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GST Bulletin

August 2015 GST developments

WHAT YOU NEED TO KNOW

This Bulletin outlines Australian GST developments in August 2015, which may impact your business, including:

Relevant area	At a glance	Relevant to
Division 11– creditable acquisitions	*Rio Tinto Services Limited v Commissioner of Taxation* [2015] FCAFC 117 - the Full Federal Court has dismissed the taxpayer's appeal concerning its entitlement to input tax credits (**ITCs**) for certain acquisitions relating to residential accommodation provided in connection with its mining operations in Western Australia.	Taxpayers making input taxed supplies
Division 93 – time limits on entitlements to input tax credits	Decision Impact Statement: *The Trustee for SBM Trust v. Federal Commissioner of Taxation* – the Commissioner has issued a decision impact statement outlining the Commissioner's response to the case involving the entitlement to ITCs for creditable acquisitions made prior to the commencement of a four year time limit on the claiming of ITCs.	All taxpayers
Division 165 – anti-avoidance	ATO Draft Practice Statement Law Administration PS LA 2005/24 - the Commissioner issued a draft practice statement providing instructions and practical guidance to Tax officers on the application of Part IVA and other General Anti-Avoidance Rules, proposing to make a determination under, among other things, section 165-40 of the GST Act.	All taxpayers

Rio Tinto Services Limited v Commissioner of Taxation [2015] FCAFC 117

The Full Federal Court in *Rio Tinto Services Limited v Commissioner of Taxation* [2015] FCAFC 117 has dismissed the taxpayer's appeal against the Federal Court judge's earlier finding, covered in our February 2015 GST Bulletin, holding that the taxpayer was not entitled to input tax credits (**ITCs**) for certain acquisitions relating to residential accommodation provided in connection with its mining operations in Western Australia.

Facts

Rio Tinto Services Ltd (**Rio Tinto**) is the representative member for the Rio Tinto Ltd GST group, which includes Hamersley Iron Pty Ltd (**Hamersley**) and Pilbara Iron Company (Services) Pty Ltd (**PICS**). As the scheme of the GST Act is to treat the GST group as if it were a single entity, Rio Tinto, as the representative member, is entitled to ITCs on creditable acquisitions made by Hamersley and PICS.

Rio Tinto claimed that it was entitled to ITCs for certain acquisitions made by Hamersley and PICS in providing, and maintaining, residential accommodation for Hamersley's mining operations workforce in the Pilbara region. The provision of residential accommodation for lease is an input taxed supply under section 40-35 of the GST Act.

The issue in the appeal, as it was before the Federal Court, was whether the acquisitions were made solely or partly for a "creditable purpose", and if only made partly for a "creditable purpose", the amount of the credit to which Rio Tinto was entitled.

The Commissioner contended, as the Federal Court held, that ITCs were denied to Rio Tinto on the basis that the acquisitions where wholly related to making supplies that would be input taxed, being the supply of residential accommodation by way of lease, and therefore, were not acquired for a creditable purpose under section 11-15(2)(a) of the GST Act.

The acquisitions the subject of the test case (for the month of October 2010) included expenditures grouped in the following categories:

a) construction and purchase of new housing;

b) refurbishment, minor works, maintenance and repairs of the residential housing;

c) mould removal, remediation and general hygiene cleansing; and

d) cleaning housing, landscaping grounds and pool maintenance.

Hamersley and PICS did not make a profit on the leasing of the accommodation. Rio Tinto's revenue in respect of its iron ore production represented 99.88% of the total revenue derived from iron ore production and the provision of remote housing.

Similarly, the operating expenditure of its iron ore production represented 97.65% of the total operating expenditure derived from its iron ore production and provision of remote housing.

Rio Tinto argued that the acquisitions were made wholly for a "creditable purpose" because the supply of the residential accommodation was not an end commercial objective in itself, but was wholly

incidental to Hamersley's mining operations as a necessary and essential part of those operations. Its alternate case was that an apportionment was required "to the extent that" the acquisitions also relate to making supplies of residential premises that would be input taxed. On a revenue basis that would provide an entitlement to 99.88% of the ITCs.

Held

The Full Federal Court held that the acquisitions fell within the scope of section 11-15(2)(a) of the GST Act, and therefore, the acquisitions were not made for a creditable purpose.

The effect of section 11-15(2)(a) is to exclude an acquisition to the extent that it relates to a supply that would be input taxed from the ambit of creditable purpose.

The Full Federal Court agreed that the supply of the premises for lease was for the broader business purpose of carrying on the enterprise. However, while that circumstance may explain why an acquisition (relating to a supply that would be input taxed) may have been made in carrying on the enterprise, it does not alter the fact that the acquisitions in question all related to the making of the supplies of the residential premises by way of lease. The terms of section 11-15(2)(a) do not depend upon the reason or purpose of the enterprise making the supply or making the anterior acquisition. Further, the provision does not turn upon a characterisation of the purpose, or the occasion of the purpose, of the supplier but upon a characterisation of the extent to which the acquisition relates to the subsequent supply.

The application of section 11-15(2)(a) requires, therefore, the precise identification of the relevant acquisition and a factual inquiry into the relationship between that acquisition and the making of supplies that would be input taxed. An acquisition will not be for a creditable purpose to the extent that the facts disclose that the acquisition relates to the making by the enterprise of supplies that would be input taxed.

Apportionment was not considered as the acquisitions related wholly to the making of supplies that would be input taxed (ie they all wholly related to the supply of residential premises by lease).

Decision Impact Statement: *The Trustee for SBM Trust v. Federal Commissioner of Taxation*

The Commissioner has issued a Decision Impact Statement outlining the Commissioner's response to *The Trustee for SBM Trust v. Federal Commissioner of Taxation* [2015] AATA 174 (covered in our March 2015 GST Bulletin). The case involved the entitlement to ITCs for creditable acquisitions made prior to the commencement of a four year time limit on the claiming of ITCs.

The AAT decided that the taxpayer was no longer entitled to claim ITCs for the relevant acquisitions made in 2005 and 2006, even though the four year time limit imposed by section 93-5 of the GST Act was enacted after the taxpayer acquired the creditable acquisitions. The Tribunal held that the focus of the operation of Division 93 is on the timing of the lodgement of the return or the timing of making an assessment and not on the timing of the acquisition. In the taxpayer's case, the acquisitions were taken into account in the revised BASs given to the Commissioner in October and November 2012 (that is, after 7.30pm on 12 May 2009, the operative date of Division 93) so section 93-5 applied, and the

taxpayer had ceased to be entitled to the ITCs.

Finally, the Tribunal noted that even if section 93-5 was put aside, section 29-10(4), which concerns attributions, would not operate to allow the taxpayer to claim ITCs in those periods. Once the original BASs were lodged without taking into account the creditable acquisitions that could have been included in them, the ITCs were no longer attributable to those tax periods.

The Commissioner considers that the Tribunal's decision gives rise to the following GST outcomes:

(a) section 93-5 of the GST Act imposes a time limit on a taxpayer's entitlement to claim ITCs for GST returns lodged, or assessed, from 12 May 2009, regardless of when the relevant acquisitions were made. It follows that, if a taxpayer is not entitled to claim ITCs, as the four year time limit has passed under section 93-5 of the GST Act, then there can be no attribution of those ITCs under section 29-10(4).

(b) the Tribunal's comments about the operation of section 29-10(4) of the GST Act, which concerns attribution, were not necessary to resolution of the issue in dispute in this case. The Commissioner proposes to maintain his existing view that section 29-10(4) of the GST Act does not prevent an entity revising an earlier GST return to claim an ITC that the entity is otherwise entitled to claim, until determined otherwise by a Tribunal or Court.

Draft Practice Statement Law Administration PS LA 2005/24 - application of General Anti-Avoidance Rules

The Commissioner has issued draft practice statement law administration PS LA 2005/24 for the purpose of providing instructions and practical guidance to Tax officers on the application of Part IVA and other General Anti-Avoidance Rules proposing to make a determination, among other things, under section 165-40 of the GST Act.

Division 165 of the GST Act contains general anti-avoidance provisions and gives the Commissioner the discretion to negate a "GST benefit" that an entity obtains from a scheme to which Division 165 of the GST Act applies. This discretion is contained in section 165-40 of the GST Act and is largely modelled on Part IVA of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**).

The draft practice statement notes that until case authority on Division 165 of the GST Act develops, Part IVA cases serve as a useful guide to the interpretation and application of Division 165 of the GST Act. However, while Division 165 of the GST Act and Part IVA of the ITAA97 are generally similar in their objects, structure and operation, there are key differences between Part IVA and Division 165 of the GST Act, some of which are outlined below.

(a) A special feature of Division 165 of the GST Act, absent from Part IVA, is that section 165-10(3) of the GST Act provides that a GST benefit can arise even if an entity could not have engaged economically in activities other than the scheme activities. This means an entity will not be able to argue against the existence of a GST benefit on the basis that it would not have entered into any type of transaction had the actual scheme not been entered into.

(b) Division 165 of the GST Act contains an alternative basis for a tax avoidance conclusion, being

the principal effect test in subparagraph 165-5(1)(c)(ii) of the GST Act. The principal effect test focuses on the result of a scheme rather than on the purpose attributed to those entering into or carrying out the scheme. There is no Part IVA equivalent to this test. Part IVA applies to a scheme only on the basis of it being concluded that a relevant person has the requisite dominant purpose.

The last day for public comment is 25 September 2015.

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