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Edited version of private advice

Authorisation Number: 1052097559232

Date of advice: 14 March 2023

Ruling

Subject: GST and residential premises

Provider
↓ Input Tax
SDA Reg Provider
↓ GST Free
Participant NDIS SDA

Question 1

Will the supply by XXXX (You) of XXXX (Property) through the way of a Head lease to a SDA provider be a taxable supply under section 9-5 of *A New Tax System (Goods and Services) Act 1999* (GST Act)?

Answer

No. The supply will be an input-taxed supply as the supply is being made to the SDA provider under a Head Lease.

Question 2

Will the supply by You, of the Property to an SDA provider by way of a Head lease, be GST-free under section 38-38 of the GST Act?

Answer

No. Your supply does not meet the requirements to be considered GST-free under section 38-38 of the GST Act.

Question 3

Can you claim input tax credits for acquisitions made in relation to the construction costs of the SDA dwelling and future ongoing management costs that relate to the Property under section 11-20 of the GST Act?

Answer

No. As the acquisition of the construction and future ongoing management costs relating to the Property are not made for a creditable purpose, you are not entitled to an input tax credit.

Relevant facts and circumstances

You are a family discretionary trust.

You have acquired the Property suitable for construction of residential premises specifically for specialist disability accommodation (SDA) purposes.

You have engaged a building company to construct the dwelling on the Property which will contain the physical characteristics of High Physical Support (HPS) in accordance with the National Disability Insurance Scheme (NDIS) SDA specifications.

You have not yet made any acquisitions relating to the construction and future ongoing management costs of the Property to which this ruling applies.

Upon completion of the property construction, you will enter into a lease with an SDA provider under a Head lease. The SDA provider will then sub-lease the property to a NDIS participant.

There is no written agreement between yourself and the NDIS participant. * ?

It is your intention to lease the property for a period of more than five years.

You are not registered for GST, however this private ruling is on the basis that you are registered or required to be registered for GST. *

Relevant legislative provisions

A New Tax System (Goods and Services Tax) Act 1999 - section 9-5.

A New Tax System (Goods and Services Tax) Act 1999 section 9-30.

A New Tax System (Goods and Services Tax) Act 1999 section 11-5.

A New Tax System (Goods and Services Tax) Act 1999 section 11-20

A New Tax System (Goods and Services Tax) Act 1999 section 38-38.

A New Tax System (Goods and Services Tax) Act 1999 section 40-35.

Reasons for decision

Section 9-5 of the GST Act provides that;

You make a **taxable supply** if:

- you make the supply for consideration; and
- the supply is made in the course or furtherance of an enterprise that you carry on; and
- the supply is connected with the indirect tax zone; and
- 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.

Section 40-35 of the GST Act relates to residential rent:

1) A supply of premises that is by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence) is input taxed if:

a) the supply is of residential premises (other than a supply of commercial residential premises or a supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises); or

b) the supply is of commercial accommodation and Division 87 (which is about long-term accommodation in commercial premises) would apply to the supply but for a choice made by the supplier under section 87- 25.

(1A) A supply of a berth at a marina that is by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence) is input taxed if:

a) the berth is occupied, or is to be occupied, by a ship used as a residence; and

b) the supply is of commercial accommodation and Division 87 (which is about long-term accommodation in commercial premises) would apply to the supply but for a choice made by the supplier under section 87- 25.

2) However:

a) the supply is input taxed only to the extent that the premises are to be used predominantly for residential accommodation (regardless of the term of occupation); and

b) the supply is not input taxed under this section if the lease, hire or licence, or the renewal or extension of a lease, hire or licence, is a long-term lease.

The supply being made under the Head lease to the SDA provider would therefore be considered input taxed as it is a supply of residential rent under section 40-35.

Section 9-30 of the GST Act outlines that if supplies were to be both GST-free and input taxed; to the extent that a supply would, apart from this subsection, be both GST-free and input taxed:


- a) the supply is GST-free and not input taxed, unless the provision under which it is input taxed requires the supplier to have chosen for its supplies of that kind to be input taxed; or
- b) the supply is input taxed and not GST-free, if that provision requires the supplier to have so chosen.

Under section 38-38 of the GST Act, a supply to a NDIS participant is GST-free if all of the following requirements are met:

- the NDIS participant has a NDIS plan in effect
- the supply is of reasonable and necessary supports that are specified in the statement of supports in the participant's NDIS plan
- there is a written agreement between you and the NDIS participant (or another person)
- it is a supply covered by one of the tables in the A New Tax System (Goods and Services Tax) (GST free Supply-National Disability Insurance Scheme Supports) Determination 2021 (NDIS Determination)

GSTR 2006/9 provides the Commissioner's view regarding supplies. Relevantly, paragraph 155 states;

155. Under the GST health provisions in Subdivision 38-B, subject to certain exceptions [51A], the supply is only GST-free where an individual receiving that service or specific health treatment is the recipient of that supply. This outcome results from the specific wording in some health provisions, whilst in other provisions it is due to the nature of the services themselves. Where this requirement is imposed, a GST-free supply of a health service cannot be made to a business entity or a non-profit body.

 Consistent with paragraph 155 in GSTR 2006/9, the supply of the lease must be to a NDIS participant. In this case, the supply is not being made by you to a NDIS participant, rather you enter into an agreement with the SDA provider. On this basis, you do satisfy the requirements of section 38-38 of the GST Act.

You are not entitled to an input tax credit for any acquisition that you make relating to the supply of the lease. Our reasons are as follows;

Section 11-20 of the GST Act provides that you are entitled to an input taxed credit for any creditable acquisition that you make. Section 11-5 provides the meaning of a creditable acquisition and the first requirement is that the acquisition is acquired solely or partly for a creditable purpose. The term creditable purpose is defined in section 11-15 and states;

- 1) You acquire a thing for a creditable purpose to the extent that you acquire it in * carrying on your * enterprise.
- 2) However, you do not acquire the thing for a creditable purpose to the extent that:
 - (a) the acquisition relates to making supplies that would be * input taxed; or
 - (b) the acquisition is of a private or domestic nature.

Note * refers to a term defined in section 195-1 of the GST Act.

In this case, you will construct the Property for the purpose of making supplies that would be input taxed. Consequently, you did not make the acquisitions for a creditable purpose and no input tax credits will arise.

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Section 17-20 of the GST Act provides that you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.

17-20 and also:

17-20(1) you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.

17-20(2) you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.

17-20(3) you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.

17-20(4) you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.

17-20(5) you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.

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17-20(6) you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.

17-20(7) you are deemed to be a person to whom a supply is made if you are a person to whom a supply is made by a person who is a member of your family or a person who is a partner in your business.