

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.

⚠ This cover sheet is provided for information only. It does not form part 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.*

⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *24 June 2009*

6. The Ruling also discusses whether an adjustment arises from the supply of an enterprise asset following a marriage or other relationship breakdown. In particular Divisions 129 and 130 of the GST Act are discussed. The Ruling includes reasonable methods that you may use to determine actual application when calculating the extent of creditable purpose for Division 129.
7. The GST Act does not apply to private assets. Property distributions that do not involve enterprise assets fall outside the GST Act. Transfers of assets between spouses not registered or required to be registered for GST have no GST consequences.
8. Certain terms used in this Ruling are defined or explained in the Background section of the Ruling. These terms when first mentioned elsewhere in the Ruling appear in **bold** type.
9. Unless otherwise stated, all legislative references in this Ruling are to the GST Act.

Date of effect

10. This Ruling explains our view of the law as it applied from 1 July 2000. You can rely upon this Ruling as and from its date of issue for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.
11. If this ruling conflicts with a previous private ruling that you have obtained, this public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of this ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Note: the Addendum to this Ruling that issued on 24 June 2009 explains the Commissioner's view of the law as it applies from its date of issue. You can rely upon this Addendum on and from its date of issue for the purposes of section 105-60 of Schedule 1 to the TAA.

If this Addendum conflicts with a previous private ruling that you have obtained or a previous public ruling, this Addendum prevails. However, if you have relied on a previous ruling (including the public Ruling that the Addendum amends), you are protected in respect of what you have done up to the date of issue of the Addendum or, if there is a change to the legislation, you are protected in respect of what you have done up to the date the legislative change takes effect. This means that if you have relied on the earlier ruling and have underpaid an amount of GST, you are not liable for the shortfall prior to either the issue date of the Addendum or the date the legislative change takes effect, as appropriate. Similarly, if you have relied on the earlier ruling you are not liable to repay an amount overpaid by the Commissioner as a refund.

Background

12. For the purpose of this Ruling the following terms have the meanings indicated.

‘Enterprise asset’ means real property, tangible and intangible personal property that is owned by either or both spouses or a related entity and used or intended to be used in an ‘enterprise’ of the ‘entity’ that is ‘registered or required to be registered’. Examples of enterprise assets include trading stock, plant, office equipment, motor vehicles and real property.

‘FLA orders or agreements’ are FLA court orders, FLA consent orders and binding financial agreements (‘BFAs’).

‘Matrimonial property’ is property of either or both spouses and may include property held by a related entity.

‘MPD’ is the abbreviation for matrimonial property distributions. MPDs involve the direct transfer of private and/or enterprise assets from the supplier spouse or a related entity to the recipient spouse and are made under the FLA.

‘Other property distributions’ are not made under the FLA and include transfers of private and enterprise assets as a result of a relationship breakdown between de facto or same sex partners. They also include transfers from a marriage breakdown where spouses come to a property agreement outside the FLA.

‘Private asset’ means any property that is not an enterprise asset.

16. Not all transfers between husband and wife concerning property will be made under the FLA. Upon a marriage breakdown spouses may proceed to a distribution of property outside the FLA by way of an informal agreement between themselves.

17. De facto and same sex relationships are not covered by the FLA. Parties to relationships that are not a 'marriage' under the FLA may resort to State and Territory legislation and the common law remedies, proceedings and separation agreements.⁶ Partners in these relationships can also make informal agreements as to the distribution of property following the breakdown of their relationship.

Ruling with explanation

18. As a result of an **FLA order or agreement**, assets of either or both spouses or of a related entity will be transferred to one of the spouses. We have explained above the characteristics of FLA orders or agreements. We consider that for GST purposes the relevant feature of FLA orders or agreements is the transfer of assets, which may involve the transfer of ownership or possession depending on the nature of the asset. In this regard we treat orders and agreements made under the FLA as the same in respect of the GST consequences. As there are no specific provisions of the GST Act covering MPDs, the basic rules of the GST Act apply. Similar considerations apply to the transfer of assets following other property distributions arising from the agreements outlined in paragraphs 16 and 17 above.

19. While this Ruling primarily deals with enterprise assets the more common situation is the transfer of private assets between spouses who are not registered or required to be registered for GST. These transfers of private assets between spouses do not have any GST consequences. For example, if a spouse not registered or required to be registered transfers a private asset, such as the matrimonial home, to his or her spouse under an MPD there are no GST consequences.

⁶ Part IV of each of the *Property (Relationship) Act 1984 (NSW)*, the *De Facto Relationships Act 1991 (NT)*, the *Domestic Relationships Act 1994 (ACT)*, Part IX of the *Property Law Act 1958 (VIC)*, Part II of the *De Facto Relationships Act 1996 (SA)*, Part 19 of the *Property Law Amendment Act 1999 (Qld)*, sections 264, 265, 270, 272, 274(1), 276 and Part 4 of the *De Facto Relationship Act 1999 (TAS)*. These provisions allow parties to opt out of the legislative regime of property distribution by making an agreement before, during or on termination of the de facto relationship.

20. Enterprise assets can be the subject of an MPD. For example, an interior design company owns two delivery vans. One van is transferred to a spouse under an MPD. The delivery vans are enterprise assets. When an enterprise asset is transferred you have to consider the GST consequences of the transfer, that is, whether the transfer is a taxable supply.

Taxable supplies

21. A supply is a taxable supply under section 9-5 if:

- (a) you make the supply for consideration; and
- (b) the supply is made in the course or furtherance of an enterprise that you carry on; and
- (c) the supply is connected with Australia; and
- (d) you are registered, or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

22. In considering whether the supply of **matrimonial property** under an MPD is a taxable supply this Ruling only addresses paragraphs (a) and (b) of section 9-5. In this Ruling we assume that the supplies are connected with Australia and the entity is registered or required to be registered.⁷

Is there a supply for consideration?

Supply

23. ‘Supply’ is given a wide meaning in the GST Act. As the term means ‘any form of supply whatsoever’⁸ it includes the transfer of assets. The transfer of an asset between parties is a supply of that asset.⁹ When an enterprise asset is transferred to a spouse under an MPD there is a supply.

⁷ Our view of when a supply of goods, real property, or things other than goods or real property is connected with Australia under section 9-25 can be found in Goods and Services Tax Ruling GSTR 2000/31. ‘Required to be registered’ has the meaning given by sections 23-5, 57-20, 144-5 and 147-5 of the GST Act.

⁸ Section 9-10.

⁹ Paragraph 23 of Goods and Services Tax Ruling GSTR 2001/4.

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30. When an MPD arises out of a court order or out of court settlement, it is appropriate to apply the principles from Goods and Services Tax Ruling GSTR 2001/4¹³ in relation to the supply of the asset.
31. Therefore, where an asset is received under an MPD resulting from a court order (following contested proceedings) there is no consideration in the nature of forbearance or discontinuance as it is the decision of the court rather than agreement between the parties that ‘settles’ the dispute.¹⁴
32. Due to the nature of consent orders and BFAs made pursuant to the FLA (but not court orders following contested proceedings), there may be some form of consideration present. Because of the wide definition of ‘consideration’ in the GST Act, there may be consideration present in the form of some forbearance or discontinuance where a sole trader supplies an asset to the recipient spouse. It is difficult to identify any consideration provided to a related entity when that entity transfers an asset to a recipient spouse under an MPD.
33. Where the asset is received under a consent order or BFA the receipt of the asset is linked to an entitlement under the FLA rather than forbearance or discontinuance. The forbearance or discontinuance of any action is merely a term or condition of the settlement.¹⁵
34. However, even if such forbearance or discontinuance is present we take the view that there is not a sufficient nexus between the consideration and the supply of the asset due to the nature of MPDs.
35. The same principles apply to other property distributions which arise from informal agreements made between spouses as outlined in paragraph 16, and from the breakdown of de facto or same sex relationships as outlined in paragraph 17.
36. We take the view that there is no consideration with a sufficient nexus to the assets supplied by way of a property distribution. Therefore, under a property distribution resulting from a breakdown of a marriage or other relationship the supply is made for no consideration for paragraph 9-5(a) purposes.

¹³ GSTR 2001/4 is about the GST consequences of court orders and out of court settlements.

¹⁴ Paragraphs 69 and 70 of GSTR 2001/4.

¹⁵ Paragraph 107 of GSTR 2001/4.

42. Where the overriding essential character of the supply is that of something being disposed of due to the personal circumstances of the spouse, upon marriage breakdown or otherwise under the FLA, rather than business circumstances of the enterprise, that supply is not made in the course or furtherance of the enterprise.

43. Even where an enterprise asset is supplied to a spouse by a related entity under an MPD the transaction does not have a business or commercial flavour. The order or agreement, which binds the parties, comes from the FLA which primarily deals with matrimonial and private matters, such as MPDs, maintenance and custody. These orders take into account contributions made by the spouses and consider other factors such as future earning capacity and age. In addition, there is no consideration with sufficient nexus to the supply because of the nature of an MPD.

44. Similar principles apply to other property distributions following a de facto or same sex relationship breakdown, and to property distributions under informal agreements made between spouses as a result of the marriage breakdown. Therefore, we take the view that these supplies, and supplies made under an MPD, are not made in the course or furtherance of the enterprise.

45. Where the requirements in paragraph 9-5(b) are not met it is not necessary to consider Division 72 for property distributions upon marriage or relationship breakdowns. Therefore, and because paragraph 9-5(a) is also not met, there is no taxable supply. Although there is no taxable supply, the spouse, partner or related entity making the supply should consider whether there is an adjustment under Division 129 or 130 in respect of the original acquisition.

Adjustments under Divisions 129 and 130

Whether an adjustment arises following the supply of enterprise assets

46. We have previously concluded in paragraphs 35 and 44 that for section 9-5 purposes the treatment of other property distributions is similar to the treatment of MPDs. Therefore, where MPDs are referred to in the remainder of this Ruling, we consider that this Ruling applies with similar effect to other property distributions.

51. The transfer of the asset under an MPD falls within the statutory definition of apply as the thing has been both disposed of and supplied. Our view is that the asset has been applied in circumstances where it is transferred to a spouse under an MPD.

Example 3: Applying an enterprise asset

52. *Emma and Darcy are in the process of divorcing each other. Darcy is the sole shareholder in Countryside Pty Ltd. As part of the MPD Emma is to receive a motor vehicle owned by the company. The orders require Darcy to do all things necessary to transfer the motor vehicle to her. The transfer of the motor vehicle from Countryside Pty Ltd to Emma is an application of the motor vehicle by Countryside Pty Ltd.*

Applied for private use

53. It is our view that entities can hold assets for a private use and purpose. Assets may be owned by a registered entity but not have been acquired for a creditable purpose. These assets are not used or intended to be used in the entity's enterprise and are 'private assets' of the entity for the purposes of this Ruling. For example, a company can acquire a yacht for the private purposes of the company or its directors and shareholders. Similarly, an entity can apply enterprise assets to a private use.

54. We consider that when an enterprise asset of a sole trader or related entity is transferred under an MPD there is an application of the asset of a 'private nature' within the terms of paragraph 129-50(2)(b). The application consists of the process of the setting aside, the taking of it out of the enterprise and the transfer or disposal of the asset. There is a total change or conversion in its application as an enterprise asset to one of a private nature when it is transferred.

Whose application

55. The application we are concerned with under Divisions 129 and 130 is the application by the entity carrying on the enterprise. This requires the entity itself to apply the asset to a private or domestic use. In a transfer of an asset under an MPD, it is the private or domestic application of the supplying spouse or related entity that is relevant. The use to which the asset is put by the recipient spouse under an MPD is not relevant for the purposes of Divisions 129 and 130.

60. However, when an application of a thing includes a disposal it is not appropriate to use a direct method to work out the extent of creditable purpose as it will not give a fair and reasonable result. It is therefore necessary to use an indirect method to work out the extent of creditable purpose under an MPD because that application involves a disposal. Because there is a disposal there is no ongoing use of the thing.

61. The method used to work out the extent of creditable purpose must be fair and reasonable.²⁹ Furthermore, the choice of method should be based on its appropriateness in the circumstances, and not just because it provides a more favourable result.³⁰

62. There are a number of approaches for calculating the extent of application to a creditable purpose for an asset transferred under an MPD which may lead to an adjustment. While either of the following two methods may not be the only reasonable methods, if you use the appropriate one for your circumstances the Commissioner will accept that you have correctly calculated your extent of creditable purpose.

63. The extent of your creditable purpose equates to the 'actual application of the thing' in step 1 of the method statement contained in section 129-40. You must then complete steps 2 and 3 of the method statement to work out whether you have an increasing adjustment. If you do have an increasing adjustment, you must then calculate the amount of the adjustment using the formula contained in section 129-70.

64. In each of the methods discussed below we give an example. These examples show the necessary steps to calculate your increasing adjustment once you have worked out your extent of creditable purpose. Because this application involves a disposal, the tax period in which you make this adjustment becomes your last adjustment period for that acquisition.³¹

(i) Effective life method for wasting assets

65. This method may be used to calculate the extent of creditable purpose where the asset is a depreciating or wasting asset. This method compares the use of the thing for the period of time it is held by the entity with either the useful life of the asset for accounting purposes or you may use the Commissioner's determination of the effective life of the asset under Division 40 of the *Income Tax Assessment Act 1997*.

²⁹ Paragraph 82 of GSTR 2000/15.

³⁰ Paragraph 85 of GSTR 2000/15.

³¹ Paragraph 129-25(1)(a).

66. The extent of creditable purpose or ‘actual application of the thing’,³² using the effective life method is given by the formula:

$$\frac{\text{Period of time held}}{\text{Useful or effective life}} \quad \times \quad \text{Extent of creditable purpose prior to disposal}$$

Example 5: Effective life method

67. Larry and Lil are former spouses who are in partnership in a garden pot supply business. As part of a property settlement under an MPD, a partnership asset (a car) is provided to Lil. The car was purchased second-hand by the partnership on 1/7/2000 for \$55,000 and at the time of acquisition it was intended that the car be used 80% for a creditable purpose and \$4,000 in input tax credits was claimed. The partnership regarded 8 years as the useful life of the car for accounting purposes. The car was in fact used 80% for a creditable purpose until the partnership disposed of the car to Lil on 31/12/2002. The setting aside and disposal of the car is a private application by the partnership. At that time, the car has a GST inclusive market value of \$33,000.

Using the formula above, the partnership calculates that the extent of creditable purpose (‘actual application of the thing’) is as follows:

$$\begin{aligned} & \frac{\text{Period of time held}}{\text{Useful or effective life}} \quad \times \quad \text{Extent of creditable purpose prior to disposal} \\ &= \frac{2.5 \text{ years}}{8 \text{ years}} \times 80\% \\ &= 25\%. \end{aligned}$$

The extent of creditable purpose (actual application of the thing) is 25% and this calculation represents step 1 of the method statement in section 129-40.

Step 2 in this example requires working out the intended application of the asset. From the facts given, we know that this is 80%.

Step 3 tells you that as the actual application of the thing is less than the intended application, there will be an increasing adjustment.

³² This is step 1 in the method statement given in section 129-40.

Example 6: Rental value method

72. *Barbara and Alistair operate a business in partnership. The partnership acquired land (not under the margin scheme), on 1 January 2001 at a price of \$110,000. They claimed input tax credits of \$10,000 on acquisition and applied the land 100% for a creditable purpose until its disposal. Following their marriage breakdown the partnership transferred the land under an MPD to Barbara on 31 December 2003. At this time the annual rental value of the land was \$11,000 and its market value was \$130,000.*

Step 1 *The extent of creditable purpose or 'actual application of the thing' is calculated as:*

<u>Total Rental value</u>			Extent of creditable purpose prior to disposal
Total Rental value + Market value at time of disposal	X		
<u>\$11,000 x 3</u>			100%
$(\$11,000 \times 3) + \$130,000$	X		
<u>\$33,000</u>			100%
\$163,000	X		

$$= \quad 20.25\%$$

The extent of creditable purpose or actual application is 20.25%.

Step 2 *The intended or former application is 100%.*

Step 3 *The increasing adjustment equals:*

$$\begin{aligned} & \text{full input tax credit} \times (\text{intended less actual}) \\ & = \$10,000 \times (100\% - 20.25\%) \\ & = \$10,000 \times 79.75\% \\ & = \$7,975 \end{aligned}$$

Therefore, the partnership's increasing adjustment is \$7,975.

Because of paragraph 129-25(1)(a) the last adjustment period for the land will be 30 June 2004.

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83. First, the recipient spouse will be unable to claim any input tax credits in respect of the acquisition under an MPD. We have stated in paragraph 34 that our view is that no consideration with a sufficient nexus to the supply is provided in such situations, and, for similar reasons, we consider that the recipient spouse is not liable to provide such consideration. We have also stated that there is no taxable supply. Consequently, there is no creditable acquisition by the recipient spouse as the tests in section 11-5 have not been satisfied.

84. Second, a subsequent supply made by the recipient spouse to another entity is not within the scope of this Ruling as it is not made under an MPD (unless the subsequent supply is also under an MPD). The GST Act will have its ordinary application to these supplies.

Example 9: Subsequent supply by the recipient

85. *Lil receives a car under an MPD from the former partnership of Larry and Lil (see example 5 in paragraph 67). The partnership previously had an increasing adjustment of \$2,750. Lil now uses the car 100% in her new business, Lil's Lillies. Although Lil had a prior interest in an entity that had an increasing adjustment in relation to the car, the car was not supplied to her in a taxable supply. There was no GST on the supply of the car to her. As the supply to her was not a taxable supply Lil has not made a creditable acquisition of the car. She cannot claim any input tax credits in relation to the car. Two years later Lil sells the car to an unrelated party. This subsequent supply made by Lil is not under an MPD, and will be a taxable supply if all the tests in section 9-5 are met.*

Detailed contents list

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