Ruling Compendium – GSTD 2013/3

This is a compendium of responses to the issues raised by external parties to draft GSTD 2013/D1 – *Goods and services tax: whether item 32 of the table in subregulation 70-5.02(2) of the A New Tax System (Goods and Services Tax) Regulations 1999 applies to some extent in respect of an acquisition for a single fee by a managed investment fund that is a recognised trust scheme from a Responsible Entity*?

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

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1	**General Comments** It is disappointing that it appears that the Commissioner intends to finalise and issue the Draft prior to issuing more general guidance regarding the new item 32. In this regard, it is understood that GST Ruling GSTR 2004/1 is intended to be updated to reflect the Commissioner's views as to how item 32 applies in relation to all acquisitions which may be made by 'Recognised Trust Schemes' as defined in subregulation 70-5.02(4) of the *A New Tax System (Goods and Services Tax) Regulations* ('GST Regulations').[1] It was considered that general guidance regarding the application of new item 32 would be of more assistance at this point in time than views on a limited application of item 32, as provided in the Draft.	Resolved. An addendum to GSTR 2004/1 issued on 24 July 2013 and incorporates guidance material in relation to item 32. Previously, the Commissioner issued guidance material on the operation of item 32 through the National Tax Liaison Group (NTLG) GST Sub-committee on 2 July 2012. The only significant concern raised concerning that guidance material is the issue addressed in this Determination.

[1] All legislative references in this compendium are to the GST Regulations unless otherwise indicated.

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2	It was submitted that the Draft should be substantially amended to reflect the commercial reality that single responsible entity ('RE') services are a composite supply of investment management services with any other services, such as administration services, being ancillary and that, as such, reduced input should be claimable at a rate of 75% for all of the GST included in the single RE fee.	We consider that in the circumstances considered in the Determination, the recognised trust entity makes a mixed acquisition of services from the RE, part of which is covered by item 32.
3	**Commissioner has adopted an incorrect approach to the characterisation of acquisitions** It was submitted that the Commissioner's approach adopted in paragraph 28 of the Draft Determination is inconsistent with the principles expressed in paragraph 24 of *Lansell House Pty Ltd v. Commissioner of Taxation* [2011] FCAFC 6 (*Lansell House*). Noting this Full Federal Court decision, it was submitted that the starting point for characterising an acquisition (or more correctly the supply) is an examination of the essential characteristics of the relevant acquisition and not the purpose of the relevant reduced credit acquisition item. The question is whether a product or services forms part of a specified class or genus.	The Commissioner's views on determining whether a supply is a mixed or composite supply in Goods and Services Tax Ruling GSTR 2001/8 *Goods and Services Tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts* has recently been updated in an addendum which issued on 15 May 2013. Paragraph 19A of GSTR 2001/8 states that an identification of the essential character of what is supplied may inform whether (and to which extent) a particular transaction falls within the terms of a specific statutory provision. However, we do consider at paragraph 19 of GSTR 2001/8 that the characterisation should be undertaken in a manner that is consistent with the object of the particular statutory provision in issue. This is because the mixed/composite analysis is only relevant where it is necessary to determine whether (and to what extent) the supply meets the description in a particular statutory provision that may be in issue (see paragraph 31B of GSTR 2001/8). The *Lansell House* decision did not consider the issue of whether a supply was a mixed or composite supply. Moreover, it was construing a different statutory provision with

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		different contextual considerations. We do not consider that the Commissioner's view is inconsistent with statements made by the Full Federal Court. Paragraph 28 of the Determination has been updated to more closely align with the wording used in GSTR 2001/8. As explained at paragraph 36 of the Determination, we consider that the text of item 32 and regulation 70-5.03, the significance of the services that the RE supplies to the managed investment fund, and the underlying policy context referred to in the Explanatory Statement support the conclusion that the acquisition made by the managed investment fund is properly characterised as an acquisition of a mixed supply made by the RE, part of which falls within item 32.
4	**The Commissioner has misunderstood the true purpose of item 32 – the purpose of item 32 is to discourage artificial bundling** It was submitted that it is clear from references made in the 2010 /11 Budget Measures Budget Paper and the Explanatory Memorandum to the Exposure Draft Regulations, that item 32 was introduced with the intention that taxpayers would not be required to artificially disaggregate a composite service incorporated within an investment fee / RE fee. The submission extracted statements from these documents and argued that they reflect the fact that item 32 was never intended	The views expressed in the Determination reflect an interpretation of item 32 that is both consistent with the text of the provision and the policy intent expressed in the *Explanatory Statement to A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No. 1)*. Paragraph 29 of the Determination discusses the structure of item 32 and explains that specific reduced credit acquisition items that cover trustee services and RE services (items 23(c), (23(d), 29 and 31) as well as item 23(h) which covers compliance with industry regulatory requirements are not excluded from item 32. We also note that the approach is consistent with Examples 7 and 8 of the Explanatory Statement.

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	to deny taxpayers reduced input tax credits of 75% of the GST included in the cost of acquiring investment management services or RE services. Rather, item 32 was intended to discourage taxpayers from bundling services and dressing them up as a 'trustee service' without subjecting taxpayers to an additional significant compliance burden. It was submitted that the Commissioner's interpretation undermines, and does not promote, the purpose of item 32. Furthermore, the Commissioner's approach undermines the purpose of other items contained in the table to subregulation 70-5.02(2) which have always enabled taxpayers to claim RITCs for 75% of the GST included in the cost of investment management services and RE services. For example, the Commissioner's proposed approach to classifying RE services will have the effect of making item 31 redundant (an outcome that is contrary to the intent of Parliament as item 31 still remains post the introduction of item 32). It was further submitted that RE services are not wrapped into a single fee for the purposes of obtaining a GST benefit. Rather, RE services are wrapped into a single fee to provide transparency to investors around fee structures in a manner that promotes	

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	competitive pricing through out the financial services sector. Accordingly, the Commissioner's proposed interpretation does nothing to discourage the 'bundling' of RE services because those services were never bundled to obtain an advantageous GST outcome	
5	**Ongoing relevance of item 31** It was noted that item 31 of the table in subregulation 70-5.02(2) always, from the commencement of the GST on 1 July 2000, allowed the claiming of reduced input tax credits at the rate of 75% for the acquisition of single RE services. Item 31 remains in the table in subregulation 70-5.02(2). However, the Commissioner's proposed approach seems to ignore the continued existence of item 31 and fails to give due consideration to the fact that because item 31 remains, then Parliament must have intended that reduced input tax credits should still be claimable at a rate of 75% for RE services. However, if the Commissioner's proposed interpretation is upheld, then item 31 is to be effectively ignored as though it could never again enliven a claim for reduced input tax credits at a rate of 75%. It is a questionable use of the Commissioner's administrative power to disregard the ongoing existence of item 31, which clearly evidences	Item 32 does not exclude acquisitions of supplies that fall within item 31 (single responsible entity services). We do not agree with the submission that the view set out in the Determination makes the operation of item 31 redundant. The definition of a recognised trust scheme set out in subregulation 70-5.02(4) includes a managed investment scheme, or part of a managed investment scheme, other than a securitisation entity or a mortgage scheme. Item 32 therefore does not apply to a managed investment scheme that is a securitisation entity or a mortgage scheme. Accordingly, these entities can acquire services from an RE that fall within item 31.

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	the fact that 'Single responsible entity services' are a composite supply, and seek to administer item 32 in a manner which would deny taxpayers the ability to recover a significant component of the GST included in a single RE fee which has historically always been recoverable.	
6	**The need for safe harbours or numeric examples to be expressed in GSTD 2013/D1** It was submitted that the Draft Determination does not provide sufficient certainty for taxpayers regarding how the law is likely to be administered in practical situations. It is considered that the apportionment exercise imposed upon taxpayers as a consequence of the Commissioner's interpretation will impose a significant administrative burden as it is more akin to clerical staff (who normally prepare BASs, tax returns or financial reports) undertaking an accounting exercise. In view of this, and to avoid the potential for disputes to arise, the Professional Bodies would prefer the Commissioner to provide either: • safe harbour percentages that taxpayers can rely upon in any	Paragraph 3 of the Determination provides that a taxpayer can use any fair and reasonable methodology to determine the value of the part of the acquisition to which item 32 applies and the value of any other part to which other reduced credit acquisition items apply. It is necessary to consider the specific facts and circumstances of each arrangement in determining whether a methodology is fair and reasonable. The example set out in the Determination does not incorporate numerical values as we do not wish to imply that there is a standard rate that applies across the industry. The Commissioner does not think it appropriate to prescribe a safe harbour percentage in this Determination. We would be happy to work with industry participants to minimise compliance costs associated with the application of item 32. However, we are not currently aware of sufficient industry concern to warrant a similar approach as adopted in PSLA 2008/1. The 'deductive benchmarking methodology' referred to in paragraphs 4 to 7 of the Determination is consistent with the methodology set out in the guidance material that issued through the NTLG GST Sub-committee on 2 July 2012. To date, we have not been

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	apportionment exercise (similar to that provided for in Practice Statement Law Administration (General Administration) PS LA 2008 /1) which could be expressed either in the Determination or in a separate ATO publication; or • numerically based examples in the Determination (to better illustrate how to approach this exercise and provide broad guidance on what may be a reasonable allocation of a single RE service).	advised of significant issues concerning the apportionment of a single fee.
7	**Example** Looking at Step 2 in paragraph 5, there should be further guidance on what items are taken into account for 'Total bps acquisitions', including further guidance on where such information would be sourced. We would have thought that the ATO could provide a realistic numerical example, based on previous audits of reduced input tax credits relating to trusts and other REs.	The term 'Total bps acquisitions' in the denominator of the formula set out in Step 2 under paragraph 5 of the Draft Determination is a typographic error and should be 'Total bps'. This error has been corrected in the Determination. The 'Total bps' is the total number of basis points that represents the single fee paid to the RE as discussed at paragraph 4 of the Determination. See response to Issue No. 6 concerning the use of numerical values in the Determination.
8	**Alternative Methods of calculating RE fees** It was submitted that GSTD 2013/D1 provides no guidance as to how the expense recovery portion of an RE service should be allocated between 75% RITC services and 55% RITC	The scope of the Determination is limited to single fee arrangements. There are multiple ways that a trustee may be remunerated for services it provides. It is necessary to determine what the

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	services, or even if GSTD 2013/D1 applies to such scenarios. Accordingly, GSTD 2013/D1 should be amended to include such scenarios.	expense recovery payment is for. If the payment is for an acquisition that is covered by item 32, a reduced input tax credit is available at the rate of 55%. If the payment is for an acquisition that is not covered by item 32 but is covered by another item, a reduced input tax credit is available at the rate of 75%. If the payment is for an acquisition of services for which an input tax credit is partly available at a rate of 55% and partly at a rate of 75%, it is necessary to use a fair and reasonable basis methodology to allocate the payment to the different parts. Depending upon the particular facts and circumstances, the apportionment methodologies set out at paragraphs 4 to 7 of the Determination may be fair and reasonable methodologies that can be used to allocate the payment to the different parts.
9	**Why does the Draft only apply to 'managed investment funds'?** It was submitted that GSTD 2013/D1 should be revised so that it applies to all 'Recognised Trust Schemes', or at the very least, to all trusts that constitute 'a managed investment scheme, or a part of a managed investment scheme, other than a securitisation entity or a mortgage scheme' (that is. the language used in paragraph (b)(i) of the definition of 'Recognised Trust Scheme') which have single fee type arrangements. Such a revision would eliminate the uncertainty as to who may rely on GSTD 2013/D1.	The Commissioner issued guidance material on the operation of item 32 through the NTLG GST Sub-committee on 2 July 2012. The only significant concern raised with the Commissioner concerning the application of the guidance material was the scenario considered by the Determination. The Commissioner does not wish to extend the Determination to apply to other types of recognised trust schemes without consulting with the relevant industries. While the reasoning contained in the Determination focuses upon a managed investment scheme and refers to the application of the *Corporations Act 2001* with respect to managed investment schemes, it provides principles as to how the Commissioner interprets the exceptions to item 32 which

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		may be of assistance for other recognised trust schemes (see paragraphs 29 to 30 of the Determination). We will evaluate whether there is a need to provide similar guidance to a wider range of recognised trust schemes that acquire RE / trustee services following the issuing of the Determination.
10	The submission did not agree with the conclusions or the technical basis on which the Draft Determination is based. Paragraph 43 of the Draft Determination misconstrues the operation of both item 23 and item 32. In terms of the construction of item 23, the assumption on which paragraph 43 of the Draft Determination is based is that the paragraphs in item 23 operate in a mutually exclusive fashion. However, this is plainly incorrect as evidenced by the very language adopted in item 23 and by the reasoning provided by the ATO in GSTR 2004/1, especially paragraphs 500 and 513 to 514. It was submitted that the correct construction of item 23 is that a service can and in most cases will fall within one or more paragraphs of the item. In other words, one paragraph in item 23 does not apply at the exclusion of another. In a simple example, a typical RE for an investment fund is a fund manager (item 23(a) and item 23 (b)), a trustee (item 23(c)) and an	As set out in paragraph 44 of the Draft Determination, the Commissioner does not favour the alternative view that had been expressed in paragraph 43 of the Draft Determination that the acquisition could be characterised as an acquisition of a composite acquisition that could only fall within one item listed in the table in subregulation 70-5.02(2). For the reasons articulated in the Draft Determination, it is considered that the view that the managed investment fund acquires a mixed supply from the RE, part of which is subject to item 32, is to be preferred over the view that the fund makes a composite acquisition of investment portfolio management services.

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	RE (item 23(d)) and may provide asset allocation services (item 23(e)). Item 23 does not in fact artificially break up a single supply to its constituent parts. It simply covers those constituent parts if they are supplied separately. We do not feel that this important point has been adequately understood by the ATO. With respect to paragraph 30 of the Draft Determination, the words 'to the extent' in item 32 contemplate a situation where an acquisition is partially covered by the item 32(a) or item 23(b). However, the words 'to the extent' in item 32 do not infringe upon, or change in any way the ambit of what is covered by item 23(b). If an acquisition is wholly covered by item 23(b), the words 'to the extent' do not limit in any way the application of the 75% reduced input tax credit. In terms of fundaments of statutory interpretation, it is universally understood that the common law prevails unless it is overridden by statute. For common law purposes, the supply is clearly a single supply, following well settled overseas and domestic case law – here we note that the ATO has been unable to cite a single case which supports its position. As there are simply no words in item 32 that override the common law notion of single supply with respect to the	See the response to Issue No. 3. We do not consider that the views taken in the Determination concerning characterising the supply as a mixed supply are contrary to Australian case law. Caution should be exercised in applying overseas case law which does not consider similar legislation and regulations.

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	ambit of item 23(b), it is clear that the common law principle of single supply must stand in relation to the supply.	