

PwC Alert

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you like to grow?*

Release of draft addendum of appropriations ruling

The Australian Taxation Office (ATO) has released their draft addendum to the Appropriations ruling (GSTR 2006/11DA) following the TT-Line case. But it may be that they need to go back to the drawing board...

TT-Line case and its consequences

After the TT-Line case was handed down in June this year, it appeared that, while the case involved very specific circumstances, the judges had their own very firm and potentially very strict views on how section 9-15(3)(c) of the GST Act and the exemption for appropriations should operate.

You will recall that the TT-Line case concerned the payment of a 'rebate' by the Commonwealth to the taxpayer (TTLine), which operates a passenger, vehicle and freight ferry service. The rebate payment was made direct to the Tasmanian government boy, TT-Line, pursuant to a program established for the purpose of reducing the cost of seagoing travel for eligible passengers and vehicles. It works much like the concession arrangements for specific consumer groups in the transport and energy markets. The majority of judges held that the Commonwealth payment was not exempt from the GST as an appropriation. It was held that the payment was not "specifically covered" by an appropriation" on the basis that, while the purpose of the payment was specified, the express payment was not. The fact that the payment could well be made to a non-government entity also influenced the judges' view that the payment was not an appropriation.

At first, it appeared that the TT-Line case might well turn GSTR 2006/11 on its head. This would be a complete turnaround from the current approach where most large funding flows are outside of the scope of the GST as appropriations. The implications of the judges' observations, particularly about what payments would "benefit" a department and therefore be appropriations for GST purposes were particularly unsettling and it appeared that many of these very large funding flows between the various levels of government might well be subject to the GST.

When the ATO eventually issued its Decision Impact Statement and a (limited circulation) Consultation Paper to the States for comment, it looked like it was preparing for a long

haul of negotiations. The principles set out in the ATO's Consultation Paper, if implemented, were going to involve a fundamental rethink about how GST would and should impact the everyday billion dollar funding machinations of government.

At last - the Draft Addendum

However, in its first draft addendum GSTR 2006/11DA, the ATO have severely - and sensibly - clawed back these principles. However, it may still have some work to do.

Of particular note, new paragraph 48A states:

*...paragraph 9-15(3)(c) does not extend to a payment, pursuant to an appropriation for the supply of services which **can**, under the terms of the appropriation, be supplied by a government related entity or a non-government related entity. Therefore if the payment that is made by a government related entity can under the terms of the appropriation be payable to **either** a government related entity or a non-government related entity then section 9-15(3)(c) will not apply...(our emphasis)*

If an Appropriation Act sets out a particular purpose (say \$120 million) and specifies a particular amount for government entities (say \$100 million) and an amount for non-government entities (\$20 million), how much of the payment will be regarded now as an appropriation for GST purposes under the draft addendum? Is it none (which is suggested by their Example 2A)? or \$100 million?

If the answer is "none", then much of States' budget funding dealing with health, aged and community care, education and transport will potentially be subject to GST and the cash flow crisis that will entail. This result can't be what the legislative drafters intended for section 9-15(3)(c).

However, we don't believe that the answer is clear from the terms of the draft Addendum and we understand that the State Treasuries have taken the issue back to the ATO for reconsideration.

We are hoping that the ATO will reissue another draft so that we can be confident that the impact of the TT-Line case on the operation of section 9-15(3)(c) is limited to the very specific facts from which the case arose. In this way, government to government payments will remain excluded from the GST and the everyday machinations of government and funding can continue to operate unhindered.

What should agencies be doing now?

In the meantime, the ATO has clearly stated in the draft addendum that any changes to GSTR 2006/11 will only take effect from 1 July 2011. However, payments made by governments after 1 July 20011 are only made as a result of the budget processes and cycles that are already underway in many States. Documents and instructions that will support the relevant Appropriations Acts that will apply after July 2011 are already being considered if not drafted.

To avoid any unanticipated GST consequences for government funding, we recommend that agencies - as a matter of priority- review all their funding programs and who is likely to be receiving the funds as part of these processes. In the event that the funding is likely to be received by non-government bodies then the structure of the appropriation, the Budget Papers and any other supporting documentation will need to be drafted with great care and attention.

To have a deeper discussion about what the above means for your business, please contact your usual PwC contact or:

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