# *Indirect Tax Update*

*1 April 2014*

## *GST refund legislation introduced*

On 27 March 2014, *Tax Laws Amendment (2014 Measures No 1) Bill 2014* was introduced into the House of Representatives. Schedule 2 to the Bill contains the proposed changes to the GST refund rules which were originally announced by the previous government on 17 August 2012. The measures in the Bill are virtually identical to the most recent exposure draft, which was released on 17 February 2014.

Broadly, the Bill proposes to replace the existing restriction on GST refunds in s105-65 in Schedule 1 to the *Taxation Administration Act 1953* with a new Division 142 in the *A New Tax System (Goods and Services Tax) Act 1999*.

Proposed Division 142 provides that, subject to certain exceptions, where an assessed net amount takes into account an amount of GST exceeding that which is payable, then so much of that excess (after adjustments and corrections) that has been passed on to another entity, is taken to have always been payable on a taxable supply (and as a consequence, not refundable) until, and to the extent that, the taxpayer reimburses the other entity for the passed on GST.

The Bill also contains measures to restore review rights under Part IVC of the TAA, addressing the decision of the Administrative Appeals Tribunal in *Naidoo v Commissioner of Taxation [2013] AATA 443* that a decision made by the Commissioner under s105-65 was not part of the assessment process, and therefore not reviewable under Part IVC.

The amendments will apply in relation to working out net amounts for tax periods starting on or after the day following Royal Assent. This is a welcome departure from earlier versions of the proposed measures, which contained a retrospective start date. Section 105-65 continues to apply in relation to net amounts for tax periods commencing on or prior to Royal Assent of the Bill, and will be repealed from 1 July 2018.

## *Cross-border supplies – tour operators*

In *ATS Pacific Pty Ltd v Commissioner of Taxation [2014] FCAFC 33*, the Full Federal Court has considered the GST implications for an Australian resident inbound tour operator which made supplies to non-resident travel agents. The Full Federal Court unanimously dismissed the taxpayer's appeal and upheld the Commissioner's cross appeal from the decision of the primary judge in *ATS Pacific Pty Ltd v Commissioner of Taxation [2013] FCA 341*.

In essence, the facts of the case were as follows:

- Non-resident travel agents selected a variety of services (referred to in the judgments as "Products") through the taxpayer's website and compiled an itinerary for their non-resident tourist clients.
- The taxpayer booked the relevant Products with the Australian provider (eg hotel, car hire firm etc).
- The taxpayer charged the non-resident a fee which included the cost of the Products plus a margin.
- The Australian providers supplied the Products to the non-resident tourists once they reached Australia.

The principal issue in the case was whether the primary judge had erred in her characterisation of the supplies made by the taxpayer to the non-resident travel agents.

Edmonds J, with whom Pagone and Davies JJ agreed, held that it was open to the primary judge to find that the supply made by the taxpayer to the non-resident travel agents was to be properly characterised as a promise by the taxpayer that it would ensure that when the tourists came to Australia, they would be provided with the Products the tourists had paid for, and that there was no error on the part of the primary judge in so finding.

Edmonds J went on to consider whether the supplies of the accommodation or non-accommodation components were GST-free pursuant to section 38-190 of the GST Act. The court confirmed that the accommodation component of the supplies was properly characterised as a supply of real property, and that insofar as such supplies are characterised as a promise that the hotel proprietors would provide accommodation to the tourists, they are not GST-free. In relation to the non-accommodation component, the supplies are excluded from GST-free treatment under s38-190 on the basis that they are the supply of a right to acquire something the supply of which would be connected with Australia and would not be GST-free. Accordingly, the taxpayer's appeal was dismissed.

The Commissioner's cross appeal concerned the decision of the primary judge that the taxpayer made two separate supplies (being the supply of the Products, and a separate supply of arranging services). The Court found that it was not open to the primary judge to find or conclude that there were two supplies, when it was not in dispute that the Australian providers supplied the Products, and not the taxpayer. Rather, the arranging or packaging of the tour was but a component of the one "critical supply", being that ATS would "ensure that the Products were supplied to the tourists". Accordingly, the Commissioner's cross-appeal was allowed, with the Court concluding that the taxpayer made single taxable supplies to the non-resident tour operators.

## *Let's talk*

For a deeper discussion of how these issues might affect your business, please contact:


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