GSTR 2009/1EC - Compendium

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Ruling Compendium – GSTR 2009/1

This is a compendium of responses to the issues raised by external parties to draft Goods and Services Tax Ruling GSTR 2008/D2 Goods and services tax: general law partnerships and the margin scheme, and draft Addendum to Goods and Services Tax Ruling GSTR 2003/13 Goods and services tax: general law partnerships

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	The threshold issue that needs to be addressed in the Draft Ruling is the question of whether a particular relationship between parties is a general law partnership or a tax law partnership. The question was addressed briefly at paragraphs 19 and 20 of GSTR 2003/13 but was of little if any assistance in enabling entities to determine their position. A common form of arrangement, particularly in relation to land development activities is for parties to enter into what is described as a 'Joint Venture Agreement' or some similar title in which the parties agree to undertake a project and share the profits of the project in agreed proportions. There are many variations to these agreements, for example in its simplest form A and B might enter into a 'Joint Venture Agreement' under which they agree to undertake a land development project. The Joint Venture Agreement will often contain a clause to the effect that the parties agree that they are co-venturers (or some other equivalent) and are not partners for any purpose. Each of A and B will contribute funds and they will jointly purchase the land to be developed, often using a bare trustee as the title holder for the land. The project will be undertaken and A and B will share the profits of the project equally.	It is acknowledged that determining the nature of the particular relationship between the parties often requires an assessment of detailed and complex, facts and circumstances. The assessment of the nature of a relationship between parties is often made more difficult by the fact that an arrangement may possess a range of indicia applicable to both general law partnerships and tax law partnerships. Goods and Services Tax Ruling GSTR 2003/13 on general law partnerships and Goods and Services Tax Ruling GSTR 2004/6 on tax law partnerships set out some general principles for ascertaining the nature of a relationship between parties. This issue is not addressed further in this Ruling as this Ruling is primarily focussed upon how the margin scheme operates subsequent to determining that there is a general law partnership in existence. Due to the many variations to arrangements and agreements the Tax Office considers that the general principles set out in GSTR 2003/13 and GSTR 2004/6 is an appropriate manner in which guidance can be provided in relation to this issue.

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	Alternatively, A and B might agree to undertake a project in circumstances where A owns the land to be developed and B (or an associate of B) conducts a building business. They agree that A will retain ownership of the land and will be the party that enters into sale agreements. The proceeds of the project are to be applied firstly to compensate A for the value of the land at the date that the project commences, and secondly to compensate B for the costs associated with the buildings that have been constructed on the land and finally to share any balance in agreed proportions. As in the previous example, A and B enter into a Joint Venture Agreement where they agree that they are not partners for any purpose. The pivotal question is whether transactions arising under such arrangements are intended to be covered by the draft Ruling, that is whether the arrangement between the parties is a general law partnership, a tax law partnership or some other arrangement. Given the implications that will arise for the parties if there is a common law partnership a detailed examination of this question is a necessary pre-requisite for the draft Ruling.	
2	**Legal Title held by Bare Trustee** In a number of instances where land is developed by a partnership the title to the land is held by a bare trustee. The ATO has recently issued GSTR 2008/3 that expresses the ATO view about how the GST Act applies in the circumstances of a bare trustee. There should be a reference to the bare trust ruling in that part of the draft Ruling that considers the concept of 'Partnership property' (paragraphs 17-20).	The Tax Office considers that circumstances where, and issues arising from, the holding of partnership property by a bare trustee is outside the scope of this Ruling. As noted, the Tax Office's views on the GST consequences arising when real property is held by a bare trustee are addressed in GSTR 2008/3. Paragraph 18 of the Ruling has been amended to refer to partnership property 'normally' held by the partners so as to acknowledge that there may be circumstances where one or more of the partners of a partnership may not always hold the legal title to property that is partnership property.

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3	**Whether a capital contribution to a partnership in exchange for an interest in the partnership is a 'sale'** The general acceptance that a sale can occur in circumstances where the consideration received for a taxable supply is non-monetary is a practical approach that seems to achieve general policy objectives including the margin scheme where applicable. The issue that is not discussed in any detail is whether the contribution is a taxable supply. Take the following example: A acquired real property in 1999 with the intention of carrying out a property development. A registered for GST with effect from 1 July 2000. After a considerable amount of work A was unable to obtain an appropriate development approval and abandoned his intention of carrying out the development but retained ownership of the land. He cancelled his GST registration with effect from 30 June 2001. In July 2008 A was approached by B with a proposal to jointly develop the land. A & B formed a common law partnership and A contributed the land as his contribution to the capital of the partnership. Was there a taxable supply by A in these circumstances?	It is agreed that the acceptance that a sale can occur in circumstances where the consideration is non-monetary achieves policy objectives. Paragraph 44 of the Ruling has been amended to provide that if the elements of section 9-5 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)* are satisfied then a contribution of real property to a partnership will be a taxable supply. Similar additions have been made to paragraph 48 (Example 1) and paragraph 54 (Example 3) of the Ruling. Whether the supply by way of a contribution to a partnership satisfies the elements of section 9-5 requires an examination of the relevant facts and circumstances. In the example given, the taxpayer has ceased carrying on an enterprise and de-registered for Goods and Services Tax (GST) in 2001. At the time of the contribution of land the taxpayer was not registered (nor presumably required to be registered) and as such the contribution would not be a taxable supply.
4	**Use of the margin scheme to calculate GST payable on taxable supplies by the partnership** The commentary in these sections of the draft Ruling appears to be consistent with the relevant legislation.	Agree with comment.
5	**Reconstitution of partnership** The approach that is taken in the draft Ruling is a practical approach.	Agree with comment.

* Unless otherwise stated, all legislative references in this Compendium are to the GST Act.

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6	**In specie distributions on general dissolution of a partnership** The view that is expressed in the draft Ruling to the effect that an *in specie* distribution is a supply for consideration is a change of view by the ATO that has also necessitated an amendment to GSTR 2003/13. The original ATO view was that there was no supply for consideration because there was no payment, act or forbearance in connection with the supply. It was said that the partner's interest was extinguished when the distribution was made and that the partner did not surrender (or supply) his interest in the partnership as consideration for the *in specie* supply. Authorities were cited for this view. The revised view is that the *in specie* distribution '…is a consequence of the partner contributing capital to the partnership and becoming a partner under the partnership agreement.' The reduction in the value of the partner interest in the partnership is said to be consideration for the *in specie* distribution. The authority for this view is said to be *Archibald Howie Pty Ltd v Commissioner of Stamp Duties* (1948) 77 CLR 143; [1948] HCA 28 and seems to rely in part on statements about 'consideration' in *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 2008 ATC 20-028; (2008) 68 ATR 158. Neither of these cases relates to the dissolution of a partnership and it remains questionable whether the ATO original view or its revised view is correct. The position is even less clear where a two partner partnership is dissolved because one partner 'buys out' the other partner. Examples 8 and 10 apply the same principles in these circumstances.	The view was re-considered and it is now thought that the better and consistent view is that there is a supply for consideration by a partnership when there is an *in specie* distribution to a partner of the partnership on dissolution of the partnership. The Tax Office is sympathetic to the practical implications that arise as a result of a partnership having a GST liability in relation to an *in specie* distribution upon dissolution. However the issue of how the resulting GST liability is satisfied is a matter for the partnership and its partners to decide in accordance with the laws of partnership. In the absence of an agreement to the contrary, an advance from a surviving partner to satisfy the GST liability that arises upon dissolution would be akin to a loan and there would be no GST consequences that would arise. There may also be cases where the surviving partner and the former partners may reach agreement whereby they satisfy the GST liability of the partnership from their own individual private funds and there would be no GST consequences that would arise.

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	If the *in specie* distribution on dissolution is a taxable supply by the partnership (including the situation where one partner 'buys out' the other partner), the draft Ruling seeks to create a practical solution in Examples 8 and 10. The examples consider the dissolution of a general law partnership that has only a single asset being land. The examples suggest that the partnership will have a liability for payment of GST on a 'distribution' to the 'surviving partner'. The GST liability is said to be calculated by reference to the value of the land at the date of dissolution. If the partnership has no assets other than the land that is being 'distributed', where will it find the funds necessary to pay that GST liability? If that liability can only be satisfied by way of an advance from the 'surviving partner' how does this impact on the GST calculation on the *in specie* distribution?	
7	You may wish to tighten up the facts in Example 4 at paragraphs 50 to 54. That example only works out if wife contributes an <u>equal</u> amount of cash <u>and</u> the presumption [section 27(1)(a) QLD] re sharing profits between partners equally applies, <u>and</u> the ordinary rules on dissolution in section 47 QLD apply. As you state, the non-monetary consideration is the value of the interest in the partnership but that is dependent on entitlements to share in profits, surplus etcetera. For example, if one partner contributes land at 600K and the other contributes 200K cash (because the latter is to work full time in the business or brings particular skill or knowledge) then the value of a 50% share may be less than the 600K contributed by partner A. The value of interest is also contingent on whether fixed term or 'at will' if contributions are different.	Agreed. Example 4 at paragraphs 59 to 63 of the Ruling has been amended accordingly.

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	Suggest you change the example to make it clear that the wife contributes 600K cash and the profits are shared equally so that the assumption in the example will work – it should not then matter about the term of the partnership if it is a 'bread and butter' 50/50 partnership.	
8	Are you aware if anyone has contested the ATO view re continuity clauses in GSTR 2003/13 which is now carried forward in GSTR 2008/D2 at paragraph 67? I appreciate paragraphs 165 to 169 of GSTR 2003/13 was a concession of sorts, however we have a risk that someone will argue that the new (reconstituted) Partnership is a different entity than the old Partnership and thereby avoid the joint and several liability imposed upon partners in the GST entity under subsection 444-30(2) of the *Tax Administration Act 1953*, which states: The partners are jointly and severally liable to pay any amount that is payable under this Schedule or an *indirect tax law by the partnership.	The comment is noted and was considered when the view in GSTR 2003/13 was determined. There is no immediate intention to review the position in GSTR 2003/13.