

ATO releases Decision Impact Statement for DoT case

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The Australian Taxation Office (ATO) has released its Decision Impact Statement (DIS) following the Victorian Department of Transport (DOT) case and – predictably - has sought to narrow the interpretation of the Full Federal Court’s decision, at least in the context of rebate and subsidy schemes. However, the DIS also indicates that the ATO is starting to appreciate the wide ranging implications this important case will have for the GST consequences of multiparty arrangements which may see changes in the way government concession programs are funded and structured. There will also be broader implications for the way key sectors including transport, health and education are funded and delivered by the public and private sectors.

The DoT case

You will recall that the DoT case centred on whether subsidy payments made by DOT to taxi –cab operators for the transportation of vulnerable persons under the Multi Purpose Taxi Program (MPTP) amounted to payment for a creditable acquisition made by DOT and, as a consequence, entitled DOT to claim an associated input tax credit (ITCs).

The majority of the judges in the Full Federal Court determined that DOT was in fact making creditable acquisitions from the taxi-cab operators and, as a consequence was entitled to claim applicable ITCs. The court concluded that the relevant taxi-cab operators were making 2 supplies, being the supply of transport to the passenger (individuals entitled to the subsidy under MTPT), and a supply to DOT being the service of transporting the eligible MPTP members. The court was of the view that the payments by DOT to the taxi-cab operators amounted to consideration for the purposes of the GST Act because the payments were made in

connection with a supply which was the service of transporting MTPT members.

The Commissioner sought special leave to appeal to the High Court, and this was denied in late 2010. Since then, we have been eagerly anticipating the ATO’s response.

What does the Decision Impact Statement (DIS) say?

Unsurprisingly, the ATO implies in the DIS that, in respect of rebate and subsidy type arrangements, there will be no broad acceptance that government agencies will be entitled to input tax credits, rather that all factual circumstances will need to be taken into account. Simply put, despite the useful, general and arguably very clear guidance the Court gave, its application must nonetheless be determined on a case-by-case basis. However, based on its interpretation of the DoT judgments (and in particular the means of payment used by an eligible member), the ATO has set out its view of the necessary (and quite strict) conditions that must exist in a subsidy arrangement so that a creditable acquisition will arise for a government agency making the payments:

1. subsidy payments are made to an entity (the supplier) by a government department or agency (the agency) in circumstances where the supplier supplies goods or services to a third party;
2. the supplier obtains, **before** each individual supply of goods or services is made, **advance authorisation** from the agency that the agency

would make the payment to the supplier if the goods or services are supplied (our emphasis); and

3. the supply by the supplier to the third party promotes the objects or functions of the agency.

Point 2 appears to create a worrying restriction. If seen in the context of the overall approach taken to multiparty arrangements (such as in GSTR 2006/9 relating to supplies and GSTR 2006/10 relating to insurance arrangements) it suggests that, in practical terms, the arrangement must not only involve eligibility processes for both suppliers and recipients, but that the recipient must hold, at the time of receiving the supply, a means of proving “advance authorisation” to the supplier that the agency will pay the subsidy (if not holding the means of payment itself).

In the circumstances of the DoT case and the Victorian taxi scheme, this condition was met by the member holding the payment card. It should logically also extend to arrangements where payment is made by the recipient by Cabcharge vouchers.

However, eligibility and payment authorisation arrangements vary widely across rebate and subsidy schemes depending on the potentially large number of suppliers and the eligibility process for recipients. Few involve arrangements where the recipient is provided with this kind of specific “advance authorisation” of payment for an individual supply. So, if the ATO is to apply this approach literally despite the DoT case, it is hard to imagine many rebate and subsidy arrangements – other than those that are very similar to the DoT case - where the ATO will accept that agencies have an input tax credit entitlement.

The ATO has indicated that it is intending to finalise the various audits it has been sitting on for the lengthy DoT court process as soon as possible and that it will be in contact with the relevant agencies within the next month. The ATO will also be looking at amending a number of public rulings that directly or indirectly touch on the subject.

It will be only then that we will be able to determine how strict the ATO intends to be and whether taxpayers may need to resort to the courts to get even greater clarity.

Potential implications for third party GST-free supplies

Throughout the DoT court case, the ATO argued that the arrangements merely involved the relevant agency paying third party consideration for a taxi supply made to someone else. While it lost on that argument, the DIS indicates that the ATO will still seek to restrict those rebate and subsidy circumstances where it will accept that a creditable acquisition arises based on a strict factual framework.

On the other hand, we understand that, in light of the findings of the DoT case, the ATO is currently looking to review scenarios that it has previously accepted involved third party consideration arrangements such as certain aspects of health insurance. This is particularly significant where the third party arrangements involve a GST-free supply made to the recipient as the ATO may now seek to apply GST on transactions related to these supplies.

Those agencies that:

- receive funding in respect of health and education supplies made to the community
- provide rebates or subsidies with respect to the provision of GST-free or out of scope services e.g. community services, Council rates, water concessions

should be reviewing these arrangements and any rulings received in respect of these arrangements to determine whether the DoT case – or at least the ATO's view of it – is likely to pose a problem into the future.

Going forward

The ATO is seeking comments on the implications of the decision by 12 April 2011.

If you are considering preparing a submission or contacting the ATO around any of the issues raised in the Statement, please do not hesitate to contact one of our GST Government specialists listed on this page.

Further information:

Kirsten Schirmer - (02) 8266 8880 or kirsten.schirmer@au.pwc.com

Sophia Varelas - (03) 8603 3247 or sophia.varelas@au.pwc.com

Michael Flanderka - (07) 3257 8335 or michael.flanderka@au.pwc.com

Amanda Hocking - (08) 8218 7082 or amanda.hocking@au.pwc.com

Todd Wills - (02) 6271 3554 or todd.wills@au.pwc.com

Michelle Tremain - (08) 9238 3403 or michelle.tremain@au.pwc.com