

GST & *in specie* distributions of discretionary trusts

By Stella Bae, Law Graduate & Luis Batalha, Director

30 April 2009

The ATO recently released *GST Determination* GSTD 2009/1 on the issue of whether a supply by way of an *in specie* distribution of an asset applied in the enterprise of a discretionary trust to a beneficiary of the trust is made 'in the course or furtherance of' the trust's enterprise.

Interestingly, the new determination does not provide any guidance on whether an *in specie* distribution is made for "consideration" and thus can result in a taxable supply for GST purposes.

***In specie* distribution**

An *in specie* distribution is a supply of trust property, other than money, where the recipient is entitled to the property as a beneficiary of the trust and for no other reason ie a contractual relationship (GSTD 2009/1, paragraph 2).

A discretionary trust may supply an asset that is applied in an enterprise carried on by the discretionary trust to a beneficiary of the trust as a consequence of a trustee's resolution to make an *in specie* distribution under the relevant trust deed (GSTD 2009/1, paragraph 3).

A supply in the course or furtherance of the trust's enterprise

The phrase 'in the course or furtherance of' is not defined in the GST Act (GSTD 2009/1, paragraph 4). However, the *Explanatory Memorandum* to the GST Act supports a broad meaning of the phrase to encompass supplies made in connection with the relevant enterprise (GSTD 2009/1, paragraph 7).

The application of an asset in an enterprise establishes the necessary connection between the supply and the relevant enterprise (GSTD 2009/1, paragraph 9). The necessary connection does not exist in the case of a supply of private commodities. A supply of private commodities is a supply by an entity as an ultimate consumer ie a car dealer selling her own private car and thus the supply of an asset must not be made by the entity as ultimate consumer (GSTD 2009/1, paragraph 8).

The use or intended use by the recipient(s) is irrelevant (GSTD 2009/1, paragraph 10). Further, the application of the asset does not have to be substantial, but can be minor (GSTD 2009/1, paragraph 11).

Therefore, a supply by way of an *in specie* distribution of an asset that is applied in the enterprise of a discretionary trust is, in general, a supply made in the course or furtherance of that enterprise (GSTD 2009/1, paragraph 13).

A supply made for consideration

For a supply to be a taxable supply, however, all of the requirements in section 9-5 of the GST Act need to be met. An important issue that arises in the context of *in specie* distributions by discretionary trusts is whether the distribution is “made for consideration”.

Strangely, the new determination only deals with this issue briefly in a footnote. This issue, however, is just as complex if not more complex than the “in the course of an enterprise” issue. The footnote provides that, as a beneficiary may be an associate of the trust (section 195-1 of the GST Act) and the *in specie* distribution is a supply made for no consideration, the distribution may be a taxable supply if Division 72 applies (GSTD 2009/1, footnote 3).

The term “consideration” is defined in section 9-15(1) of the GST Act as a payment or any act or forbearance is consideration for a supply if it is ‘in connection with’, ‘in response to or for the inducement of’ a supply. In the case of a discretionary trust, a beneficiary does not have a vested interest in either the income or the assets of the trust, but merely has a right to demand administration of the trust according to the trust deed (*ATO Interpretative Decision ID 2001/504*).

Thus, the beneficiaries of a discretionary trust have no rights to surrender or give no consideration in return for an *in specie* distribution made by a discretionary trust (*ATO Interpretative Decision* ID 2001/503). However, an *in specie* distribution made by a discretionary trust may still be a taxable supply where Division 72 of the GST Act applies (*ATO Interpretative Decision* 2001/503).

In certain circumstances, Division 72 of the GST Act removes the requirement for consideration from section 9-5 of the GST Act where the recipient is an “associate” of the supplier (*ATO Interpretative Decision* ID 2001/503). The term “associate” is defined in section 318 of the *Income Tax Assessment Act* 1936 to include a beneficiary and the trustee of a trust (*ATO Interpretative Decision* ID 2001/503).

Under section 72-5 of the GST Act, a supply to an associate for no consideration will be a taxable supply if the associate is not registered or required to be registered, or the associate acquires the thing supplied otherwise than solely for a creditable purpose.

Thus, an *in specie* distribution by a discretionary trust may constitute a taxable supply where the beneficiary is not registered or required to be registered, or the distribution is not used solely for a creditable purpose (*ATO Interpretative Decision* ID 2001/503).

Conclusion

A supply by way of an *in specie* distribution of an asset that is applied in the enterprise carried on by the discretionary trust is, in general, a supply made in the course or furtherance of that enterprise. Further, the distribution may be a taxable supply where the beneficiary is not registered or required to be registered, or the distribution is not used solely for a creditable purpose.