

# ***GSTR 2014/D5 - Goods and services tax: development lease arrangements with government agencies***

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# Draft Goods and Services Tax Ruling

## Goods and services tax: development lease arrangements with government agencies

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### What this Ruling is about

1. This draft Ruling explains the goods and services tax (GST) treatment of particular transactions arising in the context of development lease arrangements entered into between government agencies<sup>1</sup> and private developers. These arrangements typically have the following features:

- the private developer (developer) undertaking a development on land owned by a government agency in accordance with the terms of a written agreement between the developer and the government agency, and
- the government agency supplying the land by way of freehold or grant of a **long-term lease**<sup>2</sup> to the developer subject to the developer undertaking the development in accordance with the terms of the written agreement. That is, the developer becomes entitled to transfer of the freehold or grant of a long-term lease when the development is completed.

<sup>1</sup> For the purposes of this draft Ruling the term 'government agency' includes both **Australian government agencies** and **government related entities**, as defined in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997), and includes local councils.

<sup>2</sup> Certain terms used are defined in the Definitions section of this draft Ruling at paragraphs 127 to 132. These terms when first mentioned appear in **bold type**.

2. In particular, this draft Ruling considers:
- the relevant principles for identifying and characterising the various supplies that are made for consideration<sup>3</sup> under a development lease arrangement, including:
    - whether the grant of a short-term lease or licence (development lease) by the government agency to allow the developer to undertake the development on the land is a supply for consideration
    - whether, in completing the works on land owned by the government agency, the developer makes a supply of **development services**<sup>4</sup> to the government agency for consideration, and
    - whether the sale of the freehold or grant of the long-term lease of the land by the government agency is a supply for consideration, and whether any consideration the developer provides for supply of the land includes undertaking of the development works on land owned by the government agency.
  - the extent to which the consideration for particular supplies made under a development lease arrangement includes consideration that is not expressed as an amount of money, that is, non-monetary consideration
  - how the value of any non-monetary consideration provided for supplies made in the context of a development lease arrangement may be determined,<sup>5</sup> and
  - the attribution, under Division 29 of the GST Act, of the GST liabilities and input tax credit entitlements that may arise under development lease arrangements.

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<sup>3</sup> Paragraph 9-5(a) of the GST Act requires a 'supply for consideration' for there to be a taxable supply.

<sup>4</sup> The term **development services**, as used in this draft Ruling, is defined in the Definitions section in Appendix 2 of this draft Ruling at paragraph 129.

<sup>5</sup> In accordance with paragraph 9-75(1)(b) of the GST Act, the value of a taxable supply includes the GST inclusive market value of any consideration that is not consideration expressed as an amount of money.

3. This draft Ruling does not consider the application of:

- Subdivision 38-N of the GST Act (grants of land by governments)
- Division 81 of the GST Act (payment of taxes, fees and charges), or
- Division 82 of the GST Act (supplies in return for rights to develop land).

4. The GST consequences of any arrangements associated with the development entered into between the developer and third parties are not covered in this draft Ruling. For example, the draft Ruling does not address the GST consequences of the sale of the completed development, or completed units in the development, by the developer to third party purchasers.

5. This draft Ruling does not apply to development lease arrangements that do not involve a government agency. The GST implications of arrangements not involving government agencies depend on the features of the particular arrangement in question. However, a number of the principles outlined in this draft Ruling may also be applicable to similar arrangements involving private entities only.

6. This draft Ruling does not address every possible factual scenario and does not seek to identify all possible supplies for consideration that may arise in the context of development lease arrangements. Instead, this draft Ruling sets out some principles and examples which may be relevant to various specific situations.

7. All legislative references in this draft Ruling are to the GST Act unless otherwise indicated. Also, unless otherwise specified, any reference to a taxable supply assumes that all of the requirements of section 9-5 are met.

## **Background**

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8. To ensure land development is carried out in accordance with statutory requirements and policy objectives, government agencies commonly sell, or grant long-term leases over land to developers subject to conditions governing the developments to be undertaken on the land. The developments often include commercial/retail and residential components (often strata titled units).

## Common features of development lease arrangements

9. There are variations between particular arrangements but, in general, the developer is required to carry out development works under a development lease arrangement that involves:

- the government agency initially granting a short-term lease or licence (commonly referred to as a 'development lease') to allow the developer to enter the land and to carry out development works on the land.<sup>6</sup> The developer may be required to pay rent under the development lease and/or may be required to pay a lump sum amount to the government agency for the grant of the development lease
- the terms of the development lease arrangement providing that all risks relating to the development works rest with the developer
- the developer undertaking the development works on its own account and not as an agent or builder for the government agency
- an expectation of the parties that the development works will be completed in accordance with the terms of the development lease arrangement, and
- the government agency transferring or granting the freehold or long-term leasehold title to the land to the developer when certain conditions specified in the development lease arrangement are satisfied. For example, when the development is completed in accordance with the terms of the development lease arrangement.

10. A common variation that arises in some development lease arrangements is when, under the terms of the arrangement, the developer is also required to complete works, such as infrastructure works, on land that is not to be transferred to or retained by the developer.

11. In some cases, the terms of a development lease arrangement do not provide for the immediate transfer or grant of the freehold or long-term leasehold title to the land when the development is completed and/or other conditions are satisfied. Instead, the government agency grants an option to the developer which allows the developer to call for the freehold title or a long-term

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<sup>6</sup> In some cases, the developer may already hold a long-term leasehold interest in the land when they enter into a development lease arrangement with a government agency. For example, in *Federal Commissioner of Taxation v. Gloxinia Investments Limited* [2010] FCAFC 46 (*Gloxinia*), the taxpayer held a long-term leasehold interest in the land at the time of entry into a development lease arrangement with a local council.

lease (referred to as a 'call option' for the purposes of this draft Ruling).

12. In other cases, the government agency grants a call option to the developer on entry into a development lease arrangement. However, under the terms of the arrangement, the developer is not entitled to exercise the call option until the development is completed and/or other specified conditions are satisfied.

13. Often, development lease arrangements also require the developer to make one or more monetary payments to the government agency. The terms of a particular development lease arrangement specify what the payment or payments are for in each case. For example, a development lease arrangement may require the developer to pay a monetary sum in consideration for the grant of a long-term lease of the land.

14. There are some development lease arrangements where the government agency initially requires the completed development works for its own use, even though there is to be a subsequent sale or long-term lease of the land containing the completed development works to the developer.

15. This draft Ruling does not apply to development lease arrangements to the extent that they have features of the kind referred to in paragraph 14 of this draft Ruling.

## **Ruling**

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### **Supplies for consideration**

16. Identification of the supplies that are made for consideration arising under a development lease arrangement turns on the specific terms of the particular development lease arrangement. The terms of agreements entered into by the parties is primary to identifying the supplies that are made for consideration as part of a development lease arrangement.

17. The terms of a development lease arrangement typically give rise to a number of actions by the parties, these include:

- The grant, by the government agency, of a development lease (that is, a short-term lease or licence) to the developer to allow the developer to undertake development works on the land.
- The developer undertaking development works on land owned by the government agency.
- The government agency transferring the freehold interest in the land or granting a long-term lease of the land to the developer and/or granting an option for the developer to call for the transfer or grant of the freehold title or a long-term lease.
- The developer making one or more monetary payments to the government agency.

## ***Grant of a development lease by the government agency to the developer***

18. Where a government agency grants a development lease to allow the developer to undertake development works on the land, it is making a supply of land to the developer by way of lease or licence, and the developer makes a corresponding acquisition of land by way of lease or licence.

19. Where the development lease, or a related agreement, provides for rent to be paid by the developer, the rent is consideration for the supply of land by way of lease.

20. In some cases, the development lease or a related agreement, may require the developer to pay a lump sum to the government agency on the grant of a development lease. In the absence of express terms or other evidence to the contrary, the payment of this amount is also consideration for the supply of land to the developer by way of lease or licence.

## ***Example 1: short-term lease of land to the developer for annual rental***

21. *Government Agency A and the Numbat Development Co enter into a written development lease arrangement for the development of vacant land owned by Agency A.*

22. *Under the terms of the development lease arrangement, Agency A grants a development lease to Numbat for a five year term so that Numbat can access the land and construct the development. The terms of the lease require Numbat to pay annual rent of \$20,000.*

23. *The rent paid by Numbat is consideration for the supply of land by way of lease to Numbat by Agency A.*

24. *Agency A makes a taxable supply of vacant land, by way of lease, to Numbat.*

## ***Example 2: grant of a short-term lease to the developer for an upfront lump sum payment***

25. *Assuming the same facts from Example 1 except that, rather than being required to pay annual rent, Numbat must pay an upfront monetary sum of \$100,000 for the grant of the development lease.*

26. *The payment is consideration for the supply of land by way of lease made to Numbat by Agency A.*

27. *Agency A makes a taxable supply of vacant land, by way of lease, to Numbat.*

***Undertaking works on land owned by the government agency that is to be transferred to, or retained by, the developer***

28. In completing the development works on the government agency's land, in accordance with the terms of a development lease arrangement, the developer makes a supply of development services to the government agency.

29. The supply of the land to the developer by the government agency is consideration for the developer's supply of development services if there is a sufficient nexus between supply of the development services and transfer of the land.

30. There is a sufficient nexus between the development services and the transfer of freehold or grant of a long-term lease if the development lease arrangement makes the supply of the land subject to or conditional on the developer completing specified development works.<sup>7</sup> For example, the developer only becomes entitled to the freehold or long-term lease on completion of the development or a particular stage of the development.

31. In some cases, under the terms of a development lease arrangement, the government agency grants a call option to the developer. When exercised, the call option entitles the developer to the transfer of the freehold or a long-term leasehold interest in the land. The grant of a call option by the government agency is consideration for the developer's supply of development services if the grant of the call option is subject to or conditional on the developer completing specified development works.

32. Where the circumstances set out in paragraphs 28 to 31 of this draft Ruling apply, supply of development services by the developer is, in turn, consideration for the supply of the land or the grant of a call option by the government agency.<sup>8</sup> The developer makes a taxable supply of development services and the government agency makes a taxable supply of land or a taxable supply of the grant of a call option.

33. There may also be some cases where a call option is granted by the government agency to the developer on entry into a development lease arrangement or sometime soon after, and the developer's right to exercise the option is subject to or conditional on completion of the works. In these cases, the works are undertaken in connection with the exercise of the option and, under subsection 9-17(1),<sup>9</sup> the development services supplied by the developer form part of the consideration for transfer of the land by the government agency when the developer exercises the option. In turn,

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<sup>7</sup> For further explanation, see paragraphs 104 to 112 in Appendix 1 to this draft Ruling.

<sup>8</sup> Paragraph 16 of Goods and Services Tax Ruling GSTR 2001/6 *Goods and services tax: non-monetary consideration*.

<sup>9</sup> In particular, paragraph 9-17(1)(a) provides that if a right or option to acquire a thing is granted, then the consideration for the supply of the thing on the exercise of the right or option is limited to any additional consideration provided either for the supply or in connection with the exercise of the right or option.

transfer of the land by the government agency is consideration for the developer's supply of development services.

**Example 3: supply of freehold interest to the developer is conditional on the developer completing development works on the land**

34. Government Agency B and Pademelon Constructions enter into a development lease arrangement for the development of land owned by Agency B.
35. Agency B is required to transfer the freehold title to the land to Pademelon when Pademelon has completed the development in accordance with the terms of the arrangement. Pademelon is not entitled to the freehold title until it completes the development.
36. On receipt of a certificate of practical completion for the development, Agency B transfers the freehold title to Pademelon.
37. Pademelon makes a supply of development services to Agency B, and Agency B makes a supply of the land to Pademelon.
38. Supply of the land by way of the freehold is consideration for the supply of development services Pademelon makes to Agency B. In turn, Pademelon's supply of development services is consideration for Agency B's supply of land to Pademelon.
39. Pademelon makes a taxable supply of development services to Agency B.
40. Agency B makes a taxable supply of land to Pademelon.

**Example 4: grant of a call option to the developer is conditional on the developer completing development works on the land**

41. Assuming the same facts from Example 3, except that Pademelon is entitled to the grant of a call option on practical completion of the development. When exercised, the call option entitles Pademelon to the transfer of the freehold. Pademelon is not entitled to the grant of the call option until the development reaches practical completion.
42. Pademelon makes a supply of development services to Agency B, and Agency B makes a supply of the grant of the call option to Pademelon.
43. The grant of the call option is consideration for the supply of development services that Pademelon makes to Agency B. In turn, Pademelon's supply of development services is consideration for Agency B's supply of the grant of the call option.
44. Pademelon makes a taxable supply of development services to Agency B.
45. Agency B makes a taxable supply of the grant of the call option to Pademelon.

***Example 5: exercise of a call option by the developer is conditional on the developer undertaking development works on the land***

46. Assuming the same facts from Examples 3 and 4, except that the development lease arrangement provides for the grant of a call option to Pademelon immediately on entry into the arrangement. When exercised, the call option entitles Pademelon to the transfer of the freehold. However, Pademelon is not entitled to exercise the call option until the development reaches practical completion.

47. Pademelon makes a supply of development services to Agency B and, on exercise of the call option by Pademelon, Agency B makes a supply of land to Pademelon.

48. For the purposes of subsection 9-17(1), Pademelon's supply of the development services is in connection with the exercise of the call option. Pademelon's supply of development services is consideration for Agency B's supply of the land. In turn, Agency B's supply of the land to Pademelon is consideration for the supply of development services that Pademelon makes to Agency B.

49. Pademelon makes a taxable supply of development services to Agency B.

50. Agency B makes a taxable supply of land to Pademelon.

***Undertaking of works on land that is not transferred to, or retained by, the developer***

51. In some cases, as a condition of a development lease arrangement, the developer is required to complete works on land that is retained by the government agency and is not transferred to, or retained by, the developer as part of the arrangement (additional works). These works may include construction of other facilities required by the government agency, for example, car parks, parkland, or entertainment precincts. They may also include general infrastructure works such as sewers, roads and footpaths.

52. The developer makes a supply of development services to the government agency when the developer completes additional works on land that is retained by the government agency, in accordance with the terms of a development lease arrangement.

53. The supply of the land by the government agency is consideration for this supply of development services, by the developer, if:

- the terms of the development lease arrangement make the government agency's supply of land subject to or conditional on the developer completing the additional works
- and Division 82<sup>10</sup> does not apply.

54. In other cases, where the grant of a call option by the government agency is subject to or conditional on the developer completing the additional works, the grant of the call option is consideration for the developer's supply of development services if Division 82 does not apply

55. Where the circumstances in paragraphs 53 and 54 of this draft Ruling apply, the supply of development services by the developer, in the form of the additional works, also forms part of the consideration for the government agency's supply of land or grant of the call option.

***Example 6: transfer of a long-term leasehold interest in the land is conditional on the developer undertaking works on the land and additional works on adjacent land***

56. *Government Agency C and Galah Builders enter into a development lease arrangement for the construction of a development on land owned by Agency C.*

57. *Under the terms of the arrangement, Galah is entitled to the grant of a long-term lease over the land. However, the grant of the long-term lease to Galah is conditional on Galah completing the required development, as well as constructing a multi-storey car park on adjacent land owned by, and to be retained by, Agency C.*

58. *When Galah completes the development and construction of the car park, Agency C makes a supply of the grant of a long-term lease over the land to Galah. The consideration for that supply is the development services provided by Galah comprising both construction of the development, as well as construction of the car park on the adjacent land owned by Agency C.*

59. *The grant of the long-term lease by Agency C is, in turn, consideration for supply of development services by Galah in constructing the development and the car park.*

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<sup>10</sup> The application of Division 82 is outside the scope of this draft Ruling. However, in general terms, Division 82 applies if the developer makes a supply of the works in return for a supply, by a government agency, of a right to develop land. The supply of a right to develop land includes, for example, approval by a government agency for such things as subdivision and rezoning of land.

***Example 7: transfer of a long-term leasehold interest in the land is conditional on the developer completing additional works on adjacent land only***

60. *Assuming the same facts from Example 6 except that the transfer of the long-term lease over the land to Galah is only conditional on Galah constructing the car park. That is, the grant of the long-term lease to Galah is not subject to or conditional on the completion of the development on the land that is to be transferred to it. Galah is entitled to the grant of the long-term lease as soon as construction of the car park on the adjacent land is completed.*

61. *In constructing the car park, Galah makes a supply of development services to Agency C. The grant of the long-term lease over the land on which the development is to be constructed is consideration for the supply of development services that Galah makes in completing construction of the car park.*

62. *In turn, Galah's supply of development services in completing construction of the car park is consideration for Agency C's supply of the land by way of long-term lease.*

**Valuation of non-monetary consideration provided for supplies made under a development lease arrangement**

63. As explained in paragraphs 28 to 62 of this draft Ruling, the consideration for supplies made by the developer and the government agency under a development lease arrangement often involve consideration that is not expressed as an amount of money (that is, non-monetary consideration). Where the consideration for a supply is non-monetary, the GST inclusive market value of that consideration is used to work out the price and value of that supply.<sup>11</sup>

64. Where the parties to a development lease arrangement are dealing with each other at arm's length, the Commissioner considers that the things exchanged between the parties are of equal GST inclusive market value.<sup>12</sup> Therefore, in the context of a development lease arrangement between a government agency and a developer, the parties can use a reasonable valuation method<sup>13</sup> as agreed between them to determine the GST-inclusive market value of any non-monetary consideration for supplies arising in the context of a development lease arrangement.<sup>14</sup>

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<sup>11</sup> Paragraph 9-75(1)(b). 'GST inclusive market value' is defined in section 195-1.

<sup>12</sup> See paragraph 19 of GSTR 2001/6.

<sup>13</sup> It is not necessary for the government agency and/or the developer to obtain a formal valuation.

<sup>14</sup> See paragraph 155 of GSTR 2001/6.

65. For example, the full costing of the development works, undertaken by the developer as part of a competitive tender process, which takes into account the full cost of construction (including builder margins), provides a reasonable basis for determining the GST-inclusive market value of the supply of development services by the developer. It also provides a reasonable basis for calculating the price of the government agency's related supply of land (or grant of a call option).

66. Similarly, a professional valuation of the land supplied by the government agency to the developer, with appropriate adjustments made for any monetary consideration also provided for the land by the developer,<sup>15</sup> would also be a reasonable basis for the parties to determine and agree upon the GST-inclusive market value of the development services supplied by the developer. It would also provide a reasonable basis for calculating the price of the government agency's related supply of land (or grant of a call option).<sup>16</sup>

***Example 8: GST inclusive market value of development services that are consideration for a supply of a freehold interest in the land***

67. *Government Agency D and a developer, Quoll Pty Ltd, enter into a development lease arrangement for the construction of a development on land owned by Agency D.*

68. *Quoll is entitled to the transfer of the freehold subject to Quoll completing the development on the land. The terms of the arrangement do not require Quoll to make any monetary payments for the transfer of the freehold.*

69. *Quoll makes a taxable supply of development services to Agency D in exchange for the transfer of the freehold. Similarly, Agency D makes a taxable supply of the land to Quoll in exchange for Quoll's supply of development services.*

70. *As part of a competitive tender process, prior to entering into the development lease arrangement, Quoll undertook a full costing of the development works, taking into account building costs (including builder margins), internal margins and other contingencies which amounted to \$33 million.*

71. *Both Quoll and Agency D can agree to account for their respective GST obligations and entitlements on the basis that the GST inclusive market value of the non-monetary consideration provided for their respective supplies is \$33 million.*

72. *On that basis, both parties make taxable supplies for which the GST inclusive price is \$33 million. Similarly, both parties also make acquisitions for a GST inclusive price of \$33 million.*

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<sup>15</sup> See paragraphs 67 to 72 of this draft Ruling.

<sup>16</sup> See paragraph 151 of GSTR 2001/6.

***Determining the price of taxable supplies made under a development lease arrangement when the consideration comprises both monetary and non-monetary components***

73. In some cases, a development lease arrangement may give rise to a supply of land by the government agency for consideration consisting of a non-monetary component together with an amount of money.

74. For example, the grant of a long-term lease or transfer of the freehold may not only be subject to the developer completing certain works on the land. The developer may also be required to pay a monetary sum to the government agency.

75. Because the land is supplied by the government agency in exchange for both the monetary payment and the development services, the GST inclusive market value needs to be apportioned to determine the price of the supply of development services made by the developer.<sup>17</sup> The apportionment is made by deducting the amount of the monetary payment from the GST inclusive market value of the land supplied by the government agency.

76. In turn, the consideration for the government agency's supply of the land is determined by adding together the amount of the monetary payment and the GST inclusive market value of the development services supplied by the developer.

***Example 9: transfer of freehold interest in land for both monetary and non-monetary consideration***

77. *Under the terms of a development lease arrangement, Government Agency E agrees to transfer the freehold interest in land to Skink Enterprises, subject to Skink constructing a development on the land and making a lump sum payment of \$18 million to Agency E.*

78. *A professional valuation determines a GST inclusive market value of \$68 million for the freehold transferred to Skink. On that basis, the GST inclusive market value of the development services undertaken by Skink is \$50 million.*

79. *Skink makes a taxable supply of development services to Agency E. The price for Skink's taxable supply of development services to Agency E is \$50 million.*

80. *Agency E makes a taxable supply of land to Skink. The price for Agency E's taxable supply of land to Skink is \$68 million (comprising the \$50 million GST inclusive market value of Skink's supply of development services plus the \$18 million payment from Skink).*

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<sup>17</sup> Paragraphs 132 to 134 of GSTR 2001/6.

## **Attribution of GST liabilities for taxable supplies arising under a development lease arrangement**

81. Where a party to a development lease arrangement accounts for GST on a non-cash basis, any GST payable or entitlement to an input tax credit is attributable to the tax period in which:

- any of the consideration is received, or
- an invoice is issued,

whichever is the earlier.<sup>18</sup>

82. In the context of a development lease arrangement, attribution of a GST liability or a corresponding input tax credit entitlement is required in the tax period in which:

- a monetary payment is received, or
- some or part of the non-monetary consideration is received; or
- an invoice is issued; or

whichever is the earlier.

## ***Attribution of a government agency's GST liability for its taxable supply of land or the grant of a call option***

83. Non-monetary consideration, comprising a supply of development services by the developer, for a supply of land or the grant of a call option by a government agency under a development lease arrangement, is not provided in part (or in full) until the conditions specified in the development lease arrangement are satisfied and the developer is entitled to the supply of the land or the grant of a call option - for example, on practical completion of the development.<sup>19</sup>

84. In circumstances where a monetary payment has not been made in an earlier tax period and an invoice has not been issued in an earlier tax period, the government agency's GST liability for a taxable supply of land (or the supply by way of grant of a call option) is attributable to the tax period in which the development satisfies the requirements of the development lease arrangement and the developer is entitled to the supply of the land or the grant of a call option.

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<sup>18</sup> Section 29-5.

<sup>19</sup> For further explanation, see paragraphs 115 to 121 in Appendix 1 of this draft Ruling.

85. In practical terms, the view expressed at paragraphs 83 to 84 of this draft Ruling means that the government agency's GST liability for its supply of the land (or the grant of a call option in applicable cases) is not attributable until the specified development is completed (or a specified stage of the development is completed) unless:

- an invoice has been issued in an earlier tax period,<sup>20</sup> or
- a monetary payment has been received for the land (or the call option) in an earlier tax period.<sup>21</sup>

***Attribution of the developer's GST liability for its taxable supply of development services***

86. Non-monetary consideration, comprising the transfer of the freehold or long-term leasehold interest in land (or in other cases, the grant of a call option), for the supply of development services made by a developer is provided in full immediately on the transfer of the freehold or long-term leasehold interest (or immediately on the grant of the call option in applicable cases).

87. In circumstances where no monetary consideration has been provided in an earlier tax period and no invoice has been issued in an earlier tax period, the developer's GST liability for its taxable supply of development services is attributable to the tax period in which the freehold or long-term leasehold interest in the land is transferred (or the call option is granted).

***Example 10: attribution of GST payable on the supply of land by the government agency when the required works are completed prior to the payment of any monetary consideration and the issue of an invoice***

88. *Under the terms of a development lease arrangement, Government Agency F agrees to grant a long-term lease of the land to Potoroo Pty Ltd, subject to Potoroo constructing a development on the land. Potoroo is required to complete the development and obtain a certificate of practical completion before it is entitled to the grant of the long-term lease from Agency F.*

89. *The terms of the development lease arrangement require Agency F to grant the long-term lease to Potoroo immediately on Potoroo obtaining a certificate of practical completion for the development. Potoroo is also required to pay \$33 million to Agency F in consideration for the grant of the long-term lease at the time that the long-term lease is granted.*

90. *Agency F will make a taxable supply of the land to Potoroo. The consideration for that supply will include the development services supplied by Potoroo, in addition to the \$33 million payment.*

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<sup>20</sup> Paragraph 29-5(1)(b).

<sup>21</sup> Paragraph 29-5(1)(a).

91. *As no invoices have been issued and no monetary payment has been made in any earlier tax period, Agency F's GST liability for its taxable supply of the land is attributable to the tax period when Potoroo obtains a certificate of practical completion for the development. No part of the monetary consideration or the non-monetary consideration (in the form of the development services supplied by the developer) for the supply of the land is received by Agency F prior to the practical completion of the development.*

92. *The total GST liability attributable by Agency F in that tax period in which practical completion of the development is achieved is equal to 1/11 of \$33 million plus the GST inclusive market value of the development works supplied by Potoroo.*

## **Invoices for supplies arising under a development lease arrangement**

93. The issue of a document by the developer to the government agency on entry into a development lease arrangement or at any time afterwards, notifying the government agency of an obligation to supply the land subject to the development works being completed, is an **invoice** as defined in section 195-1.<sup>22</sup>

94. If none of the consideration (monetary or non-monetary) for the developer's supply of development services has been received by the developer in an earlier tax period, the developer's GST liability for its taxable supply of development services is attributable to the tax period in which the invoice is issued.<sup>23</sup> In turn, any corresponding input tax credit that the government agency is entitled to for its acquisition of the development services is attributable to that same tax period.<sup>24</sup>

95. Similarly, the issue of a document by the government agency on entry into a development lease arrangement or at any time afterwards, notifying the developer of its obligation to deliver the development outcome contemplated by the development lease arrangement (for example, practical completion of a commercial and residential apartment complex on the land), is an invoice as defined in section 195-1.

96. If none of the consideration (monetary or non-monetary) for the government agency's supply of the land has been received by the government agency in an earlier tax period, the government agency's GST liability for its taxable supply of the land is attributable to the tax period in which the invoice is issued. In turn, subject to the requirement to hold a tax invoice in subsection 29-10(3), any input tax

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<sup>22</sup> See paragraph 27 of Goods and Services Tax Ruling GSTR 2000/34 *Goods and services tax: what is an invoice for the purposes of the A New Tax System (Goods and Services Tax) Act 1999 ('GST Act')?*

<sup>23</sup> Section 29-5.

<sup>24</sup> Provided that as required under subsection 29-10(3) the developer holds a tax invoice at the time that it lodges its GST return for that tax period.

credit that the developer is entitled to for its acquisition of the land is attributable to that same tax period.

***Example 11: invoices issued prior to payment of monetary consideration or provision of non-monetary consideration***

97. *Assuming the same facts from Example 10 above, except that on entry into the development lease arrangement, Agency F and Potoroo exchange tax invoices for their respective obligations arising under the development lease arrangement – that is, transfer of the land by Agency F and the undertaking of the works by Potoroo.*

98. *At the time the tax invoices are issued, neither Agency F nor Potoroo has provided any monetary or non-monetary consideration for Potoroo's supply of development services or Agency F's supply of the land.*

99. *Agency F's GST liability for its taxable supply of the land is attributable to the tax period when it issues the tax invoice and provides it to Potoroo. Potoroo's GST liability for its taxable supply of the development works is attributable to the tax period when it issues the tax invoice and provides it to Agency F.*

100. *As the tax invoices are exchanged in the same tax period, both Agency F's GST liability and Potoroo's respective GST liabilities, are attributable to the same tax period. In turn, any input tax credits that Agency F is entitled to for its acquisition of the development services from Potoroo is also attributable to that same tax period, as are any input tax credits that Potoroo is entitled to for its acquisition of the land from Agency F.*

## **Date of effect**

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101. When the final Ruling is issued, it is proposed to apply on and from its date of issue.

102. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

### **Transitional arrangements**

103. The Decision Impact Statement for *Gloxinia* explains the Commissioner's approach to development lease arrangements following the Full Federal Court's decision. The Commissioner invites comment on any transitional arrangements that are appropriate in implementing the final Ruling.

# **GSTR 2014/D5**

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**Commissioner of Taxation**

12 November 2014

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### Supply for consideration

104. In order for there to be a taxable supply, paragraph 9-5(a) requires a supply for consideration. A payment, act or forbearance is consideration for a supply where there is a sufficient nexus between the payment, act or forbearance and the supply.<sup>25</sup> The test as to whether there is a sufficient nexus is an objective test.<sup>26</sup>

105. In *AP Group Ltd v. Commissioner of Taxation*,<sup>27</sup> the Court held that in the phrase 'you make the supply for consideration' the word 'for' functions in the statutory description to identify the character of the connection which is required and ensures that not every connection between the giving of consideration and the provision satisfy the first condition of making a taxable supply.

106. In *Commissioner of Taxation v. Qantas Airways Limited*,<sup>28</sup> the majority<sup>29</sup> considered that the word 'for' in the phrase 'the supply for consideration' was not used to adopt contractual principles but required 'a connection or relationship between the supply and the consideration'.

### ***Supplies for consideration in the context of development lease arrangements***

107. For real property transactions, 'consideration' may be regarded as anything that 'moves' the conveyance or transfer.<sup>30</sup>

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<sup>25</sup> See paragraph 68 of GSTR 2001/6; paragraph 33 of Goods and Services Tax Ruling GSTR 2002/3 *Goods and services tax: prizes*; paragraph 28 of GSTR 2003/6 *Goods and services tax: transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances*.

<sup>26</sup> See paragraph 72 of GSTR 2001/6; paragraph 33 of GSTR 2002/3; paragraph 28 of GSTR 2003/6.

<sup>27</sup> [2013] FCAFC 105.

<sup>28</sup> (2012) 247 CLR 286 at 292.

<sup>29</sup> Gummow, Hayne, Keifel and Bell JJ.

<sup>30</sup> See *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 152. See also comments made by Gleeson CJ and Callinan J in their dissenting judgement in the High Court decision *Chief Commissioner of State Revenue (NSW) v. Dick Smith Electronics Holdings Pty Ltd* (2005) 213 ALR 230 at 235-236. See also paragraph 38 of Goods and Services Tax Ruling GSTR 2009/1 *Goods and services tax: general law partnerships and the margin scheme* and paragraph 91 of Goods and Services Tax Ruling GSTR 2009/2 *Goods and services tax: partitioning of land*.

108. If the terms of a development lease arrangement make a supply of land or a grant of a call option by the government agency to the developer subject to the developer constructing a development on the land, then the completing of the development works on the land by the developer is what ‘moves’ the transfer of the land or the grant of the option. For the purposes of paragraph 9-5(a), there is a sufficient nexus between the supply of the development services by the developer and the supply of the land (or the grant of the call option) by the government agency. In these circumstances, supply of development services by the developer is consideration for the supply of the land or the grant of the call option by the government agency.

109. The completing of the development works by the developer on the government agency’s land constitutes a supply of development services by the developer for which the government agency’s supply of the land or grant of the call option is consideration.

110. The developer makes a supply of development services to the government agency, under the terms of a development lease arrangement, regardless of whether or not legal title in the works ever passes to the government agency.

111. Even if the express terms of a development lease arrangement provide that ownership of the physical works undertaken on the government agency’s land rests with the developer, having regard to the broad meaning of supply in section 9-10, the developer still makes a supply of development services to the government agency.

112. In all cases, through the developer performing its contractual obligations under the development lease arrangement and completing the required works allows the government to fulfil its policy and statutory objectives.

### **Attribution of GST liabilities for taxable supplies arising under a development lease arrangement**

113. Where a party to a development lease arrangement accounts for GST on a non-cash basis, any GST payable or any entitlement to an input tax credit is attributable to the tax period in which:

- any of the consideration is received, or
- an invoice is issued,

whichever is the earlier.<sup>31</sup>

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<sup>31</sup> Section 29-5.

114. In the context of a development lease arrangement, attribution of a GST liability or a corresponding input tax credit entitlement will be required in the tax period in which:

- a monetary payment is received, or
- some or part of the non-monetary consideration is received; or
- an invoice is issued;

whichever is the earlier.

***Attribution of a government agency's GST liability for its taxable supply of land or the grant of a call option***

115. As discussed at paragraphs 28 to 62 of this draft Ruling, the consideration for a government agency's supply of land or the grant of a call option can include a non-monetary component or an 'in-kind' payment. The non-monetary consideration or the 'in-kind' payment will be the development services supplied by the developer.

116. For the purposes of determining the tax period to which a government agency's GST liability for a taxable supply of land (or grant of a call option) it makes under a development lease arrangement, it is necessary to ascertain the time when some or part of the non-monetary consideration (that is, the 'development services' supplied by the developer) is received.

117. The terms of a development lease arrangement which require a developer to complete specified works on the government agency's land are different to a usual contract for the provision of services in the generally understood sense.

118. As noted at paragraph 9 of this draft Ruling, the terms of a development lease arrangement ordinarily provide that all risks relating to the development works rest with the developer for the duration of the development phase. The developer completes the development works on its own account and not as an agent or builder for the government agency.

119. The broader context of a development lease arrangement provides for the transfer of the land comprising the development to the developer on satisfaction of certain conditions in relation to the development – for example, practical completion of the development. Considering this, together with the factors referred to in paragraph 120 of this draft Ruling, the government agency does not obtain any benefit from the progressive fixation of the works on the government agency's land – that is, the government agency does not acquire anything from the developer before practical completion.

120. The benefit that the government agency obtains from the development services supplied by the developer is completion of the development and any specified additional works.<sup>32</sup> It is completion of the development and any specified additional works which is the relevant supply. Acquiring these things also satisfies the government agency's policy objectives and/or statutory obligations. It achieves what the government agency bargained for by entering into the development lease arrangement with the developer.

121. On the basis of the analysis discussed at paragraphs 115 to 120 of this draft Ruling, it is considered that the government agency does not receive (neither in part nor in full) any of the non-monetary consideration in the form of the development services supplied by the developer until the specified conditions of the development - for example, practical completion - are satisfied.

## **Invoices for supplies arising under a development lease arrangement**

122. An invoice is defined in section 195-1 to mean 'a document notifying an obligation to make a payment'.<sup>33</sup> A party can only be regarded as under an obligation to make a payment if '...there is a requirement for either an actual payment or, at least, a present obligation to pay a sum certain at some future date'.<sup>34</sup>

123. In cases where the transfer of land by the government agency under a development lease arrangement is consideration for a supply of development services by the developer, the government agency has a presently existing obligation to transfer the land to the developer at a future date (for example, upon practical completion of the works by the developer), from the time of entry into the development lease arrangement.

124. A document issued by the developer on entry into a development lease arrangement or anytime afterwards, notifying the government agency of that obligation to transfer the land at a future date (for example, upon practical completion of the work by the developer), is an invoice as defined under section 195-1.

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<sup>32</sup> See paragraphs 51 to 62 of this draft Ruling for a further explanation about the GST consequences of additional works undertaken by the developer.

<sup>33</sup> See section 195-1 and paragraph 12 of GSTR 2000/34.

<sup>34</sup> See paragraph 25 of GSTR 2000/34 and *Dingwall v. FC of T* 95 ATC 4345 at 4351.

125. It is acknowledged that the government agency's transfer of the land to the developer is contingent on the developer completing the works and/or satisfying other requirements. However, the terms of development lease arrangements do not ordinarily provide for the developer to be otherwise compensated for the development works and there is an expectation of the parties that the development works will be completed and the government agency will be required to transfer the land to the developer. There is a contractually binding obligation upon the government agency, at the outset, to transfer the land to the developer at a future date (that is, when the development works are completed).<sup>35</sup>

126. The practical outcomes of the view set out at paragraphs 122 to 125 of this draft Ruling is that if the parties to a development lease arrangement exchange invoices/tax invoices on entry into the development lease arrangement, or soon afterwards, their respective GST liabilities and corresponding input tax credit entitlements are attributable to the same tax period.

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<sup>35</sup> Paragraph 12 of GSTR 2000/34.

## Appendix 2 – Definitions

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127. The following terms used in this Ruling (other than development services) are defined in section 195-1.

128. **Australian government agency** has the meaning given by section 995-1 of the ITAA 1997. Section 995-1 of the ITAA 1997 defines an Australian government agency as:

- (a) the Commonwealth, a State or Territory, or
- (b) an authority of the Commonwealth or of a State or a Territory

129. **Development services** when used in this draft Ruling, means the delivery, by the developer, of the ultimate development outcome that is contemplated by the terms of a particular development lease arrangement. For example, the practical completion of a residential apartment complex on the government agency's land.

For the purposes of this draft Ruling, the term 'development services' does not mean supplies made under a development contract whereby a developer provides development services to a landowner progressively for the period of construction.

130. **Government related entity** is:

- (a) a government entity, or
- (b) an entity that would be a government entity but for subparagraph (e)(i) of the definition of government entity in the *A New Tax System (Australian Business Number) Act 1999*, or
- (c) a local governing body established by or under a State law or Territory law.

131. **Long-term lease** means a supply by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence for at least 50 years) if:

- (a) at the time of the lease, hire or licence, or the renewal or extension of the lease, hire or licence, it was reasonable to expect that it would continue for at least 50 years, and
- (b) unless the supplier is an Australian government agency – the term of the lease, hire or licence, or the renewal or extension of the lease, hire or licence, as they apply to the recipient are substantially the same as those under which the supplier held the premises.

132. **Invoice** means a document notifying an obligation to make a payment.

## **Appendix 3 – Your comments**

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133. You are invited to comment on this draft Ruling including the proposed date of effect. Please forward your comments to the contact officer by the due date.

134. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments, and
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

<b>Due date:</b>	<b>9 January 2015</b>
<b>Contact officers:</b>	<b>Sheree Clancy</b> <b>Jo Stewart</b>
<b>Email address:</b>	<a href="mailto:sheree.clancy@ato.gov.au">sheree.clancy@ato.gov.au</a> <a href="mailto:johanna.stewart@ato.gov.au">johanna.stewart@ato.gov.au</a>
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<b>Address:</b>	<b>Australian Taxation Office</b> <b>PO Box 9977</b> <b>Brisbane QLD 4500</b>

## Appendix 4 – Detailed contents list

135. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

GSTR 2000/34; GSTR 2001/6;  
GSTR 2002/3; GSTR 2003/6;  
GSTR 2009/1; GSTR 2009/2;  
TR 2006/10

*Previous Rulings/Determinations:*

GSTR 2008/2

*Subject references:*

- attribution
- freehold
- GST consideration
- GST grants of freehold land
- GST long-term lease
- GST new residential premises
- GST residential premises
- strata titles
- supply of land
- taxable supply

*Legislative references:*

- ANTS(GST)A 1999
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-5(a)
- ANTS(GST)A 1999 9-10
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- ITAA 1997 995-1
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- Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143; [1948] 2 ALR 489; (1948) 22 ALJR 331
- AP Group Ltd v. Commissioner of Taxation [2013] FCAFC 105; 2013 ATC 20-417
- Chief Commissioner of State Revenue (NSW) v. Dick Smith Electronics Holdings Pty Ltd (2005) 213 ALR 230
- Dingwall v FC of T (1995) 57 FCR 274; 95 ATC 4345; (1995) 30 ATR 498
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NO: 1-549B5Y1

ISSN: 1443-5160

ATOLaw topic: Goods and services tax ~~ Property ~~ Development leases ~~ Residential premises under long term leases  
Goods and services tax ~~ Property ~~ Development leases ~~ Under freehold arrangements  
Goods and services tax ~~ Property ~~ Development leases ~~ Other  
Goods and services tax ~~ Property ~~ Premises ~~ New residential premises  
Goods and services tax ~~ Property ~~ Premises ~~ Residential premises

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