information exchange

Level 5, 75 Miller Street, North Sydney NSW, 2060 Australia
Phone: (02) 9956 7775 Fax: (02) 9954 7659 Website: www.ifx.info Email: admin@ifx.com.au

ISSUE 6 FEBRUARY 2013

# AUSTRALIAN GST ADVISER

Brian Egan, LLM (Sydney University), BA

## IN THIS ISSUE



*Continued*

information exchange
Level 5, 75 Miller Street, North Sydney NSW, 2060 Australia
Phone: (02) 9956 7775 Fax: (02) 9954 7659 Website: www.ifx.info Email: admin@ifx.com.au


# AUSTRALIAN GST ADVISER

Brian Egan, LLM (Sydney University), BA

## IN THIS ISSUE



*Continued*

information exchange
Level 5, 75 Miller Street, North Sydney NSW, 2060 Australia
Phone: (02) 9956 7775 Fax: (02) 9954 7659 Website: www.ifx.info Email: admin@ifx.com.au


# AUSTRALIAN GST ADVISER

Brian Egan, LLM (Sydney University), BA

## IN THIS ISSUE



*Continued*

information exchange
Level 5, 75 Miller Street, North Sydney NSW, 2060 Australia
Phone: (02) 9956 7775 Fax: (02) 9954 7659 Website: www.ifx.info Email: admin@ifx.com.au

ISSUE 6 FEBRUARY 2013

# AUSTRALIAN GST ADVISER

Brian Egan, LLM (Sydney University), BA

## IN THIS ISSUE

# SECTION 1 – PROFESSIONAL DEVELOPMENT

## 2012: THE GST YEAR IN REVIEW

### ¶6.1 Introduction

As is our custom following the end of each calendar year, in this issue of the *Australian GST Adviser* we take a look back, in a summary fashion, at the significant events that have occurred in the administration and jurisprudence of the goods and services tax during calendar 2012.

Enough has happened during 2012, of sufficient importance to a sufficiently wide range of business entities and their advisers, to warrant a retrospective survey of:

- new and amending legislation
- case law, and
- Tax Office rulings

that have happened during the year. (Some events which occurred towards the end of 2011 are included for completeness' sake.)

## LEGISLATION

### ¶6.2 GST treatment of new residential premises; financial supplies

Click here to view

The Tax Laws Amendment (2011 Measures No 9) Bill 2011 received the Royal Assent on 21 March 2012, and is Act No 12 of 2012. The Act amended the GST Act to:

- ensure that sales or long-term leases of new residential premises by a registered entity are taxable supplies and that sales or long term leases of residential premises (other than new residential premises) are input taxed supplies, and
- implement three of the seven recommendations agreed to by the government arising out of Treasury's *Review of the GST financial supply provisions*. The measures requiring legislative change and included in this Bill:
  - increase the first limb of the financial acquisitions threshold from $50,000 to $150,000;
  - exclude financial supplies consisting of a borrowing made through the provision of a deposit account by an Australian authorised deposit-taking institution from the current concession for borrowings; and
  - allow taxpayers who account on a cash basis to treat an acquisition made under a hire purchase agreement as though they do not account on a cash basis.

## ¶6.3 Commissioner's ability to retain refunds pending verification checks; GST-free health supplies; GST treatment of appropriations

Click here to view the Tax and Superannuation Laws Amendment (2012 Measures No 1) Bill 2012

Click here to view Explanatory Memoranda

The *Tax and Superannuation Laws Amendment (2012 Measures No 1) Act 2012* received the Royal Assent on 26 June 2012, and is Act No 75 of 2012. For GST purposes, the Act made amendments in the following areas:

- refunds
- GST-free health supplies, and
- GST treatment of appropriations.

## ¶6.4 Indirect tax administration amendments

Click here to view the Indirect Tax Laws Amendment (Assessment) Bill

Click here to view Explanatory Memoranda

The *Indirect Tax Laws Amendment (Assessment) Act 2012* received the Royal Assent on 15 April 2012, and is Act No 39 of 2012. The Act amended GST law to:

- harmonise the current self-actuating system that applies to the goods and services tax, the luxury car tax, the wine equalisation tax and fuel tax credits with the self-assessment system for income tax
- legislate the Commissioner's power to make a determination allowing a taxpayer to take into account, on his or her goods and services tax or fuel tax return for the current tax period or fuel tax return period, errors made in working out net amounts and net fuel amounts for preceding tax periods or fuel tax return periods
- confirm that the luxury car tax and the wine equalisation tax are part of the 'net amount' that is calculated under the GST Act.

## ¶6.5 GST supplies by representatives who are creditors

Click here to view

The *Tax Laws Amendment (2012 Measures No 4) Act 2012* received the Royal Assent on 28 September 2012 as Act No 142 of 2012.

Among other things, the Act amends the GST Act to ensure that in circumstances where a representative of an incapacitated entity is a creditor of that entity, the correct provision of the GST Act is applied.

The amendments are intended to ensure that Div 105 of the Act operates to the exclusion of Div 58 in circumstances where a representative of an incapacitated entity is a creditor of the incapacitated entity, and the representative makes a supply in satisfaction of a debt that the incapacitated entity owes to the representative.

The Bill was amended in the House of Representatives, but not in respect of the GST proposals in the Bill.

## ¶6.6 Financial supplies: GST regulations amended

Click here to view

A range of amendments were made to the GST Regulations to implement recommendations arising out of Treasury's *Review of the GST Financial Supply Provisions*. The amending regulations implement four of the seven recommendations agreed to by the government. The other three recommendations have been implemented through amendments to the GST Act contained in Schedule 3 to the *Tax Laws Amendment (2011 Measures No 9) Act 2012*. The amending regulations are *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No 1)* (SLI 2012 No 87; registered 29 May 2012).

The GST regulations are amended to:

- treat all components of a hire purchase transaction as taxable supplies (see ¶9.1 and following, above)
- extend the availability of reduced input tax credits (RITC) relating to life insurance, lenders mortgage reinsurance and transactional fraud monitoring services
- modify access to a RITC for recognised trust entities, and
- clarify the language used in relation to guarantees and indemnities.

### ¶6.7 Government fees and charges

Click here to view

The GST Regulations were amended to clarify the GST treatment of Australian fees and charges and provide additional certainty to Australian government agencies by extending the operation of the *A New Tax System (Goods and Services Tax) (Exempt taxes, fees and charges) Determination 2011 (No 1)* until 1 July 2013: *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No 2)* (SLI 2012 No 148; made 28 June 2012).

### ¶6.8 Deferred transfer farm-out arrangements – attribution rules

Click here to view

The Tax Office made a legislative determination to prevent the provisions of Div 29 (attribution rules) and Ch 4 (special rules) of the GST Act applying in a way that is inappropriate in particular circumstances under a deferred transfer farm-out arrangement to which Miscellaneous Taxation Ruling MT 2012/2 *Miscellaneous taxes: application of the income tax and GST laws to deferred transfer farm-out arrangements*, applies. The determination is *A New Tax System (Goods and Services Tax) (Particular Attribution Rules Where Supply or Acquisition Made Under a Contract Subject To Preconditions)* Determination 2012 (F2012L00866; made 12 April 2012; registered 16 April 2012).

## CASES

### ¶6.9 Pre-GST commercial building lease subject to GST: *MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd v FCT*

Click here to view

The Full Court of the Federal Court unanimously dismissed the taxpayer's appeal from the decision of the Administrative Appeals Tribunal in *Re MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd and FCT* [2011] AATA 769. The court, in essence, found that supplies made post-GST start date under a lease of a commercial building entered into before that date were not GST-free under s 13 of the *A New Tax System (Goods and Services Tax Transition) Act 1999* (Cth) (Transition Act). The court agreed with the Tribunal's decision on all relevant points: *MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd v FCT* [2012] FCAFC 89 (20 June 2012) (Gilmour, Perram and Jagot JJ).

## ¶6.10 Business arrangement constituted a partnership, not a non-entity joint venture: *Yacoub v FCT*

Click here to view

The Federal Court found on the evidence that a business arrangement formed to carry out a single property development project was a partnership for GST purposes, not a non-entity joint venture: *Yacoub v FCT* [2012] FCA 678 (29 June 2012) (Jagot J).

## ¶6.11 Student accommodation as commercial residential premises: *ECC Southbank Pty Ltd v FCT*

Click here to view

A large property development designed and constructed specifically to meet the needs of students, and occupied by students, was found by the Federal Court to be commercial residential premises within the meaning of s 40-35 and the definition of 'commercial residential premises' in s 195-1 of the GST Act. The court found that the premises were sufficiently similar to a hostel, and otherwise had sufficient characteristics of commercial residential premises, to fit within the definition. This meant that the supply of the premises by the head lessee to the sub-lessee, and supplies by the sub-lessee to students, were taxable supplies: *ECC Southbank Pty Ltd v FCT* [2012] FCA 795 (Nicholas J, 31 July 2012).

## ¶6.12 The margin scheme and anti-avoidance provisions considered: *Unit Trend Services Pty Ltd v FCT*

Click here to view

In a lengthy and complex decision, the Full Court of the Federal Court, by majority, allowed the taxpayer's appeal from a decision of the Administrative Appeals Tribunal which had found that the anti-avoidance provisions of Div 165 of the GST Act applied to some, though not all, of the sales of residential apartments constructed and sold by a property development group, the sales utilising the margin scheme: *Unit Trend Services Pty Ltd v FCT* [2012] FCAFC 112 (Bennett and Greenwood JJ – Dowsett J dissenting,17 August 2012).

The decision of the AAT was reported as *Re the Taxpayer and the FCT* [2010] AATA 497 (Deputy President P E Hack SC and F D O'Loughlin, Senior Member, 2 July 2010).

Part of the decision considers what is the appropriate consideration for the taxable supplies of property subject to the margin scheme. The primary significance of the decision is, however, its detailed consideration of the effect and application of Div 165.

## ¶6.13 GST group companies under administration: Commissioner can lodge multiple proofs of debt: *Application of Solomons & Tayeh*

Click here to view

As is well known, when entities form a GST group, one member of the group, the representative member, deals with all the GST liabilities and entitlements (except for GST on most taxable importations) of the group, and transactions among the members of the group have no GST consequences. However, that does not absolve the other members of the GST group from *liability* to pay GST. Section 53(1) of the *A New Tax System (Goods and Services Tax Administration) Act 1999* (Cth) provides that the members of a GST group are jointly and severally liable to pay any amount that is payable under the GST law by the representative member of the group. Section 444-90(1) of the *Taxation Administration Act 1953* (Cth) is to the same effect. What, therefore, happens when companies which happen to be members of a GST group all enter external administration (eg, they execute a deed of company arrangement or go into liquidation), owing GST debts to the Commissioner? Is the Commissioner obliged to submit only one proof of debt covering all of the group members, or can he submit a separate proof of debt in respect of each of the group members? According to a recent decision of the Supreme Court of New South Wales, the answer is the latter: *Application of Solomons & Tayeh* [2012] NSWSC 923 (27 July 2012).

## ¶6.14 Time of supply of property: *Re Trustee for Naidu Family Trust*

Click here to view

The Administrative Appeals Tribunal found that the supply of a property, for GST purposes, took place not when the vendor executed the contract of sale but when the sale was subsequently completed by the agent of the mortgagee in possession, which entered into possession after execution by the vendor. This meant that s 105-5 of the GST Act applied, and the mortgagee in possession had made a taxable supply of property towards the satisfaction of a debt that the vendor owed the mortgagee in possession: *Re the Trustee for the Naidu Family Trust and FCT* [2011] AATA 910 (19 December 2011).

## ¶6.15 Tax shortfall penalty for input tax credit claim confirmed: *Re Craddon*

Click here to view

The Administrative Appeals Tribunal affirmed the Commissioner's decision to impose an administrative penalty calculated on the basis that the tax shortfall was caused by recklessness. The taxpayer had claimed an input tax credit in relation to the purchase of two commercial strata lots. It emerged, however, that the sale was never completed. Further, the taxpayer accounted for GST on the cash basis, which meant that he was not entitled to attribute any input tax credit in respect of the purchase price payable under the contract of sale in the relevant tax period, since no part of the purchase price had been paid in that tax period: *Re Craddon and FCT* [2011] AATA 790 (9 November 2011).

## ¶6.16 Property dealings as principal, not agent: *Re Climo*

Click here to view

The Administrative Appeals Tribunal found, on the evidence, that transactions entered into by a real estate agent who conducted seminars for persons who wished to invest in property constituted taxable supplies for consideration, and were not carried out as an employee or as an agent: *Re Climo and FCT* [2012] AATA 350 (M D Allen, Senior Member, 13 June 2012).

## ¶6.17 Acquisitions and disposals of second-hand aircraft: *Re Confidential*

Click here to view

The Administrative Appeals Tribunal affirmed the Commissioner's decisions on objections to private rulings sought by two taxpayers in relation to input tax credits said to in relation to second-hand aircraft purchased and sold in Australia. The Tribunal decided that the taxpayers did not hold the aircraft for sale or exchange, as at 1 July 2000, in the ordinary course of their business: *Re Confidential and FCT* [2012] AATA 407 (Egon Fice, Senior Member, 29 June 2012); *Re Confidential and FCT* [2012] AATA 408 (Egon Fice, Senior Member, 29 June 2012). There were two separate matters, but the Tribunal heard them together in the light of the extensive overlap of the factual and legal issues involved. The matters were primarily concerned with the application of *A New Tax System (Goods and Services Tax Transition) Act 1999* (Transition Act).

## ¶6.18 Taxpayer not carrying on an enterprise (No 1): *Re Campbell*

Click here to view

A taxpayer who claimed input tax credits over a number of tax periods, associated with what she said was a start-up business, failed to establish her entitlement to the input tax credits, on the basis that she was unable to satisfy the Administrative Appeals Tribunal that she was carrying on an enterprise at the relevant times: *Re Campbell and FCT* [2012] AATA 473 (Senior Member B J McCabe, 25 July 2012). Penalties imposed by the Commissioner were also confirmed.

## ¶6.19 Taxpayer not carrying on an enterprise (No 2): *Re Trnka*

Click here to view

Another taxpayer failed to substantiate claims for input tax credits because of a lack of tax invoices and because he failed to satisfy the Commissioner and, on review, the Administrative Appeals Tribunal, that he was carrying on an enterprise: *Re Trnka and FCT* [2012] AATA 492 (Ms J L Redfern, Senior Member, 30 July 2012).

## ¶6.20 Incentive payments by car manufacturers to car dealers taxable: *Re AP Group Ltd*

Click here to view

Certain types of 'incentive' payments by motor vehicle manufacturers to motor vehicle dealers were found by the Administrative Appeals Tribunal to be consideration for taxable supplies to customers, while certain other payments were not consideration for taxable supplies. The taxpayer was therefore partly successful: *Re AP Group Ltd and FCT* [2012] AATA 409 (S E Frost, Deputy President, Professor R Deutsch, Deputy President, 2 July 2012).

## ¶6.21 Discrepancies found between BASs and income tax returns: *Re Siddiqi*

Click here to view

A taxpayer who conducted a business in which most transactions involved cash payments, and who did not keep business records, failed to explain discrepancies between his business activity statements and his income tax returns, and therefore failed to discharge the onus of proving that the Commissioner's amended assessments were excessive. Save for certain amounts conceded by the Commissioner as not being taxable supplies or assessable income, and consequent adjustments to penalties, the Administrative Appeals Tribunal affirmed the Commissioner's objection decision: *Re Siddiqi and FCT* [2012] AATA 589 (Egon Fice, Senior Member, 31 August 2012).

## ¶6.22 Bare trustee not carrying on enterprise; premises not commercial residential premises: *Re Wynnum Holdings No 1 Pty Ltd*

Click here to view

The Administrative Appeals Tribunal decided two remaining issues in the *Wynnum Holdings No 1 Pty Ltd* case. These issues were an 'enterprise' issue, in which the question was exactly which entity was carrying on the relevant enterprise, and a separate issue as to whether certain premises constituted commercial residential premises: *Re Wynnum Holdings No 1 Pty Ltd and FCT* [2012] AATA 616 (Deputy President S E Frost, 14 September 2012).

Two previous issues, relating to whether the Commissioner was out of time to recover what he considered were overclaimed input tax credits, and whether Wynnum was protected from the Commissioner's proposed adjustment by a ruling that Wynnum claimed the Commissioner had made, had previously been decided, both in the Commissioner's favour: *Re Wynnum Holdings No 1 Pty Ltd and FCT* [2011] AATA 296.

### ¶6.23 Intentional disregard of GST law – penalties affirmed: *Re Subloo's Investments Pty Ltd*

Click here to view

The Administrative Appeals Tribunal affirmed the Commissioner's decision not to remit penalties imposed on the members of a partnership who intentionally and repeatedly disregarded their obligations to report GST on sales they had made: *Re Subloo's Investments Pty Ltd and FCT* [2012] AATA 703 (Deputy President P E Hack SC, 11 October 2012).

### ¶6.24 GST going concern exemption: parties agreed in writing: *Re SDI Group Pty Ltd*

Click here to view

The Administrative Appeals Tribunal found that the sale of a commercial property subject to an existing monthly tenancy held over from an expired lease was a supply of a going concern for the purposes of s 38-325 of the GST Act, and was therefore GST-free: *Re SDI Group Pty Ltd and FCT* [2012] AATA 763 (Dr Gordon Hughes, Member, 2 November 2012).

## TAX OFFICE RULINGS AND DETERMINATIONS

### ¶6.25 Loyalty programs: GSTR 2012/1

Click here to view

The Tax Office released the final version of its major GST ruling on the GST consequences of loyalty programs: GSTR 2012/1 (4 April 2012).

The ruling considers:

(a) whether it is necessary to apportion some consideration to the supply of points, when a member pays the consideration to purchase goods or services and as a consequence has points allocated to them

(b) whether a payment from a program partner to the loyalty program operator is consideration for a supply

(c) to the extent that such a payment is consideration for a supply, how is that supply characterised? Specifically, the Ruling considers the implications of such characterisation in determining whether the supply is to any extent GST free or input taxed

(d) whether the provision of a reward to the member (upon redemption of points by them) is a supply to the member for consideration

(e) whether any payments made by the loyalty program operator to a redemption partner is consideration for a supply made by the redemption partner to the loyalty program operator, or is instead consideration for the supply of the reward made to the member, and

(f) whether the redemption partner makes a supply to the program member, even if it also makes a supply to the loyalty program operator.

The ruling was originally issued in draft as GSTR 2011/D3.

## ¶6.26 Financial assistance payments: GSTR 2012/2

Click here to view

The Tax Office released a new GST ruling which explains the Commissioner's views on when a financial assistance payment is consideration for a supply: GSTR 2012/2 (30 May 2012)

Where it is established that there is a taxable supply, the ruling explains the GST obligations of the payee and the payer's entitlement to any input tax credit in relation to the arrangement.

The ruling does not address the treatment of payments made between government-related entities that are covered by an appropriation under an Australian law. However, where s 9-15(3)(c) of the GST Act does not apply to a payment the principles in this ruling may be relevant.

The ruling was previously issued in draft as GSTR 2011/D4.

### *Previous ruling withdrawn*

Click here to view

GSTR 2000/11 was withdrawn with effect from 30 May 2012 except to the extent that it applies to the class of entities who fall within the transitional provisions described below: GSTR 2000/11W (30 May 2012). Where the transitional provisions apply, this ruling is withdrawn from 1 January 2013. GSTR 2000/11 is, in effect, replaced by GSTR 2012/2 (above).

## ¶6.27 GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels: GSTR 2012/3

Click here to view

This GST ruling explains when care services and accommodation provided to residents in privately funded nursing homes, aged care hostels and serviced apartments in a retirement village are GST-free: GSTR 2012/3 (11 July 2012).

In particular, this ruling explains when supplies of care services and supplies of accommodation to care recipients are GST-free under s 38-25(3), 38-25(4) and 38-25(4A) of the GST Act.

## ¶6.28 Fees and charges payable on exit by residents of a retirement village operated on a leasehold or licence basis: GST 2012/4

Click here to view

This GST ruling explains the GST treatment of amounts which a resident becomes liable to pay to the operator of a retirement village when the resident's interest in the village terminates (exit payments).

In this context, the resident's 'interest' is a right to possession of residential premises under a lease or licence with a right to use the communal facilities of the village: GSTR 2012/4 (15 August 2012).

The ruling was originally issued in draft as GSTR 2012/D2.

## ¶6.29 Acquisition of investment banking services: GSTD 2011/3

Click here to view

The Tax Office issued a GST determination which considers the questions whether the acquisitions of the services provided under the arrangement described in Taxpayer Alert TA 2010/1 form part of a reduced credit acquisition made by the financial supply provider under item 9 of the table in reg 70-5.02(2) of the GST Regulations: GSTD 2011/3 (30 November 2011). The determination was previously issued in draft as GSTD 2011/D2.

## ¶6.30 GST consequences following sale of residential premises subject to lease: GSTD 2012/1

Click here to view

This GST Determination concerns the following GST issues:

(a) whether a supply of residential premises by way of lease remains an input taxed supply under s 40-35 of the GST Act following the sale of a reversion

(b) whether the purchaser of the reversion is entitled to input tax credits in connection with the acquisition of the reversion and other acquisitions, and

(c) whether the purchaser of a reversion has an increasing adjustment under Div 135 if the sale of residential premises is, or is part of, the sale of a going concern: GST Determination GSTD 2012/1 (22 February 2012).

(For the companion determination dealing with commercial premises see below.)

## ¶6.31 GST consequences following sale of commercial premises subject to lease: GSTD 2012/2

Click here to view

This GST Determination, which is, in effect, a companion to GSTD 2012/1 (above) concerns the following GST issues:

(a) the GST liability of the vendor and purchaser in respect of a lease of commercial premises, following the sale of such premises subject to a continuing lease, and

(b) how any GST liability for such a supply is attributed: GST Determination GSTD 2012/2 (22 February 2012).

## ¶6.32 M&A transaction that does not proceed – adjustment for change in extent of creditable purpose: GSTD 2012/3

Click here to view

This GST determination considers the question: does an adjustment for a change in extent of creditable purpose necessarily arise for services acquired in relation to a proposed merger and acquisition transaction that does not eventuate, or that does not proceed in the manner contemplated at the time the services were acquired?: GSTD 2012/3 (7 March 2012).

## ¶6.33 GST: what is 'hospital treatment'?: GSTD 2012/4

Click here to view

This GSTD determination considers the question: what is 'hospital treatment' for the purposes of s 38-20 of the GST Act?: GSTD 2012/4 (4 April 2012).

## ¶6.34 Retail foreign currency exchange transactions: GSTD 2012/5

Click here to view

This GST determination considers the question: are acquisitions related to an entity's retail foreign currency exchange transactions with customers in Australia made solely for a creditable purpose under s 11-15 of the GST Act?: GSTD 2012/5 (6 June 2012).

The answer provided by the determination is no; the acquisitions are made only partly for a creditable purpose.

## ¶6.35 How to calculate input tax credits and bad debt adjustments when a dividend is paid to creditors: PS LA 2012/1 (GA)

Click here to view

This Practice Statement Law Administration was released to assist representatives of incapacitated entities in calculating input tax credits and bad debt adjustments when a dividend is paid to creditors: PS LA 2012/1 (GA) (28 March 2012).

This practice statement applies to representatives of an incapacitated entity who pay a dividend of less than 100 cents in the dollar to creditors towards satisfaction of debts owed by the incapacitated entity. The payment of such a dividend may create either an increasing adjustment (as a consequence of the creditor writing off the remainder of the debt), or an input tax credit entitlement, depending on the incapacitated entity's accounting basis for goods and services tax (GST) purposes. This practice statement discusses how representatives may calculate the increasing adjustment (which is referred to as a 'bad debt increasing adjustment') or the input tax credit and its impact upon the dividend, if any, payable by the representative to the Commissioner.

This practice statement does not consider the GST consequences for creditors who receive a dividend from the representative of an incapacitated entity.

Goods and Services Tax Bulletin GSTB 2003/1 is withdrawn with effect from 28 March 2012 and replaced by PS LA 2012/1 (GA).

## ¶6.36 GST classification of food and beverage items: PS LA 2012/2 (GA)

Click here to view

This practice statement sets out:

- the arrangement the Tax Office has with GS1 Australia to ensure food and beverage items shown on GS1net are correctly classified for GST purposes
- the administrative approach the Tax Office will take for past years or periods where manufacturers and other suppliers have applied the Tax Office confirmed GST classification on GS1net, and
- the procedures for tax officers to follow and matters to take into account when considering a change in the GST treatment of a food or beverage item listed on GS1net: Practice Statement Law Administration (General Administration) PS LA 2012/2 (GA) (19 July 2012).

This practice statement applies to manufacturers and other suppliers that rely on GS1net, the GS1 Australia database, to determine the Tax Office confirmed GST classification of the food and beverage items that they supply.

It outlines the procedures for tax officers to follow and matters to take into account when considering a change in the GST classification of a food or beverage item listed on GS1net.

## ¶6.37 When the Tax Office can withhold a refund: PS LA 2012/6

Click here to view

The Tax Office released a practice statement which is intended to provide guidance to tax officers on when it is reasonable to exercise the Commissioner's discretion to delay a refund amount pending verification of the taxpayer's entitlement to the amount: PS LA 2012/6 *Exercise of the Commissioner's discretion under section 8AAZLGA of the Taxation Administration Act 1953 to retain an amount that would otherwise have to be refunded* (1 November 2012).

## ¶6.38 Application of income tax and GST laws to immediate transfer farm-out arrangements: MT 2012/1

Click here to view

The Tax Office issued Miscellaneous Taxes ruling MT 2012/1: *Miscellaneous taxes: application of the income tax and GST laws to immediate transfer farm-out arrangements* (18 April 2012).

This ruling sets out the Commissioner's views on the application of the income tax and GST provisions upon entry into an immediate transfer farm-out arrangement as described in the ruling.

The ruling was originally released in draft as MT 2011/D1.

## ¶6.39 Application of income tax and GST laws to deferred transfer farm-out arrangements: MT 2012/2

Click here to view

The Tax Office issued Miscellaneous Taxes ruling MT 2012/2: *Miscellaneous taxes: application of the income tax and GST laws to deferred transfer farm-out arrangements* (18 April 2012).

This ruling sets out the Commissioner's views on the application of the income tax and GST provisions upon entry into a deferred transfer farm-out arrangement as described in the ruling.

The ruling was originally released in draft as MT 2011/D2.

# SECTION 2 – PROFESSIONAL CURRENCY

## LEGISLATION

### ¶6.40 GST margin scheme and subdivided land

Click here to view

The Tax Laws Amendment (2012 Measures No 6) Bill 2012 was introduced into the Parliament on 29 November 2012. It is currently before the House of Representatives.

The Bill will, among other things, amend the GST Act to confirm that when determining the margin for a taxable supply of an interest, unit or lease where the real property supplied has been subdivided from land or premises previously acquired by the supplier, the margin can be determined by reference to the corresponding proportion of (as applicable):

- the consideration for the acquisition or supply (depending upon the specific statutory requirements) of the interest, unit or lease;
- the approved valuation of that interest, unit or lease as at the specified date; or
- the GST inclusive market value of that interest, unit or lease as at the specified day or time.

The Explanatory Memorandum to the Bill provides the following example showing how the amended provisions would apply.

> **Example 8.1**: Using the GST inclusive market value to calculate the margin on subdivided land John carries on a property development enterprise and is registered for GST. In July 2012, John makes a taxable supply of real property by selling a newly developed residential lot to Patrick for $400,000. The residential lot sold to Patrick was subdivided from land that John acquired from his father, Aston, on 10 August 2010 for no consideration. Aston held the land for private purposes and at the time that John acquired the land, Aston was not registered for GST. The GST inclusive market value of the land at 10 August 2010 was $1,800,000.
>
> John and Patrick agreed in writing that the margin scheme was to apply to the sale of the residential lot to Patrick. John acquired the land from his father who is his associate for the purposes of the GST Act, and s 75-11(7) applies for the purposes of calculating John's margin for the sale of the residential lot to Patrick. The margin for John's sale to Patrick is equal to the difference between the sale price of $400,000 and the relevant proportion of the $1,800,000 GST inclusive market value of the land that John acquired from Aston at 10 August 2010.
>
> Assuming the land that John acquired from Aston on 10 August 2010 was subdivided into twelve lots of equal size and value, then the margin for the sale of the residential lot to Patrick may be calculated as being: $400,000 – ($1,800,000 / 12) = $250,000.

### ¶6.41 Australian Charities and Not-for-profits Commission begins operation

Click here to view

Following the passage of the *Australian Charities and Not-for-profits Commission Act 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012*, the Australian Charities and Not-for-profits Commission (ACNC) has been established as the Commonwealth level regulator for the not-for-profit (NFP) sector in Australia.

Initially, only tax endorsed charities will be regulated by the ACNC. However, the ACNC Act establishes a regulatory framework that can be extended to all NFP entities in the future.

The intention is that the ACNC will become a 'one-stop-shop' for NFP entities, enabling them to apply to the ACNC for registration, tax concessions, and accessing Australian Government services and concessions.

Amendments have been made, among others, to the GST Act, to reflect the new regulatory environment. These include amendments to:

- Subdiv 38-G (activities of charities)
- Subdiv 40-F (fund raising events conducted by charities)
- Div 157 (accounting basis of charities), and
- Div 176 (endorsement of charities).

## CASES

### ¶6.42 The margin scheme; going concern: *Cyonara Snowfox Pty Ltd v FCT*

Click here to view

The Full Court of the Federal Court has dismissed the taxpayer's appeal from the decision of the Administrative Appeals Tribunal in the *Cyonara Snowfox* case: *Cyonara Snowfox Pty Ltd v FCT* [2012] FCAFC 177 (Greenwood, Collier and Middleton JJ, 4 December 2012).

The case concerned the proper treatment of GST in respect of certain transactions entered into by it between September 2004 and February 2007. There were two primary issues:

- whether the taxpayer could choose to adopt the margin scheme after the supply in question (the supply was before the amendments to the margin scheme in 2005 which made the matter of timing of the choice explicit)
- the application of the going concern concession to a particular transaction.

There was a third issue about whether GST was no longer payable through the effluxion of time. This issue had been dealt with previously but was briefly reprised in the Tribunal's reasons. In the event, on the evidence, the Tribunal found for the Commissioner on all points: *Re Cyonara Snowfox Pty Ltd and FCT* [2011] AATA 124 (25 February 2011).

On appeal, the Full Court of the Federal Court essentially confirmed the Tribunal's decision on all points.

### *Background*

In 1997 the taxpayer (Cyonara) purchased real property at Springwood on the southern outskirts of Brisbane. The land was thereafter subdivided. The present proceedings originally concerned the sales by Cyonara of five separate parcels of land from that subdivision – Lots 1, 6, 9 and 10 on SP150819 and Lot 8 on SP131663.

The argument concerning the timing of the margin scheme choice was raised in relation to Lot 1 and Lot 9, the going concern argument related only to Lot 8 and the limitation point was relied upon in relation to Lot 1, Lot 9, Lot 8 and Lot 10.

### *Margin scheme*

Cyonara argued that the GST Act, prior to the March 2005 amendments, allowed a taxpayer to make a choice to apply the margin scheme (and apply the cost to complete method) after the date of supply, indeed up to the time of proceedings in the Tribunal. (Section 75-5(1) now requires that the vendor and purchaser agree in writing to use the margin scheme, and s 75-5(1A) makes it clear that the agreement to utilise the margin scheme must be made on or before the making of the supply, or within such further period as the Commissioner allows.)

The Tribunal, however, held that, on the proper construction of the margin scheme provisions as they stood at the time, the taxpayer's choice to apply the margin scheme must have been made no later than the time of supply.

The court held there was no error of law demonstrated in the Tribunal's approach to the construction of s 75-5.

### *Going concern*

The issue between the parties was whether the matters in s 38-325(2) of the GST Act were satisfied. Cyonara submitted that those matters were made out because it was carrying on an enterprise, namely leasing property, it carried on that enterprise until the date of supply and it supplied to the recipient all things necessary for the continued operation of the enterprise.

On the evidence, however, the Tribunal found that Cyonara failed to satisfy each of the requirements for the supply of a going concern. If the enterprise be regarded as being the leasing of Lot 8 (and no other enterprise was suggested), the Tribunal was not satisfied that Cyonara carried on that enterprise until

the day of supply. Indeed, the Tribunal was not satisfied that it carried on the enterprise of leasing at any time within the period of many months prior to the day of supply. It was, at various times, attempting to obtain a tenant to take a lease but Cyonara did not suggest that the enterprise of leasing could be carried on merely by seeking to obtain a tenant. Additionally, no things necessary for the continued operation of the enterprise were supplied to the purchaser.

Again, the court agreed with the Tribunal's decision on this point, essentially for the reasons given by the Tribunal.

### *The limitation question*

Section 105-50(1) of Sch 1 to the Taxation Administration Act 1953 (Cth) has the effect that GST 'ceases to be payable 4 years after it becomes payable by you'. However, s 105-50(3) provides that s 105-50(1) does not apply to an amount if, 'within those 4 years the Commissioner has required payment of the amount... by giving a notice to you.'

In an earlier decision the Tribunal concluded that a notice of assessment issued to the taxpayer and dated 24 May 2007 constituted a notice that satisfied s 105-50(3) and thus the Commissioner was not barred by s 105-50(1) from claiming payment of the amounts in issue here.

Again, the court dismissed the taxpayer's application on this ground.

## ¶6.43 Entities not carrying on an enterprise – penalties increased: *Re Bayconnection Property Developments Pty Ltd*

Click here to view

A group of five companies incorporated as part of what was intended to be a new vocational training institution has been found by the Administrative Appeals Tribunal not to have been carrying on an enterprise, even taking into account the extended statutory definition of 'carrying on' an enterprise that includes 'doing anything in the course of the commencement or termination of the enterprise'. If the taxpayers made any acquisitions at all (and even this was doubtful), they did not make any creditable acquisitions because they did not acquire anything in carrying on an enterprise. Consequently, claims for input tax credits made by the taxpayers were entirely without foundation: *Re Bayconnection Property Developments Pty Ltd and FCT* [2013] AATA 40 (Deputy President S E Frost, Senior Member G Lazanas, 29 January 2013).

Each of the taxpayers became registered for GST purposes in the years 2003 to 2006. Each of them lodged BASs in which they claimed ITCs. The ITCs in dispute were for the tax periods ranging from February 2005 to January 2009. The ITC claims related to acquisitions that the taxpayers said they made in carrying on their enterprise. The first four taxpayers claimed to have made those acquisitions from a related company. The fifth taxpayer based its ITC claims on acquisitions it purported to have made from third party, arm's

length suppliers. None of the first four taxpayers made any taxable supplies (or, in fact, any supplies at all) in the relevant period. The fifth taxpayer purported to have made some minor taxable supplies.

There were no business records other than BASs and bank statements. Some but not all of the taxpayers had 'tax invoices' that had been issued to them and only one taxpayer (Bayconnection) had lodged income tax returns covering the tax periods in question but even then the returns were unhelpful as they reported no income and no expenses.

On the evidence, the Tribunal found that the taxpayers were not carrying on an enterprise at any time during the relevant period.

The Tribunal also accepted the Commissioner's determination as to penalties.

## ¶6.44 Consideration for a taxable supply: *FCT v Qantas Airways Ltd*

Click here to view

The Tax Office has released a Decision Impact Statement on the decision of the High Court in *FCT v Qantas Airways Ltd* [2012] HCA 41 (Gummow, Hayne, Kiefel and Bell JJ – Heydon J dissenting, 2 October 2012). The case concerned whether an airline made a supply for consideration where the airline passenger does not take a booked flight and any payment made by the passenger is not refundable or no refund is claimed.

The issue in dispute was whether Qantas (and its subsidiaries, including Jetstar) had made a taxable supply when it received fares for flights booked but not undertaken by prospective passengers. The critical element of this was whether Qantas made a 'supply for consideration' under the definition of 'taxable supply' in s 9-5(a) of the GST Act.

The High Court held, by majority, that Qantas did make a taxable supply and was liable to pay GST on the fares paid.

In cases where a payment is made on entry into a contract which secures rights (whether conditional or not) to a further supply, the Commissioner considers that the payment will be consideration for a supply consisting at least of the provision of those rights (and entry into corresponding obligations), even if the further contemplated supply is not ultimately made (see GSTR 2009/3, paragraph 24).

The decision does not cause any significant change in the way the Commissioner approaches 'supply', or the nexus between supply and consideration. Obviously, it is necessary in any case where a payment is made to consider the particular facts and circumstances to determine whether there is anything supplied, and if so whether the payment has a sufficient nexus to be consideration for what is supplied.

The Commissioner considers that observations in earlier cases concerning how to characterise supplies continue to be relevant where such characterisation is necessary to apply the statute in any particular case.

There is nothing in the Qantas decision that would suggest that supplies need to be 'dissected' into their component parts, or that the focus of GST should be on contractual rights and obligations instead of performance.

The Commissioner maintains the view, as recognised in his public rulings, that in many cases, the entry into contractual obligations and corresponding creation of rights should be construed, where relevant, as part of a composite supply that includes the performance of those obligations.

The court considered that there was a supply in this case consisting of the promise to use best endeavours to transport the passenger and their baggage. The court also observed that there was no failure by Qantas in its performance.

Although there was not a direct argument about the application of the adjustment provisions in this case, the Commissioner considers that the mere failure of a ticketholder to utilise their rights to transport or of entry to an event would not have the effect of cancelling a supply that is made on sale of the ticket.

## ¶6.45 GST going concern exemption: parties agreed in writing: *Re SDI Group Pty Ltd*

Click here to view

The Tax Office has released a Decision Impact Statement on the decision of the Administrative Appeals Tribunal in this case, which concerned whether a vendor (supplier) and purchaser (recipient) had agreed in writing on or before settlement that a property was sold as a going concern and thus was a GST-free supply. The decision is reported as *Re SDI Group Pty Ltd and FCT* [2012] AATA 763 (Dr Gordon Hughes, Member, 2 November 2012).

The principal issue was whether the parties to the sale of the property had 'agreed in writing' that the sale would a supply of a going concern, as required by s 38-325(1)(c).

The contract of sale itself contained no reference to a supply of a going concern. The Tribunal found, however, that references to sale as a going concern in collateral documents, including a letter from the purchaser's solicitor to the vendor's solicitor, a tax invoice provided in anticipation of settlement, and a Goods Statutory Declaration, constituted sufficient evidence that the vendor and the purchaser had agreed in writing that the supply involved a going concern, as required by s 38-325(1)(c).

In the Tax Office's view, the finding was open to the Tribunal on the evidence in this case and does not differ in principle from the requirements outlined in GSTR 2002/5.

# TAX OFFICE RULINGS AND DETERMINATIONS

## ¶6.46 Residential premises: GSTR 2012/5

Click here to view

This is one of three major GST Rulings dealing with residential premises and commercial residential premises and released simultaneously.

This ruling considers how Subdiv 40-B and Subdiv 40-C of the GST Act apply to supplies of residential premises: GSTR 2012/5 (19 December 2012).

This ruling was previously released in draft in GSTR 2011/D2 and GSTR 2012/D1.

## ¶6.47 Commercial residential premises: GSTR 2012/6

Click here to view

This is the second of three major GST Rulings dealing with residential premises and commercial residential premises and released simultaneously.

This ruling considers how s 9-5, Subdiv 40-B and Subdiv 40-C of the GST Act apply to supplies of commercial residential premises and supplies of accommodation in commercial residential premises: GSTR 2012/6 (19 December 2012).

This ruling was previously released in draft in GSTR 2011/D2 and GSTR 2012/D1.

## ¶6.48 Long-term accommodation in commercial residential premises: GSTR 2012/7

Click here to view

This is the third of three major GST Rulings dealing with residential premises and commercial residential premises and released simultaneously.

This ruling considers how Div 87 and s 40-35 of the GST Act applies to supplies of long term accommodation in commercial residential premises: GSTR 2012/7 (19 December 2012).

This ruling was previously released in draft in GSTR 2011/D2 and GSTR 2012/D1.

## ¶6.49 Telecommunications supplies: GST Determinations

The Tax Office has released a group of four GST Determinations dealing with aspects of telecommunications supplies. They were all released on 28 November 2012.

They are as follows:

- When are supplies of interconnection services made by an Australian resident telecommunication supplier GST-free under item 2 in the table in s 38-190(1) of the GST Act?: GSTD 2012/7 — Click here to view
- When are telecommunication supplies made under arrangements for global roaming outside Australia by an Australian resident telecommunication supplier GST-free under item 3 in the table in s 38-190(1) of the GST Act?: GSTD 2012/8 — Click here to view
- Is the supply of a right to capacity in an international telecommunication network made by an Australian resident telecommunication supplier GST-free under item 4 in the table in s 38-190(1) of the GST Act?: GSTD 2012/9 — Click here to view
- When are telecommunication supplies made under arrangements for global roaming in Australia by an Australian resident telecommunication supplier GST-free under s 38-570(1) and s 38-570(3) of the GST Act?: GSTD 2012/10 — Click here to view

## ¶6.50 New residential premises been used for residential accommodation before 2 December 1998: GSTD 2012/11

Click here to view

This GST Determination considers the question: have new residential premises been used for residential accommodation before 2 December 1998 for the purposes of s 40-65(2)(b) of the GST Act where the premises were only operated as commercial residential premises before that date?: GSTD 2012/11 (19 December 2012).

## ¶6.51 GST and points fee in a loyalty program: ID 2013/1

Click here to view

A loyalty program operator makes a taxable supply to a program partner where it allocates points to nominated customers of the loyalty program partner in return for a points fee, and those points would be redeemed by the nominated customers for vouchers which are subject to the modified rules in Div 100 of the GST Act: ID 2013/1 (4 January 2013).

# TAX OFFICE NEWS

## ¶6.52 Draft GST Subcommittee minutes, 20 November 2012

Click here to view

The Tax Office has released draft minutes of the National Tax Liaison Group (NTLG) GST subcommittee meeting held on 12 September 2012.

Matters discussed included:

- input tax credit limits for cars
- the differing treatment of meals provided in hospitals and university residential accommodation
- the circumstances when a 'contract' is a supply
- government funding arrangements, and
- changes of trustee (PS LA 2012/2).

## ¶6.53 BAS Agent Advisery Group minutes, June 2012

Click here to view

The Tax Office has released the minutes of the BAS Agent Advisery Group meeting held on 14 June 2012. Matters discussed included:

- Employee or contractor — Promoting a level playing field for business
- Taxable payments reporting for businesses in the building and construction industry
- GST Self assessment regime and GST refunds
- Clean Energy Measures — Excise and Fuel Tax Credit Amendments
- BASAAG Withholding Working Group
- Tax Practitioners Board update
- Realising the benefits of SBR for BAS agents
- Enhancements for Portal, Standard Business Reporting and lodgment functionality
- Reducing paper activity statements for electronic lodgers
- ATO Tax Practitioner Forum (ATPF) significant issues update.

# SECTION 3 – QUESTIONS AND ANSWERS

## ¶6.54 Supplies connected with Australia

| | | | |
|---|---|---|---|
| **Date Published** | 8 November 2012 | **Subject** | GST |
| **Adviser** | Tony van der Westhuysen | **Library Name** | Q&A Library |
| **Firm** | | **Source Industry** | Accounting |

### *Question*

My client (H) is a non-resident company incorporated in Hong Kong (HK). It sells goods worldwide to online customers, including those in Australia. The server, bank account and invoicing of orders takes place in HK.

The Australian customer places an order online, makes payment and receives an invoice from H in HK. The goods are then dispatched to the Australian customer from warehouses in Australia.

In order to facilitate delivery of goods to Australian customers, bulk stocks of goods are imported into Australia by H and are warehoused by a third party contactor (unrelated to H). The stocks of goods are not specific to any individual order.

H pays GST when the goods clear customs and claims it back on the BAS. It is registered for GST as a non-resident.

When an order is placed online, an invoice is generated and the specific goods are picked, packed and delivered by the third party contractors. Any returns are handled by the warehousing contractor.

At regular intervals, an H employee from HK is sent to Australia to review returns and to deal with any other operational matters.

My questions are:

1. Does the sale of goods by H to Australian customers fall outside of the GST system as an international transaction even though the goods are imported/cleared though customs into Australia by H?

2. Is H a foreign company doing business from outside Australia or within Australia?

### *Answer*

The issue here is whether the sale of goods from H to its Australian customers is a taxable supply.

Under s 9-5 of the GST Act, you make a taxable supply if (among other things) the supply is connected with Australia (s 9-5(c)). Under s 9-25, a supply of goods is connected with Australia if the goods are delivered or made available, in Australia to the recipient of the supply. Under s 9-25(3), a supply of goods is also connected with Australia if the supplier imports the goods into Australia.

Since either of these provisions could apply to H, I consider that the supplies of these goods is connected with Australia. That being the case, the sale of these goods would be a taxable supply and the fact that the goods are warehoused and delivered to customers via unrelated entities would not, in my view affect this outcome.

H would be seen as doing business outside Australia, but would be seen as carrying on an enterprise in Australia (see s 9-25(6)(b)).

## ¶6.55 Going concern

| | | | |
|---|---|---|---|
| **Date Published** | 3 December 2012 | **Subject** | GST |
| **Adviser** | Tony van der Westhuysen | **Library Name** | Q&A Library |
| **Firm** | | **Source Industry** | Accounting |

### *Question*

Our client is purchasing a factory that has been tenanted on a month-to-month basis for many years. Despite the lack of a formal leasing contract, would this sale satisfy the GST going concern provisions?

If not, would a formal month-to-month leasing contract satisfy the 'going concern' provisions as long as it was in force at settlement, despite the fact that the tenant will be asked to leave shortly after settlement?

Should the tenant decide to vacate prior to settlement, given the purchasers intention to move into the premises and hence no possibility of a new tenant taking up a lease, would this effectively prevent the taxpayer from using the GST exemption?

### *Answer*

The 'going concern' provisions are predicated on two things:

- firstly that an enterprise is being carried on; and
- secondly that the enterprise (and all things necessary for the continued operation of that enterprise) are supplied under the transaction (see s38-325 of the GST Act).

Despite the fact that there is no written lease agreement, as you have described the arrangement, I consider that the sellers are indeed carrying on an enterprise relation to the building.

The question as to whether an enterprise is being supplied under this arrangement is less clear. As you have described the position, it seems more likely that what is being supplied is the asset rather than the enterprise (which would not qualify for the GST-free concession in s 38-325).

It may be possible to strengthen the 'going concern' argument by having the building purchased in a separate entity, which would then lease the building to your client, but unless there were other reasons for doing this (such as asset protection), it seems like an expensive strategy merely to secure a timing benefit.

I note that if the sale were treated as a taxable supply rather than a GST-free supply, the purchaser would be entitled to an input tax credit when the BAS was filed, so the only advantage to treating the sale as a going concern would be the time value of the input tax credit amount.

## ¶6.56 New residential property — sale within five years

| | | | |
|---|---|---|---|
| **Date Published** | 5 December 2012 | **Subject** | GST |
| **Adviser** | Tony van der Westhuysen | **Library Name** | Q&A Library |
| **Firm** | | **Source Industry** | Accounting |

### *Question*

We have long been of the opinion that the building and sale (within five years) of a new residential property is subject to GST on sale.

However our client has been given the following quote from another accountant.

> 'Section 185-25 excludes from the calculation of annual turnover the supply of a capital asset. Building the property for rental then selling, is the supply of a capital asset and not included in the annual turnover.'

Are we correct or is the view of the other accountant correct?

### *Answer*

Your view is correct. Section 188-25 deals with the situation where an unregistered entity sells a capital asset — proceeds from the sale of a capital asset is not included in an entity's GST turnover, which means that if turnover from other sources is less than $75,000, the entity will not be required to register for GST even if the proceeds from the sale of a capital asset would otherwise push the entity over the registration turnover threshold.

Simply put, if the entity is registered (or required to be registered) for GST, then the sale of the building in the course or furtherance of the entity's enterprise would attract GST. On the other hand, if the entity was not registered (or required to be registered) for GST, then the sale of the building would not require the entity to register, and the sale would not attract GST.

## ¶6.57 Accounting for GST

| | | | |
|---|---|---|---|
| **Date Published** | 17 December 2012 | **Subject** | GST |
| **Adviser** | Tony van der Westhuysen | **Library Name** | Q&A Library |
| **Firm** | | **Source Industry** | Commerce |

### *Question*

What are the GST implications for software products downloaded from the internet?

1. If the software is downloaded from a foreign server by an entity carrying on a business in Australia and sold to that entity by another entity registered for GST in Australia, does GST apply? In this case, the latter entity sends an e-mail to the first entity with the link to the foreign web-site.
2. If GST applies, who has the responsibility of returning the GST in the business activity statement (BAS)? Does the entity which sold the software have to include GST in the invoice to the customer?
3. Would the answers to the above be different if the server was located in Australia?

### *Answer*

The key to these transactions is to identify the supplier.

If the product is sold to an Australian entity by another GST-registered Australian entity, then on the face of it, the registered Australian entity would be the supplier (irrespective of the fact that the order may have been executed by a foreign server). That being the case, under s 9-40 of the GST Act, the supplier would be the entity responsible for returning the GST in the BAS. The purchasing entity would then be entitled to an input tax credit, but would need a tax invoice from the supplier to claim it (see s 29-10(3)).

The location of the server would only be relevant if the entity who owned the sever was:

- the supplier; and
- was not registered nor required to be registered for GST in Australia; and
- the supply was not connected with Australia — (in regard to this last requirement, I am assuming that the reverse charging provisions of Division 84 would not apply, since the purchaser acquired the software solely for a creditable purpose).

If the above did not apply, it would make no difference where the server was located.

## ¶6.58 Commercial property – sale as going concern

| | | | |
|---|---|---|---|
| **Date Published** | 16 January 2013 | **Subject** | GST |
| **Adviser** | Tony van der Westhuysen | **Library Name** | Q&A Library |
| **Firm** | | **Source Industry** | Accounting |

### *Question*

Our client purchased a commercial property in December 2007 in a discretionary trust. The property was sold to them using the margin scheme, so the discretionary trust was registered for GST on the date of the transaction. The discretionary trust deregistered for GST within six months after the transaction, as the rent being received from the related trading company was less than the 75K threshold.

The client would now like to sell the property to a superfund. I am unsure about the GST requirements for this sale. Does the discretionary trust need to be registered for GST for this transaction (the sale price for the property is $700,000)? If so, can I assume that the property could be sold as a going concern if a lease is in place?

### *Answer*

Your question raises several issues. The first (and arguably the most important) is the rent paid by the related company. The GST Act has its own version of the 'market value substitution rule' which enables the Commissioner to substitute the market value of a supply for the consideration charged in certain circumstances. What this means is that, if the rent charged was (say) $60,000, but the market value of the supply of the property was (say) $100,000, Division 72 allows the Commissioner to deem the rent to have been $100,000 and apply GST accordingly. This would mean that the de-registration of the trust would be ineffective.

For Division 72 to apply, the following factors must be present:

- The supply must be made between associates — your use of the term 'related trading company' suggests that this might be the case.
- The supply must be made for no consideration or for consideration that is less than the market value of the supply — your question is silent on this point.
- The recipient of the supply must either be unregistered for GST or the acquisition of the thing was not for a wholly creditable purpose — again your question is silent on this point, but as a trading company, I assume that the entity is registered for GST. So the only issue is to determine whether the acquisition of the property was made wholly for a creditable purpose and not (for example) to make input taxed supplies.

If any of these factors does not apply, then Division 72 cannot be invoked by the Commissioner.

The second issue is whether an entity can cancel their GST registration where the value of their taxable supplies falls below the registration turnover threshold of $75,000. An entity is only required to be registered for GST if their current or projected GST turnover is $75,000 or more per annum. Assuming that your client makes no other taxable supplies, and the rent from the property is less than $75,000 per annum, then your client would be entitled to cancel its GST registration.

The final issue is the sale of the property. Assuming that the GST registration was validly cancelled, then the sale of the property would be an out-of-scope supply. A supply made by an unregistered entity will not attract GST. I note that proceeds from the sale of a capital asset is not included in an entity's GST turnover, so the sale will not cause your client to have to again register for GST (see s 188-25 of the GST Act).

If through the application of the 'market value substitution rule' explained above, your client is required to be registered for GST, then the sale would of course be a taxable supply and would, on the face of it attract GST. If however the supply meets the requirements of s 38-325, then the sale would be GST-free as a supply of a going concern. As you have described the position, this would appear to be the case here.

## ¶6.59 Division 81 charges

| | | | |
|---|---|---|---|
| **Date Published** | 23 January 2013 | **Subject** | GST |
| **Adviser** | Tony van der Westhuysen | **Library Name** | Q&A Library |
| **Firm** | | **Source Industry** | Accounting |

### *Question*

Our client has several industrial properties. The leases provide that prior to the commencement of each outgoings year, the landlord may estimate the yearly outgoings and the tenant shall pay each month 1/12th of the estimate. After the end of the year the landlord will calculate the actual outgoings and issue an invoice to the tenant for the balance outstanding.

When the actual figures are confirmed, a summary of the actual expenditure is prepared and the only GST charged is on the expenses that had GST included; for example:

| *Yearly Landlord Outgoings (*GST inclusive)* | *Costs ($)* |
|---|---|
| Repairs & Maintenance* | $700 |
| Rates | $200 |
| Land Tax | $500 |
| Cleaning* | $300 |
| Total = | $1700 |
| GST on items*= | $100 |
| Total = | $1800 |
| Less Paid by Tenant = | $1000 |
| | **$800** |

The outgoings are included as assessable income, however the taxpayer believes the amounts are a deposit or surety so that at the end of the year, the tenant will not get caught unable to pay the outgoings and therefore should not have a GST component.

The monthly invoice states that the rent payable is GST-inclusive and the outgoings are GST-free. Our client has become aware that he has been remitting to the Tax Office 1/11th of the monthly outgoings for the past four years and is substantially out of pocket.

For example:

| *GST-inclusive expenses* | *GST($)* |
|---|---|
| Received = | $100 GST |
| Remittances (1/11 × 1800) paid by tenant = | $164 GST |
| **Overpaid to Tax Office =** | **$64 GST** |

He has since stopped remitting GST on outgoings and is treating these amounts as GST-free. He would now like to amend the GST returns.

My questions are:

1. As Division 81-1 provides that GST applies to payments of taxes, fees and charges, can the taxpayer rely on his interpretation of the leases being the amounts he receives are only deposits on the anticipated actual outgoings payable and GST is not payable until the final reconciliation?

2. Should the companies be able to amend the GST returns for the previous years and if so how far back?

### *Answer*

Your question raises several issues, and I should perhaps start by addressing the implications of Division 81. Division 81 treats the payment of certain taxes, fees and charges as not being the provision of consideration and, since to be a taxable supply, you need a supply for consideration the relevant taxes fees and charges are effectively exempt from GST (not because they are GST-free, but because there is no consideration).

The second thing to note about these taxes, fees and charges is that they are exempt from GST when made to the recipient of the supply. As you have described the position, it would appear that the landlord rather than the tenant is the recipient (even though the tenant has agreed to pay the landlord for these outgoings). The outgoings do not retain their exempt status when on-charged to a tenant — they are simply treated as part of the consideration for occupying the premises.

So in your example, the correct treatment would be to add GST to all of the outgoings including the rates and land tax components. In your example, the tenant should be charged:

- $1,700 + GST of $170 = $1,870.
- GST of $170 should then be remitted to the Tax Office.

In relation to the payment in advance, I consider that since this is merely a part of the consideration for occupying the premises, the payments should attract GST in the tax period in which they are paid.

**ACKNOWLEDGEMENTS**

Material for this document is originally compiled by qualified, independent experts following consideration of various decisions and announcements made by state and federal parliaments; government departments; courts, commissions and tribunals; daily and weekly financial press; professional institutes and associations; legal and regulatory publishers; professional firms; and other commentaries published in hard copy or on the Internet.