


GSTD 2024/2EC - Compendium

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Australian Government

Australian Taxation Office

Public advice and guidance compendium – GSTD 2024/2

❗ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Goods and Services Tax Determination GSTD 2021/D2 *Goods and services tax: is the supply of a burial right in respect of a public cemetery subject to GST?* It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it. There were a lot of similar comments received and therefore many comments have been grouped together in the issues below.

Summary of issues raised and responses

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

Issue number	Issue raised	ATO response
1	Prospective date of effect for final Determination Given past inconsistent ATO advice, comments requested that the final Determination apply prospectively only.	This change has been agreed. See paragraph 28 of the final Determination. Given the past inconsistent ATO advice, the final Determination has a prospective date of effect and applies from the date of publication. In taking this approach, we applied the principles in Law Administration Practice Statement PS LA 2011/27 Determining whether the ATO's views of the law should be applied prospectively only.
2	Implementation period for the ATO view to be applied Comments requested the Commissioner consider an implementation period to give industry time to change their invoicing systems and contracts to align with the ATO view.	No change is needed in the final Determination. Impacted suppliers will have up to 3 months from the date of publication of the final Determination to change their invoicing systems and contracts. We have separately communicated this expectation with the industry.

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3	<p>Administrative burden on Australian government agencies that operate cemeteries in managing refund requests in connection with granting burial rights, due to a lack of awareness about how the GST law operates regarding overcharged GST.</p> <p>Comments noted:</p> <ul style="list-style-type: none"> • There is a lack of awareness of how the GST law applies when a supplier over charges GST. In particular, there is a lack of understanding that suppliers are not required under the GST law to refund overcharged GST. • It is not clear how a supplier should deal with refund requests for a pre-sale of a burial right. • There will be a financial and administrative burden on the industry in having to manage potential refund requests from customers for overcharged GST on past supplies of burial rights, especially for small operators who have less resources. • There will be a reputational risk to suppliers if customers perceive they have done the wrong thing in charging GST on past supplies of burial rights when, in fact, suppliers were charging GST based on past ATO advice. 	<p>No change has been made in the final Determination.</p> <p>There is no requirement in the GST law to provide a refund for overcharged GST on past supplies of burial rights.</p> <p>There are special rules in the GST law (Division 142) that deem overcharged GST that has been ‘passed on’ to a customer to have always been payable until the customer is reimbursed for the ‘passed on’ GST. A customer can request a supplier to reimburse the overcharged GST, however, this is a private contractual matter between the supplier and the customer. If a supplier reimburses their customer for overcharged GST, the supplier can then seek a corresponding refund by making an adjustment in their business activity statement.</p> <p>These rules also apply to pre-sale burials rights.</p> <p>We have published updated web guidance to help explain how these special rules apply – see Incorrectly charged GST. This web guidance supplements public advice in Goods and Services Tax Ruling GSTR 2015/1 <i>Goods and services tax: the meaning of the term ‘passed on’ and ‘reimburse’ for the purposes of Division 142 of the A New Tax System (Goods and Services Tax) Act 1999.</i></p> <p>This web guidance also explains what a supplier must consider if they charge a customer a fee for administering a refund request.</p> <p>There was past ATO advice that was different to the view in the final Determination. Given our past inconsistent advice on this issue, it is not unreasonable that suppliers continued to charge GST on such supplies while the draft Determination was being finalised.</p>
4	<p>Uncertainty regarding how suppliers of burial rights practically deal with any refund requests</p> <p>Comments asked:</p> <ul style="list-style-type: none"> • how suppliers determine who the recipient of a supply of a burial right is in order to reimburse the correct person • what records are required 	<p>No change is needed to the final Determination.</p> <p>The recipient of the burial right is the person who acquired the right.</p> <p>Where a supplier chooses to provide a reimbursement to the recipient of the burial right supply for any overcharged GST, the supplier will need to keep records of this reimbursement to substantiate any corresponding refund request they make to the ATO. Such records are the supply contract and an invoice recording the GST that they have reimbursed to the customer.</p> <p>See paragraphs 57 to 68 of GSTR 2015/1 for further information on evidence surrounding the transaction.</p>

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	<ul style="list-style-type: none"> • if the original payment was made by someone who has since moved residence, to what extent the supplier must go to locate the payee for a refund • whether councils will be expected to split refunds if the reservation of a plot was paid for and reserved under 2 individuals and they hold joint rights of burial • what happens when a supplier has ceased trading. 	<p>There is no obligation on a supplier to identify customers that have been overcharged GST.</p> <p>Where 2 individuals hold joint rights to a burial right and the supplier chooses to provide a refund of overcharged GST, the supplier will need to ensure the refund is provided to the recipient of the right, to be able to claim a reimbursement from the ATO.</p> <p>Where a supplier has ceased trading, the recipient is not able to request a refund from them.</p>
5	<p>Who can customers request a refund from for any overcharged GST?</p> <p>Comments queried:</p> <ul style="list-style-type: none"> • who is required to provide a refund for any overcharged GST, and • how they deal with any customers who insist on a refund. 	<p>No change is needed to the final Determination.</p> <p>The supplier of the burial right that remitted the overcharged GST to the ATO is the entity from whom a customer may request a refund from for any overcharged GST.</p> <p>As explained in Issue 3 of this Compendium, there is no requirement in the GST law for a supplier to provide a refund for overcharged GST on past supplies of burial rights. A request for a refund of overcharged GST is a private contractual matter between the supplier and the customer.</p>
6	<p>Does Division 93 apply to restrict any refund requests to 4 years?</p> <p>Comments queried whether the 4-year time limit on entitlements to input tax credits in Division 93 restricts a supplier's ability to claim a refund for overcharged GST they have reimbursed a customer.</p>	<p>No change has been made in the final Determination.</p> <p>Division 93, which is about when entitlements to input tax credits cease, does not apply to limit a supplier's ability to claim a refund of overcharged GST from the ATO that the supplier has reimbursed to a customer.</p> <p>The refund is claimed by the supplier as an adjustment under paragraphs 19-10(1)(b) or (c). For further information, see Incorrectly charged GST.</p>
7	<p>Compensation for suppliers who incur administration costs providing refunds for overcharged GST</p> <p>Comments asked if the ATO would pay compensation to suppliers for the administration costs they incur in refunding customers overcharged GST.</p>	<p>No change has been made in the final Determination.</p> <p>The ATO will not be compensating suppliers.</p> <p>If an entity considers that there has been defective administration specific to their circumstances, information about how we assess discretionary compensation claims is available at Applying for compensation.</p>
8	<p>How does the general interest charge (GIC) apply to any refunds provided to a supplier by the ATO?</p> <p>Comments asked how GIC applies to any amount reimbursed to the supplier by the ATO.</p>	<p>No change is needed to the final Determination.</p> <p>GIC does not apply in these circumstances as there is no shortfall.</p> <p>Interest on overpayment of tax also does not apply. This is because these circumstances do not involve a delay in refunding an amount owing to a</p>

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		supplier. The overcharged GST is deemed payable on a taxable supply until the supplier reimburses a customer for any overcharged GST as explained in Issue 3 of this Compendium.
9	<p>Definition of Australian government agency – what is a public cemetery?</p> <p>Comments asked:</p> <ul style="list-style-type: none"> • what a public cemetery is • how suppliers and consumers identify a public cemetery • whether the ATO will publish a list of public and private cemeteries • whether a cemetery is a ‘public cemetery’ where it has a mix of cemetery sites that are Crown land, council-owned, and privately-owned land within the same site • whether a charitable trust created by statute for the purpose of operating a cemetery under the supervision of a state or territory government on government-owned land is a ‘public cemetery’. 	<p>The GST exemptions in Division 81 that are covered by the Determination only apply to Australian government agencies as defined for GST purposes. The final Determination makes clear that the term ‘public cemetery’ is used to describe a cemetery that is operated by an Australian government agency. As cemetery operators are appointed under and governed by state or territory legislation, the ATO is unable to publish a list of public cemeteries.</p> <p>However, new paragraphs 7 and 8 were added to the final Determination to clarify what is meant by a public cemetery and how this is based on the requirement in the GST law that the supplier is an Australian government agency. The final Determination also describes the types of entities which operate cemeteries that may satisfy the definition of an ‘Australian government agency’ for GST purposes.</p> <p>The supplier of a burial right needs to understand if they are an Australian government agency, as they need to self-assess whether Division 81, which exempts certain taxes fees and charges from GST, applies to them.</p> <p>It is the responsibility of the cemetery operator to properly account for any GST payable on their supplies, including by taking reasonable care to determine if they are an Australian government agency as defined for GST purposes. Taking reasonable care could also involve cemetery operators informing funeral directors of the GST status of their supplies of burial rights where a funeral director arranges the supply of a burial right for a customer of the funeral director’s business. Footnote 10 has also been added to the final Determination to:</p> <ul style="list-style-type: none"> • explain that the issue of whether a charitable trust that is created by statute for the purpose of operating a cemetery under the supervision of a state or territory government on government-owned land is a public cemetery, will depend on all the relevant facts and circumstances, and • make reference to the guidance on this issue in Goods and Services Tax Ruling GSTR 2006/5 <i>Goods and Services Tax: meaning of ‘Commonwealth, a State or a Territory’</i>.

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10	<p>Ancillary or incidental components of bundled services</p> <p>Comments raised the view that where the fee for a burial right is not separately charged and is part of a charge for a plot, the issuing of the burial right is incidental and ancillary to the supply of the plot and the bundle of supplies that go with that. In such cases, there is also no apportionment under the mixed supply rules.</p>	<p>No change has been made in the final Determination.</p> <p>Goods and Services Tax Ruling GSTR 2001/8 <i>Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts</i> provides guidance on when a supply includes parts that are taxable and non-taxable, and how to determine if the supply is a mixed or composite supply. Paragraphs 19 to 24 of GSTR 2001/8 describe how to consider, on an objective assessment, whether the thing or part of a supply is integral, ancillary or incidental to another part of a supply.</p> <p>We consider that where a bundled supply is made that includes a burial right and other taxable services, the supply of the burial right is not integral, ancillary or incidental to the other supplies in the bundle. The supply of the burial right is a separately identifiable supply that has specific purpose and value by itself.</p> <p>Paragraphs 80 to 84 of the final Determination explain how to apportion an undissected amount charged in a packaged arrangement that includes burial rights which are not subject to GST, together with other supplies that are subject to GST.</p>
11	<p>Competitive disadvantage for private cemeteries</p> <p>Comments explained that the draft Determination does not align with the principle underpinning the introduction of the GST legislation, noted in paragraphs 4.6 and 4.7 of the Explanatory Memorandum to the Tax Laws Amendment Bill (2011 Measures No. 2) Bill 2011*:</p> <p>When the GST was introduced, the Commonwealth, states and territories agreed that the GST would apply to the commercial activities of government at all levels and that the non-commercial activities of government would be outside the scope of the GST.</p>	<p>The special rules in Division 81 only apply to supplies made by Australian government agencies. In the context of burial rights, Division 81 requires consideration of the rights that are granted by an Australian government agency.</p> <p>In the final Determination, paragraphs 62 to 67 have been added to explain that burial rights in cemeteries operated by Australian government agencies are only able to be supplied by Australian Government agencies.</p> <p>The final Determination explains that the supply of a burial right and the supply of a renewal of a burial right in a public cemetery operated by an Australian government agency involves the grant of a right that permits the holder to have human remains buried or interred at a specific location within that public cemetery.</p> <p>The final Determination states ‘the supply in question involves the grant of a right which concerns a particular location within a public cemetery operated</p>

* See paragraph 4.6 of the Explanatory Memorandum to the Tax Laws Amendment Bill (2011 Measures No. 2) Bill 2011.

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		by a public cemetery operator (or other Australian government agency) and is therefore not a supply that may also be made by another supplier that is not an Australian government agency.
12	<p>Definition of a burial right</p> <p>Comments asked for further clarity on what the term ‘burial right’ in the draft Determination means and if a burial right fee should be distinguished from an ‘interment right fee’.</p>	In the final Determination, paragraph 9 has been added to explain the difference between the supply of a burial right and the supply of a permission that allows the exercise of a burial right in a public cemetery by performing the physical act of burying human remains or creating a memorial at the location covered by the burial right.
13	<p>Terminology for describing a burial right is different across States and Territories</p> <p>Comments asked us to consider the distinct legislative regimes of the different States and Territories and their respective definitions and types of rights, services and fees.</p>	<p>In the final Determination, footnote 12 has been added.</p> <p>In finalising the Determination, we have closely considered the different regimes for the state and territories and the respective law.</p> <p>Footnote 12 refers to the relevant legislative provisions in each state and territory and the respective terminology they use to describe what the final Determination collectively refers to as a ‘burial right’.</p> <p>In the final Determination, footnote 13 has also been added to make it clear that a burial right also may include the right to place a memorial on the location that is the subject of the burial right.</p>
14	<p>Application of the final Determination to South Australia</p> <p>Comments asked if the Determination applied to South Australia, given South Australia’s legislative regime does not distinguish between rights offered by a private and public cemetery.</p> <p>The comments raised the view that South Australia’s legislative regime results in the fee or charge payable for the supply of a burial right not being payable to an Australian government agency or imposed under an Australian law for the purposes of Division 81.</p>	<p>No change has been made in the final Determination.</p> <p>In circumstances where state or territory legislation governing burial and cemetery operations permits Australian government agencies to grant burial rights in exchange for a fee or charge, we consider that the fee or charge so payable is imposed under an Australian law. The relevant Australian law may be the state or territory legislation empowering the agency to grant the burial rights, or other state or territory legislation, such as local government legislation, that permits local or shire councils that operate public cemeteries to impose fees or charges for the use of property, the provision of services, or the granting of licences or other rights which they provide in their relevant local government area.</p> <p>The fact that some legislative regimes may also permit the supply of burial rights by private cemeteries (that is, cemeteries that are not operated by Australian government agencies) does not alter these conclusions.</p>

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15	<p>Determination to provide clarity on all fees and charges in relation to cemetery activities</p> <p>Comments requested that the final Determination provide clarity on other types of fees commonly supplied with a burial right.</p>	<p>In the final Determination, paragraph 12 has been added to provide clarity on what commonly provided supplies that are made with a supply of a burial right are taxable.</p> <p>Example 2 has also been added to the final Determination to explain how funeral directors need to separately itemise supplies in order to ensure GST is not charged on burial rights granted by Australian government agencies, and any other GST-free supplies provided as part of a bundle of supplies.</p>
16	<p>Past ATO advice was to the effect that funeral directors do not supply burial rights as agents for cemetery operators, and that a funeral service is a single supply</p> <p>Given inconsistent past advice that the ATO has given that funeral directors do not act as an agent and funeral services are a single taxable supply, comments requested clarification on:</p> <ul style="list-style-type: none"> • when funeral directors are acting as an agent, particularly when there is no written agency agreement • how funeral directors should treat other GST-exempt supplies • whether funeral directors can have extra time to change their invoicing systems. 	<p>The final Determination makes clear that in the case of cemeteries operated by Australian government agencies, it is the Australian government agency that is the supplier when burial rights are granted, and not the funeral director that may arrange for the making of this supply.</p> <p>We understand there is diverse industry practice, with some but not all States or Territories introducing regulations that treat funeral directors as being agents of cemetery operators when supplying burial rights.</p> <p>In light of this, the final Determination makes clear that whether or not a funeral director acts as an agent, the supply of a burial right in a cemetery operated by an Australian government agency is a supply made by the government agency (and not the funeral director), which is exempt from GST under Division 81.</p> <p>A funeral director will however remain liable for GST on any fee payable to the funeral director for their service of arranging the supply of the burial right, and on any other fees payable to the funeral director for the taxable supplies of goods and services that the funeral directors make.</p> <p>In the final Determination, paragraphs 72 to 79 and Example 2 have been added to further explain and clarify these matters and related invoicing practices.</p> <p>Example 2 illustrates the GST consequences for the supply of a burial right in a public cemetery arranged by a funeral director.</p> <p>Example 2 also explains how funeral directors should separately itemise supplies in order to ensure GST is not charged on burial rights granted by Australian government agencies, and any other GST-free supplies provided as part of a bundle of supplies.</p>

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		<p>Where necessary, funeral directors will need to update their practices to ensure that no GST is charged on the supply of a burial right made by an Australian government agency.</p> <p>As explained in Issue 2 of this Compendium, impacted suppliers will have up to 3 months from the date of publication of the final Determination to make any necessary changes to their invoicing systems and contracts. We have separately communicated this with the industry.</p>
17	<p>Prepaid funeral packages</p> <p>Comments asked for clarification on the GST treatment of existing prepaid funerals arrangements.</p>	<p>No change has been made in the final Determination.</p> <p>The Determination addresses circumstances where a burial right is supplied and paid for in advance.</p> <p>Burial rights included in a prepaid funeral arrangement have the same GST treatment as burial rights acquired by deceased estates.</p> <p>Where suppliers have supplied a prepaid funeral arrangement, they will need to review their contract to determine if it includes a supply of a burial right.</p> <p>Suppliers should ensure that their new contracts are updated to ensure GST is not imposed on any burial right supplied by an Australian government agency that is included in a prepaid funeral.</p> <p>Division 142 also applies to any overcharged GST for a burial right included in an existing prepaid funeral as explained in Issue 3 of this Compendium.</p>

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