Ashurst Australia
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GST Bulletin

November 2013 GST developments

WHAT YOU NEED TO KNOW

This Bulletin outlines Australian GST developments in November 2013, which may impact your business, including:

Relevant area	At a glance	Relevant to
Division 9 – Taxable supplies	*Interim decision impact statement: AP Group Ltd v FC of T* - the ATO has released an interim Decision Impact Statement regarding the decision of the Full Federal Court in *AP Group Ltd v FC of T* [2013] ATC 20-417	**Entities paying / receiving third party and potentially other rebates / incentives**
Division 11 – Creditable acquisitions	*Professional Admin Service Centres Pty Ltd v FC of T* [2013] FCA 1123 – the Federal Court has held that a taxpayer who paid for legal services provided to a third party for defence of criminal proceedings was not entitled to input tax credits on those invoices	**Entities involved in tripartite arrange-ments**
	Trustee for the Grewal Property Trust v FC of T [2013] AATA 788 - the AAT has partially affirmed the Commissioner's assessment disallowing a taxpayer input tax credits in relation to his motel businesses	**All taxpayers**
	Zarev v Commissioner of Taxation [2013] AATA 777 – the AAT has upheld GST and penalty assessments against the taxpayer, but ruled that the taxpayer's cancelled GST registration be restored	**All taxpayers**
	Class Rulings 2013/83 and 1013/84 - the ATO has issued class rulings relating to the GST treatment of creditable acquisitions made by members of the Waste Contractors and Recyclers Association of NSW in respect of supplies from landfill waste disposal facility managers	**Waste contractors and recyclers**
Division 13 – Taxable importations	*Press Release: GST on online purchases* - the Federal Treasurer has issued a media release regarding discussions with the State Treasurers about the low value import threshold for GST	**All taxpayers**
Division 38 – GST-free supplies	*Snugfit Australia Pty Ltd v FC of T* – the AAT has held that the supply of a product designed to position the body to reduce the incidence of snoring was GST-free	**Providers of medical supplies**

Division 40 – Financial supplies	*Australian Style Investments Pty Ltd as Trustee for the Australian Style Investments Unit Trust and Commissioner of Taxation* [2013] AATA 847 – the AAT held that the supply of an irrevocable proxy was not a financial supply	**Investors selling proxy rights**
Division 135 – Increasing adjustments	*Interim decision impact statement: MBI Properties Pty Ltd v FC of T* - the Tax Office has released an interim decision impact statement on the Full Federal Court decision in *MBI Properties Pty Ltd v FC of T* 2013 ATC ¶20-420	**Vendors / purchasers of real property**
Administration	*PS LA 2013/6: Collection of debts from groups and joint ventures* - the ATO has released a Practice Statement PS LA 2013/3 regarding the collection of debts from groups and joint ventures	**Taxpayers in GST groups / joint ventures**
Carbon tax	*Press Release: Carbon Tax repeal - GST* – the Government has issued a Press Release regarding the effect on GST of the legislation repealing the Carbon Tax	**All taxpayers**
Various	Addendum to GSTR 2013/D2: Supplies made by an operator of a "moveable home estate". The addendum clarifies the date of effect of the ruling	**Operators / residents of "moveable home estates"**

This Bulletin also includes a development in international VAT / GST law in November 2013, which may impact on your business:

Relevant area	At a glance	Relevant to
Division 9 – Carrying on an enterprise	*Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* - the Austrian Court of Justice has held that the operation of a photovoltaic installation with no storage capacity on a house, where the power generated is below the power consumed by the house, is an "economic activity" of the installation operator.	**All taxpayers**

Interim decision impact statement: AP Group Ltd v FC of T

TheATO has released an interim Decision Impact Statement regarding the decision of the Full Federal Court in *AP Group Ltd v FC of T* [2013] ATC 20-417 (covered in our September 2013 GST Bulletin and our special indirect tax alert).

The Statement analyses the decision at some length, but broadly the preliminary views of the ATO are:

(a) **other motor vehicle arrangements** – the Commissioner is giving further consideration to how the decision applies to other motor vehicle incentive payments;

(b) **tripartite arrangements** – whether a set of actions gives rise to supplies to more than one party is fact and circumstance dependent;

(c) **wholesale motor vehicle holdback payments** – the decision supports the view in GSTD 2005/4 that wholesale motor vehicle holdback payments are not consideration for supplies; and

(d) **retail motor vehicle holdback payments** – such payments are essentially about maintaining the dealer's profit margin, therefore the existing view in GST 2005/4 will be maintained.

Other points regarding the administrative treatment of the decision:

(e) **luxury car tax -** there will be consequential implications for the luxury car tax because total consideration calculations will need to include the incentive payment;

(f) **Division 134** – the Commissioner is developing more detailed views on Division 134 adjustments; and

(g) **incentive payments in other industries** – volume rebates are generally considered to be a reduction in consideration (described as being a rebate where the supplier pays rebates to customers who reach certain levels of purchases – ie not tripartite). DIS says whether other types of incentive payments are consideration for supply by the payee to a third party will depend on the specific facts and circumstances.

In light of the decision, the ATO has withdrawn ATOID 2008/166: GST and motor vehicle industry incentive payments: fleet sales support – margin support – discretionary payments. The ATO will also review existing precedential documents to determine if any changes are required.

Professional Admin Service Centres Pty Ltd v FC of T [2013] FCA 1123

The Federal Court in *Professional Admin Service Centres Pty Ltd v FC of T[2013] FCA 1123* has held that a taxpayer who paid for legal services provided to a third party for defence of criminal proceedings was not entitled to input tax credits on those invoices.

Facts

An individual, Mr F, was involved in lengthy litigation. Mr F entered into several Litigation Funding Deeds with a number of entities, including the taxpayer (**Funders**). Under the agreement, the Funders would fund Mr F's legal proceedings, and share in any damages he was awarded if, successful. Importantly, while the Funders paid the legal fees, the lawyers were retained solely by Mr F.

The taxpayer claimed input tax credits on the legal fees it had paid on behalf of Mr F. The taxpayer also claimed input tax credits on invoices issued by a related company for management services. The Commissioner issued assessments on the basis that the taxpayer was not entitled to claim these input tax credits.

The taxpayer paid fees to Corporate Business Centres International Pty Ltd (**CBCI**), an entity without an ABN. The Commissioner assessed the taxpayer to a penalty for failure to withhold amounts form

payments made to an entity without an ABN.

The Commissioner disallowed the taxpayer's objection.

Held

His Honour considered two key issues regarding the claims for input tax credits in respect of the invoices for legal advice.

1. ***Did the applicant acquire legal services?***

His Honour accepted that under the GST Act, one act may constitute more than one supply of services and give rise to more than one acquisition. However, in this case it was clear that the lawyers made no supply to the taxpayer because they were retained by Mr F. Therefore, the taxpayer was not the recipient of any legal services.

2. ***If so, did the applicant acquire those services in carrying on an enterprise?***

Having found that the taxpayer was not the recipient of the legal services, the Court need not have considered whether or not the taxpayer incurred the legal services as part of its enterprise. However, the Court still considered this question at length.

The Commissioner accepted that the taxpayer carried on a form of enterprise, but not one that extended to "litigation funding" activities. The taxpayer was unable to provide any real evidence to satisfy the Court that there was any such "litigation funding enterprise".

His Honour also dismissed the taxpayer's claim in relation to invoices issued for management services, concluding that no management services were actually supplied to the taxpayer by another of the Funders, which was a related entity. His Honour considered the invoices to be a "sham" and described in detail how he did not consider the transaction between the parties to have ever taken place.

His Honour held that the taxpayer was liable to a penalty for its failure to withhold in respect of payments made to CBCI.

Trustee for the Grewal Property Trust v FC of T [2013] AATA 788

In *Trustee for the Grewal Property Trust v FC of T* [2013] AATA 788, the AAT has partially affirmed the Commissioner's assessment disallowing input tax credits (**ITCs**) totalling $88,452 in relation to the taxpayer's motel businesses. The AAT determined that the taxpayer was only entitled to ITCs of $15,846 for the relevant period based on materials the taxpayer provided after the lodgement of the notice of objection.

Facts

The taxpayer was the trustee of a trust that operated a motel business and was registered for GST. The taxpayer lodged Business Activity Statements (**BAS**) for the period 1 January 2007 to 30 September 2010 (**Relevant Period**). The Commissioner advised that the BAS were subject to an audit and requested evidence from the taxpayer to demonstrate entitlement to the ITCs claimed in the BAS. The taxpayer was not able to provide the documents, and the Commissioner issued assessments disallowing the ITCs of $88,452.

At the hearing, the taxpayer argued that he was unable to respond to the requests for information sought by the Commissioner because he was not in Australia at the time and that the records had been damaged or lost due to flooding in the motel.

The key issue was whether, or to what extent, the taxpayer was entitled to ITCs in accordance with Division 11 of the GST Act.

Held

The AAT held that the taxpayer had failed to comply with the provisions of sections 382-385 of Schedule 1 to the Tax Administration Act, which require an entity to keep records of its indirect tax transactions.

However, the AAT was satisfied that materials provided by the taxpayer after the lodgement of notice of objection demonstrated that he was entitled to ITCs worth $15,846.

The Senior Member spoke at length about the burden of proof that lies with the taxpayer, pointing to section 14ZZK(b)(i) of the *Taxation Administration Act 1953* which states that the person applying for review before the AAT has the burden of proving that an assessment is excessive. In this instance, the AAT held that the taxpayer did not discharge his burden of proof as he was unable to produce documentation to support his claims in relation to the ITCs.

Zarev v Commissioner of Taxation – [2013] AATA 777

In *Zarev and Commissioner of Taxation* [2013] AATA 777, the AAT has upheld GST and penalty assessments against the taxpayer but ruled that the taxpayer's cancelled GST registration be restored.

Facts

The taxpayer carried on a computer repair business. The ATO audited the taxpayer's BAS for the period 31 March 2007 to 28 February 2011 and issued GST net amount assessments, penalty assessments and cancelled the taxpayer's GST registration.

The Commissioner disallowed many of the taxpayer's input tax credits (**ITC**) claims on the basis that he did not consider the taxpayer to be carrying on an enterprise during the relevant periods and that some of the claims appeared not to have any obvious links to commercial activity. The taxpayer provided additional information, which caused the Commissioner to accept that he was carrying on an enterprise during the relevant tax periods, and that the cancellation of his GST registration should be set aside.

Held

The AAT upheld the GST and penalty assessments against the taxpayer but held that the taxpayer's cancelled GST registration be restored. The AAT considered submissions from the applicant and respondent on each type of expense incurred, before determining that the GST net amount assessments were not open to review. In addition, the AAT held that the penalty assessment made in relation to each of the shortfalls as they stood at the date the application for review was reserved for the preparation of reasons was not to be disturbed on that application.

The AAT said the Commissioner's decision to cancel the taxpayer's GST registration should be set aside and a decision substituted restoring the registration.

Class rulings 2013/83

On 13 November 2013 the ATO issued class ruling CR 2013/83 relating to the GST treatment of creditable acquisitions made by members of the Waste Contractors and Recyclers Association of NSW in respect of supplies from landfill waste disposal facility managers who are liable entities, in relation to the carbon pricing mechanism, under Subdivision B of Division 2 of the *Clean Energy Act 2011*.

Broadly, the Ruling states that fees charged for waste management services including on-charging of any carbon pricing mechanism costs are subject to GST in full, and the amount of input tax credits under section 11-25 of the GST Act is equal to the GST payable on the taxable supply of waste management services.

Class Ruling CR 2013/84

On 13 November 2013 the ATO issued class ruling CR 2013/84 relating to the GST treatment of creditable acquisitions made by members of the Waste Contractors & Recyclers Association of NSW in respect of supplies from landfill waste disposal facility managers who are liable to pay a waste levy under s 88 of the Protection of the *Environment Operations Act 1997* (NSW). The Ruling states that a fee charged for waste management services, including on-charging of a waste levy is subject to GST in full. However, it states that the payment of the waste levy by facility managers to the NSW Environmental Protection Authority is exempt from GST.

GST on online purchases

The Federal Treasurer issued a media release regarding discussions with the State Treasurers about the low value import threshold for GST.

The Federal Treasurer said that the State Treasurers were provided with the material they had previously requested on the costs of any changes to the low value import threshold for GST of $1,000.

Snugfit Australia Pty Ltd v FC of T [2013] AATA 802

The AAT in *Snugfit Australia Pty Ltd v FC of T* [2013] AATA 802 has held that the supply of a product designed to position the body to reduce the incidence of snoring was GST-free under section 38-45(1) of the GST Act.

Facts

The taxpayer supplies a product designed to support the body while a person is sleeping, in such a way as to prevent the person snoring. The taxpayer submitted a private ruling application to the Commissioner seeking a ruling that the supply of the product was GST-free as the supply of a "medical aid" in accordance with section 38-45(1) of the GST Act. The Commissioner ruled that the product was subject to GST and disallowed the taxpayer's objection to the ruling.

The product is for people who suffer from sleep deprivation and snoring, and is designed to help associated problems by supporting the body and encouraging certain body positions while a person is asleep.

The issue was whether the supply of the product was a medical aid that fell within one of the items described in Schedule 3 to the GST Act such as "bed restraints" (item 64), "backrests, leg rests and footboards for bed use" (item 67), "night-time positioning equipment modification" (item 82), or "cushions specifically designed for people with disabilities" (item 87).

Held

The AAT applied the "essential character" test, and held that the product only fell within the description of "night time positioning equipment modifications" in item 82 of Schedule 3 to the GST Act. It found that a mattress is classed as night time positioning equipment, and that the product modified the shape of the mattress to accommodate the particular requirement of a person with a disability. In this respect the AAT differed from the Commissioner, who appears to have classed the product itself as only night time positioning equipment (as distinct from the modifications to, which are GST-free).

The AAT did not agree with the Commissioner's qualification that "night time positioning equipment should be construed as a reference to equipment designed to modify a person's position while in bed".

As it fell within the definition of a "night time positioning equipment modification", the supply of the product was held to be GST-free.

Australian Style Investments Pty Ltd as Trustee for the Australian Style Investments Unit Trust and Commissioner of Taxation [2013] AATA 847

The AAT in *Australian Style Investments Pty Ltd as Trustee for the Australian Style Investments Unit Trust and Commissioner of Taxation* [2013] AATA 847 has held that an irrevocable proxy was not a financial supply under Regulation 40-5.09 of the GST Regulations.

Facts

Mr Nicholas Bolton was the sole director of the taxpayer, which held almost 20% of the units in BrisConnections, a managed investment scheme registered under the Corporations Act and listed on the ASX. The scheme was granted a concession by the Queensland State Government in respect of the Brisbane Airport Link Project.

Many retail investors had bought shares in BrisConnections for a fraction of a cent, not realising that each share came with a deferred $2 liability. Mr Bolton, through the taxpayer, acquired many of these shares (as well as the attached $150 million liability), becoming a major shareholder.

Mr Bolton requisitioned an extraordinary general meeting to vote on various resolutions, including the winding up of the trusts. Mr Bolton then sold his "no" vote, by way of a deed, to Thiess and John Holland (**TJ**) who were participants in an unincorporated joint venture formed for the purpose of the design and construction of the project.

Under the deed, the taxpayer would deliver to TJ irrevocable proxies which would vote against the resolutions to be considered at a meeting of unit holders in the trusts. In return, TJ would pay the taxpayer a sum of $4,500,000.

The primary issue was whether the supply made by the taxpayer upon execution of the deed was a "financial supply" under the GST Act, and thus input taxed, or whether it was a "taxable supply". In particular, the AAT considered whether the supply was an "interest in or under…[s]ecurities" for the purposes of regulation 40-5.09 of the GST Regulations.

Held

The AAT determined that the "interest" provided by the taxpayer was not an "interest in or under…[s]ecurities" for the purposes of Regulation 40-5.09(3). Consequently, the supply was not a "financial supply, but a "taxable supply".

The AAT considered that the "interest" was to be characterised according to the legal effect of the deed. The AAT considered that the interest provided was a chose in action in relation to rights arising under the deed, including the promise to deliver the irrevocable proxies.

The AAT found that the phrase "interest in or under" ought to be read as a whole, and requires an "immediate nexus" with the matters enumerated in the regulations, such that the interest must reside within those matters; in this case, the "securities".

The interest, or rights, provided to TJ under the deed were contractual rights, only enforceable against the applicant. As such , the interest provided by the taxpayer was not enforceable at law under such "[s]ecurities". For the purposes of the Regulation 40-5.09, the interest supplied must be one which was either property of the supplier immediately before the supply or was created by the supplier in making the supply. The rights supplied by the taxpayer did not fall within these boundaries.

Interim decision impact statement: MBI Properties Pty Ltd v FC of T

The Tax Office has released an interim decision impact statement on the Full Federal Court decision in MBI Properties Pty Ltd v FC of T 2013 ATC ¶20-420 (covered in our October 2013 GST Bulletin).

In that case, the Full Federal Court held that the recipient of a GST-free supply of a going concern was not liable to an increasing adjustment because there was no "continuing supply" by the vendor after sale of the reversion of the lease of residential premises to the recipient.

Tax Office view of decision

On 15 November 2013 the ATO applied to the High Court of Australia for special leave to appeal the decision of the Full Federal Court. Subject to this application, the decision means that purchasers of leased residential premises as a GST-free going concern would not be liable for an increasing adjustment under Division 135 of the GST Act.

The ATO is continuing to consider the other potential implications of the decision, but in particular is concerned that the decision might mean that:

(a) following the sale of a reversion, the incoming landlord of commercial premises is not liable for GST on the rent payable by the tenant under the lease granted by the vendor of the reversion;

(b) the tenant of commercial premises would not be entitled to input tax credits in relation to rental payments after the sale of a reversion;

(c) alternatively, an entity that grants a lease in, but later sells commercial premises, may remain liable for GST on rental payments received by the purchaser following a sale of the premises; and

(d) a purchaser of leased residential premises can claim input tax credits for costs associated with the rental of the premises, so far as the lease originally granted by the vendor remains on foot and no new or further lease is granted by the purchaser; and

(e) property owners are not able to sell leased premises as a GST-free going concern.

Reliance on GST Determinations

1. ***No penalty***

The ATO does not intend to revise its current published views about the sale of lease premises and leased commercial premises, as set out in GSTD 2012/1 and GSTD 2012/2. Taxpayers may continue to lodge returns on the basis of these published views and will be protected from having to pay any underpaid tax, penalty or interest if those views are determined to be incorrect.

2. ***Refunds***

Taxpayers who have self-assessed GST net amounts on the basis of the Commissioner's current published views may consider that the Full Court's decision means that they are entitled to a refund.

To preserve entitlements to refunds for pre-1 July 2012 transactions, taxpayers can notify the ATO of their intention to claim the refund at a later date, pending the outcome of the current High Court application.

PS LA 2013/6: Collection of debts from groups and joint ventures

The ATO has released Practice Statement PS LA 2013/3 regarding the collection of debts from groups and joint ventures.

A GST group or a GST joint venture has a representative member responsible for payment of the group's indirect tax amounts. Even so, each member of a group is jointly and severally liable. The ATO will initially pursue the representative member of the group, but if appropriate can choose to pursue recovery from one or more members of the group. This decision will be based on the most expedient means for recovery.

The Commissioner may defer the time for payment of an indirect tax amount in accordance with the policy outlined in *Practice Statement* PS LA 2011/14 - "General debt collection powers and principles".

The Commissioner may grant an arrangement to pay the indirect tax amounts by instalments in accordance with the policy in *Practice Statement* PS LA 2011/14.

Carbon tax repeal - GST

On 13 November 2013, the government introduced a series of bills into parliament to repeal the carbon tax from 1 July 2014. This follows draft legislation that was released for public consultation on 15 October 2013.

According to a Government Press Release, if passed, the proposed legislation will include a definition of "eligible emissions unit" in the GST Act to ensure that the GST-free status continues to apply to the categories of emissions units that continue to exist. This definition effectively excludes redundant carbon units and prescribed international units. The GST-free treatment will remain for units issued prior to the repeal.

Addenda to GST Rulings this month

GSTR 2013/D2: supplies made by an operator of a "moveable home estate". The addendum clarifies the application of the date of effect and also extends the due date for comments to 20 December 2013. This is a draft ruling and the public is encouraged to make submissions.

Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz

The Austrian Court of Justice in *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz* has held that the household operation of a photovoltaic installation with no storage capacity is an "economic activity" of the installation operator, even though the power generated is below the power consumed by the house.

Facts

The taxpayer installed a photovoltaic cell on the roof of his house. The installation had no storage capacity, so all electricity produced was supplied to the electricity network under a contract. The network paid market price for the electricity, which was subject to VAT. The taxpayer then bought electricity sufficient to run the house back from the network at the same price as the price of supply. The electricity supplied to the network was less than that which the taxpayer bought back for the operation of the house.

The taxpayer applied for reimbursement of the VAT (20% in Austria) he paid in connection with the purchase of the photovoltaic installation.

At first instance, the Finanzamt ruled that the taxpayer was not entitled to deduct the input VAT on the basis that he had not carried out any economic activity. The taxpayer appealed, claiming that he was carrying out an economic activity. The appeal was upheld. The respondent challenged the ruling

before the Verwaltungsgerichtshof, which referred an identified issue to the Court of Justice for a preliminary ruling.

The Court of Justice was asked to consider whether the operation of a network-connected photovoltaic installation installed on a private residence, with no independent power storage capability, which generates less power that the total quantity of power privately consumed by the household, is an "economic activity" of the installation operator.

Held

"Economic activity" is defined under European Union law to include "all activities of… persons supplying services…for the purpose of obtaining income therefrom on a continuing basis". Supply of goods is defined to include the supply of electric current.

The case law shows that the scope of the term "economic activities" is very wide. Accordingly the operation of a photovoltaic installation must be regarded as falling within the definition if it is carried out for the purpose of obtaining income on a continuing basis.

The Court reasoned that "income" must be understood as meaning remuneration received as consideration for the activity carried out. This was satisfied by the contract between the taxpayer and the network for the supply of electricity for consideration. The Court determined that it was irrelevant whether or not the exploitation of property was intended to make a profit.

The contract between the taxpayer and the network was for an "indefinite duration", satisfying the requirement that the supply take place on a continuing, not just an occasional, basis.

The Court determined that it was irrelevant that the amount of electricity produced by the installation was lower than that consumed by the operator. This was on the basis that the supply of electricity to the network clearly fell within the definition of "economic activities". The Court also noted that it may well have been impossible to identify the fungible property supplied by the taxpayer after it has been fed into the network, and then supplied back to the taxpayer. That each activity occurred independently of the other meant that the relative amounts of supply became irrelevant.

This decision is in contrast with the Australian position that for an individual to be considered as "carrying on an enterprise" there must be a reasonable expectation of profit or gain.

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