has entered into agreements for lease on those premises. Agreements for lease should be considered appropriate evidence of 'carrying on an enterprise' as defined in paragraph 9-20(1)(c), on the basis that the	See the Tax Office's General Comment under Issue No. 1 of this Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the draft Addendum and accepts that in accordance with current

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	entity is supplying 'an interest' in property.	paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement.
7.	GSTR 2002/5 and the draft Addendum do not provide guidance on the Tax Office's view of the meaning of the words 'or other grant of an interest in property' in the definition of 'enterprise' in section 9-20(1)(c). The words must have (and should be given) some meaning.	The issue addressed in the draft Addendum was when an enterprise of leasing commences operating in the context of the going concern provisions in Subdivision 38-J. As referred to in the responses to Issue No. 1 and Issue No. 2 of this Compendium, in light of the comments received in response to the draft Addendum, the Tax Office accepts that the current view in paragraph 151 of GSTR 2002/5 is appropriate and the activity of leasing commences when at least one tenant enters into an agreement for lease or occupies the building under a periodic tenancy arrangement. The meaning of the term 'or other grant of an interest in property' in paragraph 9-20(1)(c) is an issue of wider significance than the going concern provisions, and the related issues addressed in GSTR 2002/5. It is therefore not considered appropriate to address the meaning of this term in the context of a ruling that specifically addresses the application of the going concern provisions in Subdivision 38-J.
8.	Where an entity enters into an agreement for lease the entity has supplied 'an interest' in the relevant property to the tenant (being either an equitable interest in the property, or a contractual right to be granted a lease on the terms set out in the agreement for lease). At least in New South Wales, the tenant would be entitled to caveat its interest under the agreement for lease and to register that caveat on title.	Comment noted.
9.	Where a land owner enters into an agreement for lease, that entity is carrying on an 'enterprise' in accordance with paragraph 9-20(1)(c), on the basis that the entity has engaged in an activity, or series of activities, that involves the 'grant of an interest in property'. We do	See the Tax Office's General Comment under Issue No. 1 of this Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the

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	not agree with the proposed paragraphs 151 and 151A that a leasing enterprise has not commenced where an entity has entered into one or more agreements for lease.	draft Addendum and accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) of the GST Act commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement.
10.	Paragraph 151 states that the activity of leasing 'commences and operates on and from the day that at least one tenant enters into an actual lease…'. It is not clear whether the Tax Office view is that a tenant must have physically entered into possession of newly leased premises before it can be established that the landlord has commenced a leasing enterprise. There will be some instances where a tenant does not immediately move into newly leased premises. If the Tax Office view is that the activity of leasing commences when the supplier has granted a leasehold estate to at least one tenant upon the commencement of a lease, then this should be clarified. If a land owner has done something in the commencement of an enterprise, such as entering into an agreement for lease, then it must follow that the relevant enterprise is 'operating'. Further, it must be possible for the land owner to supply everything necessary for the 'continued operation' of that enterprise, such that those things can be supplied GST-free as the supply of a going concern.	See the Tax Office's General Comment under Issue No. 1 of this Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the draft Addendum and accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement. In circumstances where an agreement for lease has been entered an enterprise of leasing will be considered to have commenced operation, regardless of whether or not a tenant has entered into possession of the premises. Provided that the enterprise of leasing continues operating up until the day of supply, and the other requirements of section 38-325 are satisfied then the premises will be capable of being supplied as a GST-free going concern.
11.	It should be made clear in GSTR 2002/5 that where an entity has commenced a leasing enterprise in respect of one part of a new strata titled building (entering into a lease of one strata titled floor in a new office tower) that the entity has commenced a leasing enterprise in respect of all parts of the building, irrespective of whether the building has been strata subdivided.	Paragraphs 152 to 158 of GSTR 2002/5 discuss and provide examples in relation to partially tenanted buildings and when an enterprise of leasing would be considered to be operating with respect to the entire building, including those parts that are untenanted. The Tax Office considers that the principles and examples set out in paragraphs 152 to 158 would apply equally to all circumstances where a building was only partly tenanted, regardless of whether the building has been strata subdivided.

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		That is, it will depend on the specific facts and circumstances of each individual case as to whether or not an enterprise of leasing has commenced with respect to an entire building when the building is strata subdivided and is only partly tenanted.
12.	I believe that it would be of benefit if the ATO were to clarify one particular point concerning whether or not a 'leasing activity', whilst not being carried on at the point of an exchange of contracts for the sale of land, may, as far as the ATO is concerned, be capable of being carried on at the time of the supply (that is settlement). Under paragraph 182 of GSTR 2002/5, 'The supplier and the recipient must agree that the supply is a supply of a going concern on or before the day of the supply.' Under paragraph 161 of the same Ruling, 'The day of the supply is determined in each case by reference to the terms of the particular contract, if applicable, and the nature of the supply. It is the date on which the recipient assumes effective control and possession of the enterprise carried on by the supplier.' ***Example*** Vendor A and purchaser B enter into a contract for the sale of commercial premises (exchange of contracts) which have not previously been leased to a tenant (for example because the premises form part of a new building), the premises are vacant. Separate negotiations however were on foot between a prospective tenant and vendor A, for the leasing of the premises, and those leasing negotiations are concluded prior to settlement of the contract between vendor A and purchaser B. ***Question*** Can vendor A and purchaser B agree, at the time of exchange, that the supply is a supply of a going concern and therefore GST-free (in anticipation of a lease being entered into prior to settlement), despite that at the time of exchange of contract, no actual lease has been entered into?	Further clarification of this issue in GSTR 2002/5 is not considered necessary as paragraph 183 of GSTR 2002/5 states that an agreement in writing by the parties that the supply is a 'supply of a going concern' will not conclusively determine that the supply is a 'supply of a going concern' where the other requirements of Subdivision 38-J are not satisfied.

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	I believe that the draft Addendum would be of great assistance if it were to clarify this point, as I do not believe GSTR 2002/5 answers this question.	
13.	Paragraph 151B raises the possibility that even though a leasing enterprise may not be operating, some other form of enterprise may be operating 'during a period when commercial premises that are to be leased are under development.' An example involving the sale of incomplete premises is provided in paragraph 151C. The clarification provided by paragraphs 151B and 151C is welcomed. It is suggested to include a further example which demonstrates the point made in paragraph 151B regarding the importance of the relevant facts and circumstances. The example might address a situation involving a commercial property developer who has a track record of building commercial buildings, actively marketing them to prospective tenants and upon completion selling them GST-free as going concerns, together with all the plans for exploiting the building as an investment and the assignment of any agreements for lease that have been completed. Where the developer makes a further sale following the adoption of the draft Addendum, the question will arise as to the status of the supply. It is considered that while the developer's activity in relation to the building may fall short of constituting a leasing enterprise, it constitutes an operating enterprise for the purposes of the going concern concession and could be supplied GST-free provided that all things necessary for the continued operation of the enterprise are supplied. Even if the Commissioner disagrees with this conclusion, an example could be included for the interest of taxpayers and their advisers.	It is agreed that there will be a number of varying factual scenarios where an enterprise is operating, including an enterprise that entails the development of commercial premises for lease. However it is not possible to cover every possible scenario in GSTR 2002/5 as each individual case will turn on its own particular set of facts and circumstances. Further guidance can be found in Miscellaneous Tax Ruling MT 2006/1 which provides some general principles with respect to different activities which may constitute an enterprise pursuant to each of the paragraphs in section 9-20.
14.	Paragraphs 151B and 151C make it clear that the Tax Office accepts that where a land owner has partially completed construction of new premises, and has entered into agreement for lease in respect of those premises, the land owner is carrying on a 'business enterprise'	See response to Issue No. 13 of this Compendium.

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	and can supply the incomplete premises as part of the GST-free supply of a going concern. This view is supported and it is contended that the same arguments should equally apply where the construction of a building has been completed. For example, assume that a land owner has commenced construction of a new shopping centre. The land owner has entered into agreements for lease with key anchor tenants, including major supermarket retailers and department stores. The land owner decides to sell the development site, and to assign the agreements for lease, to a second land owner who will complete the construction of the new shopping centre. Based on proposed paragraph 151C, the Tax Office would accept that the sale of the partly completed shopping centre, together with the assignment of the agreements for lease, is the GST-free supply of a going concern. However, if the initial land owner instead completes the construction of the new centre (that is achieves 'practical completion'), and at that point decides to sell the centre and to assign the agreements for lease, it is not clear from the draft Addendum that the Tax Office will accept that the sale (of the completed premises) is the supply of either a business enterprise or the supply of a leasing enterprise. In paragraph 151C, reference is made to development activities which are undertaken as 'part of a business of developing for sale'. However, development activities may also be undertaken as part of a business of developing for lease. The first sentence should be amended to read 'for sale or lease'. In paragraph 151C, the word 'may' in the first sentence should be amended to read 'will'. This would help to make it clear beyond doubt that the Tax Office does accept that development activities and negotiations with future tenants are activities which do form part of a business enterprise.	
15.	Treasury proposes to broaden the scope of the going concern	See the Tax Office's General Comment under Issue No. 1 of this

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	concession such that a recipient's current operational capacity may be taken into account when assessing whether the supply is of all things necessary for the continued operation of the enterprise and additionally allow for the supply of a going concern that may have ceased but is still capable of being operated as a going concern. The draft Addendum is inconsistent with the policy attitude of the government and ultimately denigrates from the objective of the going concern concession, which, is to obviate the need for a purchaser to fund the GST component of a purchase price when acquiring a business.	Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the draft Addendum and accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement.
16.	At the very time that the Government is signalling its strong desire to make a concession more accessible by adopting the Board of Taxation recommendations when businesses are being purchased and sold, the Commissioner is proposing to narrow the scope of the existing going concern concession by tightening one of his own public rulings.	See the Tax Office's General Comment under Issue No. 1 of this Compendium as well as the response to Issue No. 2 of this Compendium. The Tax Office has reconsidered the view that was set out in the draft Addendum and accepts that in accordance with current paragraph 151 of GSTR 2002/5 that an enterprise of leasing pursuant to paragraph 9-20(1)(c) commences operating when at least one tenant enters into an *agreement for lease* or occupies the building under a periodic tenancy arrangement.
17.	These labels should be used with caution. These labels are often used as a convenient way to distinguish between activities that may constitute an enterprise under paragraph 9-20(1)(a) (a 'business enterprise'), as opposed to activities that may constitute an enterprise under paragraph 9-20(1)(c) (a 'leasing enterprise'). However, in many instances, an entity will undertake one or more activities which may constitute an 'enterprise' under both sections. This point should be acknowledged in GSTR 2002/5.	Noted.