GSTR 2012/2EC - Compendium

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Ruling Compendium – GSTR 2012/2: Goods and services tax: financial assistance payments

This is a compendium of responses to the issues raised by external parties to draft GSTR 2011/D4 – financial assistance payments

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	ATO Response/Action taken
1	The approach adopted in the draft Ruling adds a level of complexity and uncertainty that is unwarranted and unnecessary because the draft, in general, does not deal with matters that impact on the GST revenue base.	The final Ruling has been amended to clarify and further explain the propositions discussed in GSTR 2011/D4.
2	The draft Ruling does not explain the context of the purpose of the Ruling. The draft does not describe the character of such payments in the context of the purpose and object of GST.	Paragraphs 95 to 99 of the final Ruling detail the practical and legislative context of the Ruling. These paragraphs highlight the fact that in determining whether a financial assistance payment is consideration for a supply general GST principles must be applied.
3	The draft Ruling does not contain an examination of the extraneous material, cases and commentaries that indicate grants and subsidies towards cost are generally not consideration for a supply.	The final Ruling contains comments in extraneous material considering the nature of the nexus required between consideration and a supply. It takes account of some cases where there is no supply or there is an insufficient nexus.
4	GSTR 2000/11 examines the similarity between the Australian provisions and overseas VAT/GST law and the relevance of overseas cases to the interpretation of paragraph 9-5(a). The draft omits this.	GSTR 2000/11 was published at a time when there was little Australian guidance in relation to GST law. Whilst it is useful to refer to overseas VAT/GST cases some caution needs to be exercised because of the differences in the text of those overseas laws. Furthermore, as there is now a body of Australian judicial consideration of the GST law and principles we consider that less reliance should now be placed on overseas VAT/GST law.

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5	The draft does not deal with Government to Government funding that is the subject of GSTR 2011/2. Consequently, it is unclear whether the Commissioner's view is that such payments would be subject to GST but for paragraph 9-15(3)(c).	GSTR 2011/2 deals specifically with government to government funding where the payment is an appropriation under an Australian law. The draft and final Rulings apply to government to government funding where the specific requirements of paragraph 9-15(3)(c) are not met. Where government to government funding is not an appropriation there will be a taxable supply where the general GST principles expressed in the final Ruling are satisfied.
6	The draft does not deal with the treatment of amounts to which the law of trust apply – such as gifts for charitable purposes, distributions made by charitable trusts and foundations or the settlement of amounts on trustees. The draft's focus on 'agreements' and 'contracts' is narrow in light of the subject matter of the Ruling being payments intended to benefit certain purposes or activities carried out.	The Ruling addresses gifts at paragraphs 69 to 83 and whether a settlement of a trust would be a taxable supply at Example 9 and paragraphs 117-118. The Ruling also addresses common financial assistance payment scenarios between charities, non-profit bodies etcetera and like bodies, and in particular, whether such payments are consideration for a supply.
7	The draft covers similar ground to GSTR 2006/9. Because too little emphasis is given to the character of grants, subsidies etcetera, there is a tension between the two rulings and the role of each.	GSTR 2006/9 details the Commissioner's views about the concept of supplies more broadly. This final Ruling applies the propositions advanced in GSTR 2006/9 in the context of financial assistance payments and whether those payments are consideration for a supply.
8	Paragraphs 10-12 of the draft Ruling purport to set out an approach to determine whether a supply is for consideration for the purposes of paragraph 9-5(a). Is this approach accurate or necessary?	The discussion in paragraphs 10 to 12 of the draft Ruling now appear in the explanation section of the final Ruling and has been given more context by reference to the legislative scheme of the GST Act and other GST rulings in which the Commissioner discusses the connection between consideration and a supply (see paragraphs 88 to 92 and 115-116 of the final Ruling).

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9	Paragraphs 13 to 22 of the draft Ruling, we disagree with the conclusion that 'most financial assistance payments are consideration' and the approach of the draft Ruling for the following reasons: • the impact the *Qantas* decision and the Full Federal Court's rejection of an approach that referred first to the supplies listed in subsection 9-10(2). • the statement of the High Court in *Commissioner of Taxation v Reliance Carpet Co Pty Limited* (2008) 236 CLR 342 that 'taxable supply' is a composite term • the term 'consideration' has no meaning except in relation to its connection to a supply	The comment that 'most financial assistance payments are consideration' has been omitted from the final Ruling because whether a financial assistance payment is consideration for a supply will depend on an examination of the facts and surrounding circumstances of the arrangement. The Commissioner's views on the connection between consideration and a supply are made clearer in the final Ruling in that there is some clarification of when, in the context of financial assistance payments, a sufficient nexus between the two exists (see paragraphs 15 to 43 and 121 onwards).
10	Paragraphs 13 to 22 of the draft Ruling – It is our view that it is not correct to say that because there is a payment there is consideration. There is no support for the notion that a supply is identified independently of the 'payment' to which it is connected. A relevant connection with a particular supply made by the payee is necessary for a payment to fall within the definition of consideration.	The reasoning in the final Ruling has been amended to clarify the Commissioner's position on this issue (see paragraphs 15 to 43 and 121 onwards).
11	Paragraph 21 of the draft Ruling – The requisite nexus is a question of law. Whether the nexus exists in any particular case is a question of fact having regard to the legal standard of the character of the necessary nexus. The Ruling should seek to describe the appropriate nexus test that applies in the context of grants, subsidies and funding arrangements, having regard to the statutory provisions as interpreted in the light of relevant judicial principles.	The view expressed in paragraph 21 of the draft Ruling is further expanded in the final Ruling by including (in the final Ruling) further Australian case support for our view on the nexus test, in particular a reference to the comments made in *Vidler v. Federal Commissioner of Taxation* [2009] AATA 395; 2009 ATC 10-093; (2009) 72 ATR 832 (see paragraphs 123-130).

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12	Paragraph 22 of the draft Ruling – The ATO should recognise that the significant relevance of the nature of grants, subsidies and funding payments will be supported by the circumstances in which they arise, and the identity of the payer and payee.	Noted. The Commissioner's agrees that in establishing whether the payment is consideration for a supply, it is necessary to look at the whole of the arrangement taking into account the surrounding facts and circumstances which may include reference to the identity of the payer and payee and the nature of the assistance being provided. However, the Commissioner considers that none of these indicators are determinative on their own.
13	Paragraph 23 of the draft Ruling – The payment is contractual consideration for the intellectual property received. No reference to 'sufficient nexus' is required to establish a taxable supply in that circumstance. As such, the question arises as to whether the payment can be referred to as a 'financial assistance payment'.	In the final Ruling a wide range of payments are encompassed in the concept of 'financial assistance payment' (see paragraph 5). Although a relatively straight forward application of the principles described in the Ruling, it was considered appropriate to include such an example to illustrate the breadth of arrangements which may be considered by some taxpayers to constitute financial assistance.
14	Paragraph 24 of the draft Ruling – The ruling says a 'payment has a sufficient nexus with the supply of the entry into the obligation for which the financial assistance payment is made'. It is the view that this raises difficult questions of the presence of 'legal relations' and when those obligations are the things 'for which' the payment is made.	Noted. The final Ruling further clarifies this statement at paragraphs 28-31.
15	The draft does not consider the role of the law of equity where gifts for purposes are concerned. It is apparent that many of the examples in the draft involve gifts such that circumstances similar to those referred to in *Chatham Island Enterprise Trust v. CIR* [1999] 2 NZLR 388 (*Chatham Islands*) are involved.	The final Ruling has been amended to include a discussion on the principles outlined in *Chatham Islands* (see paragraphs 117-118) and an expanded discussion on the meaning of gift and non-profit body in the context of section 9-15 of the GST Act.

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16	Based on *C of IR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (*New Zealand Refining*): • a contribution to cover costs of operations, even if subject to conditions, is not consideration in respect of a supply to the payer; • the conclusion may be different in the case of subsidies of the 'price' of supplies to third parties.	Noted. The Commissioner's views on the principles for which *New Zealand Refining* is authority is contained in GSTR 2006/9: supplies (paragraphs 102-103) and it was considered appropriate to cross reference that view in the final Ruling.
17	Example 2 – The troupe is merely affirming a pre-existing equitable obligation to apply the monies in the authorised way. In this context, any undertaking by the recipient troupe is likely to be regarded as 'insufficient consideration' for the purposes of contract law to form a binding contractual agreement. Furthermore, by accepting the funding to continue to operate, the troupe is not necessarily making any supply simply because it is subject to conditions. Rather the payment would be seen as a unilateral contribution by a charitable trust to the troupe's operating expenses.	The example has been re-drafted to make it clearer that the troupe is receiving the financial assistance payment for the entry into an enforceable obligation (refer to example 3 in the final Ruling).
18	Where Government to Government grants are concerned, at least for GREs of the same level of Government, Division 149 of the GST law does not go so far as to deem supplies nor payment to be consideration flowing between these 'fictional entities'. Accordingly, it is difficult to conclude that payments between government branches could be regarded as consideration for supplies. They should be characterised in accordance with their legal form as mere funding of government programs.	The Commissioner does not agree that there can never be taxable supplies between government entities. Division 149, whilst it does not deem supplies to have occurred between the relevant entities, has the effect of recognising those government entities, once registered, as entities carrying on an enterprise. Hence, it is possible for supplies for consideration to flow between such entities which have registered.

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19	The draft Ruling does not establish a clear enough position for taxpayers to confidently determine whether a payment is in return for the entry into an obligation, or such payment has been made with a mere expectation that the thing will be done. We suggest further examples to address funding agreements that do, and do not, establish binding obligations that have a sufficient nexus with the funding provided.	Noted. Further examples have been added to the final Ruling to address funding agreements which are binding and not binding on the parties.
20	The draft Ruling appears to ignore a key concept touched on in the *Secretary of Department of Transport v. Commissioner of Taxation* [2010] FCAFC 84; 2010 ATC 20-196; 76 ATR 306. In that case, the fact that the Department had a statutory function of ensuring access to public transport played an integral part in the primary judge's reasoning.	The relevance of the payer's objectives is discussed in paragraph 130 of the final Ruling. In establishing whether a payment is consideration for a supply it is necessary to look at the whole of the arrangement including the surrounding facts and circumstances. This may include reference to the statutory function of the payer and the nature of the assistance being provided. However, none of these indicators are determinative on their own.
21	There is no recognition in the draft Ruling that a unilateral obligation may give rise to a supply where the public sector entity has agreed to pay a certain amount of money where an entity undertakes an activity according to certain criteria.	Example 12 in the final Ruling considers the situation where a government entity becomes obligated to pay an amount when an entity satisfies certain eligibility criteria (see paragraphs 63 to 68). In the circumstances described in the final Ruling, it is concluded that in merely meeting the eligibility criteria the entity is not supplying any good, service, or anything else to the government agency. As a result there are no GST consequences for either party.