client alert | explanatory memorandum

April 2017

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 10 March 2017.

Ride-sharing drivers must register for GST

Not surprisingly, the ATO has moved quickly to state its views on the implications of the recent Federal Court decision regarding Uber. The Court held that the UberX service supplied by the ride-sharing network's drivers constitutes the supply of "taxi travel" within the meaning of s 144-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act), effectively meaning that Uber drivers need to register for GST.

The ATO agrees that ride-sharing (also known as ride-sourcing) is taxi travel within the meaning of the GST law. As a result, the ATO says taxpayers who provide ride-sharing services must:

- keep records;
- have an Australian Business Number (ABN);
- register for GST, regardless of how much they earn (that is, the $75,000 GST turnover registration threshold does not apply – drivers must register from dollar one of their ride-sharing income);
- pay GST on the full fare amounts received from passengers;
- lodge activity statements; and
- include all income from ride-sharing in their tax returns.

The ATO says drivers are entitled to claim income tax deductions and GST credits (for GST paid) on expenses apportioned to the ride-sharing services they supply. Where the ATO's data-matching activities identify people who provide ride-sharing services, it will write to them to explain their tax obligations.

Source: ATO, Ride-sourcing is taxi travel, 17 February 2017, https://www.ato.gov.au/Tax-professionals/Newsroom/Your-practice/Ride-sourcing-is-taxi-travel/.

Tax offset for spouse super contributions: changes from 1 July 2017

Currently, an individual can claim a tax offset up to a maximum of $540 for contributions they make to their spouse's eligible superannuation fund if, among other things, the total of the spouse's assessable income, total reportable fringe benefits and reportable employer super contributions is under $13,800.

The ATO reminds taxpayers that from 1 July 2017, the spouse's income threshold will increase to $40,000. The current 18% tax offset of up to $540 will remain and will be available for any individual, whether married or de facto, contributing to super for a recipient spouse whose income is up to $40,000. As is currently the case, the offset gradually reduces for incomes above $37,000 and completely phases out when income exceeds $40,000.

Individuals will not be entitled to the tax offset when the spouse receiving the contribution:

- has exceeded their non-concessional contributions cap for the relevant year; or
- has a total superannuation balance equal to or more than the general transfer balance cap ($1.6 million for 2017–2018) immediately before the start of the financial year in which the contribution was made.

The ATO says the intent of this change is extending the current spouse tax offset to allow more couples to support each other in saving for retirement.

Source: ATO, Change to spouse tax offset, 21 February 2017, https://www.ato.gov.au/Individuals/Super/Super-changes/Change-to-spouse-tax-offset/.

ATO targets restaurants and cafés, hair and beauty businesses in cash economy crackdown

The ATO is visiting more than 400 businesses across Perth and Canberra in April as part of a campaign to help small businesses stay on top of their tax affairs. Assistant Commissioner Tom Wheeler said the ATO is focusing on businesses operating in the cash and hidden economies, with the aim of ensurig fairness for all businesses and the community.

He said ATO officers will be visiting restaurants and cafés, hair and beauty and other small businesses in Perth and Canberra to make sure their registration details are up to date. “These industries are on our radar because they have ready access to cash, and this is a major risk indicator”, Mr Wheeler said.

Mr Wheeler said the industries the ATO is visiting have some of the highest rates of concerns reported to the ATO from across the country. He said the visits are part of an ongoing ATO program of work, which is making its way around the country. So far, the ATO has met businesses in Sydney, Adelaide, Melbourne and the Gold Coast.

Source: ATO, Tax officers hit the streets to help small businesses, 7 March 2017, https://www.ato.gov.au/Media-centre/Media-releases/Tax-officers-hit-the-streets-to-help-businesses/; Working with industry, 11 January 2017, https://www.ato.gov.au/general/building-confidence/in-detail/working-with-industry/.

Super reforms: $1.6 million transfer balance cap and death benefit pensions

Draft Law Companion Guideline LCG 2017/D3

On 13 February 2017, the ATO released Draft Law Companion Guideline LCG 2017/D3. This Draft Guideline deals with the treatment of superannuation death benefit income streams under the $1.6 million pension transfer balance cap from 1 July 2017.
Where a taxpayer has amounts remaining in superannuation when they die, their death creates a compulsory cashing requirement for the superannuation provider. This means the superannuation provider must cash the superannuation interests to the deceased person’s beneficiaries as soon as possible. The payment of superannuation interests after the person’s death is called a superannuation death benefit.
Where a superannuation interest is cashed to a dependant beneficiary in the form of a death benefit income stream, a credit arises in the dependant beneficiary’s transfer balance account under s 294-25(1) of the *Income Tax Assessment Act 1997* (ITAA 1997). The amount and timing of a transfer balance credit for a death benefit income stream depends on whether the recipient is a reversionary or non-reversionary beneficiary.

Reversionary vs non-reversionary pensions

The Draft Guideline states that a reversionary death benefit income stream is an income stream that reverts to the reversionary beneficiary automatically upon the super fund member’s death. That is, the income stream continues, with the entitlement to it passing from one person (the deceased member) to another (the dependant beneficiary) under the rules of the fund. On the other hand, a non-reversionary death benefit income stream is a new superannuation income stream created and paid to a dependant beneficiary where the trustee exercises a power or discretion to determine an amount in the beneficiary’s favour: see Taxation Ruling TR 2013/5.

Transfer balance credit: reversionary pension

For a reversionary death benefit income stream, a credit will arise in the recipient’s transfer balance account 12 months after the original super fund member’s death. If the reversionary income stream commenced before 1 July 2017, the credit will arise on the later of 1 July 2017 or 12 months after the death of the original member.
The credit that will arise in the reversionary beneficiary’s transfer balance account is equal to the value of the superannuation interest on the day when it first becomes payable to the reversionary beneficiary (ie at the date of the death); or just before 1 July 2017 if the income stream commenced before that time.

Transfer balance credit: non-reversionary pension

For a non-reversionary income stream, a credit will arise in the recipient’s transfer balance account on the later of 1 July 2017 or when the person becomes entitled to be paid the income stream. The credit is the value of the superannuation interest at the time it commences, or just before 1 July 2017 if it commenced before that time. The ATO notes that the value for non-reversionary pensions may include any investment earnings that accrued to the deceased member’s interest between the date of their death and the time the death benefit income stream commences.

Example

Nathaniel commences a pension worth $1.4 million on 1 October 2017. The rules of the pension do not provide that it may revert to another person on Nathaniel's death. Nathaniel dies on 1 January 2018. The value of the superannuation interest supporting the pension at the time of Nathaniel's death, 1 January 2018, is $1.3 million. Nathaniel had no other superannuation interests.

Malena is Nathaniel's spouse and only beneficiary. On 15 June 2018, she is advised she is entitled to all of Nathaniel's remaining superannuation interest. During the period between Nathaniel's death and the death benefit income stream payment to Malena commencing, $1,000 of investment earnings accrued to the interest, bringing its total value to $1,301,000. The value of the superannuation interest supporting the death benefit income stream when it commences on 15 June 2018 is $1,301,000.

A transfer balance credit arises in Malena's transfer balance account on 15 June 2018. That transfer balance credit is equal to the value of the superannuation interest supporting the death benefit income stream on 15 June 2018 (ie $1,301,000).

Commutation of excess transfer balance

To reduce an excess transfer balance so that it does not exceed the general transfer balance cap ($1.6 million for 2017–2018), an individual can choose to commute either (fully or partially):

- the death benefit income stream; or
- a superannuation income stream that the individual already has in retirement phase.

If an individual choose to commute their own existing superannuation income stream, the commuted amount can remain within the superannuation system as an accumulation interest. However, if the individual chooses to commute the death benefit income stream, the commuted amount cannot be retained as an accumulation phase interest and the commuted amount must be cashed out as a lump sum death benefit.

Source: ATO, Law Companion Guideline LCG 2017/D3, 13 February 2017, https://www.ato.gov.au/law/view/document?DocID=COG/LCG20173/NAT/ATO/00001.

No deduction for carried-forward company losses

The Administrative Appeals Tribunal (AAT) has confirmed that a company that was a partner in a shopping centre development business was not entitled to deductions for carried-forward losses of over $25 million incurred from carrying out those activities in the 1990 to 1995 income years. The AAT found that the company did not satisfy the relevant "continuity of ownership" and "same business" tests that applied in relation to the 1996 to 2003 income years, when it sought to recoup the losses.

Background

The taxpayer company was part of a complex family corporate structure that included interposed trusts and subsidiary companies. In the 1990 to 1995 income years, it was a 50% partner in a shopping centre development business. However, by the time the development was completed, the combination of increasing interest rates, overruns in development costs and the receipt of lower-than-expected rental income meant the company was in a difficult financial position. A receiver and manager was appointed to the partnership and the company went into administration.The taxpayer later claimed a deduction for carried-forward losses of $25 million from the venture, which it sought to recoup in the 1996 to 2003 income years.

The issue for the AAT's consideration was whether the taxpayer satisfied the "continuity of ownership" test that applied for the 1996 and 1997 income years, the 1998 and 1999 income years and the 2000 to 2003 income years in order to be entitled to a deduction for the carried-forward losses. Alternatively, the taxpayer was required to satisfy the "same business" test that applied for the relevant years.

For the 1996 and 1997 income years, the continuity of ownership test under s 80A of the *Income Tax Assessment Act 1936* (ITAA 1936) required the same persons to beneficially own more than 50% shareholding in the company in both the year the loss was incurred and the year it was sought to be recouped. For the 1998 and 1999 income years, the test under ss 165-12 and 165-165 of the *Income Tax Assessment Act 1997* (ITAA 1997) required the same persons to beneficially own more than 50% shareholding in the company in the both the year the loss was incurred and the year it was sought to be recouped, as well as during any intervening period. For the 2000 to 2003 income years this test (under amended ss 165-12 and 165-165) applied in the same manner, but with the additional requirement that the exact same interests must be owned by the same persons over the relevant period.

Decision

In confirming that the taxpayer had not discharged the burden of proving it had satisfied the "continuity of ownership" test or the "same business" test for the years in question, the AAT first found that, for the 2000 to 2003 income years, the requirements in amended s 165-12 and s 165-165 were clearly not met because interests held by the relevant shareholders during the loss years were fundamentally different from interests they held in the 2000 to 2003 income years. The AAT also took into account the lack of specific records about the shareholdings at the relevant times, and noted gaps in the documentation and other evidence. At the same time, the AAT dismissed the taxpayer's claims that the amendments to ss 165-12 and 165-165 did not apply to the years in question, because the legislation clearly stated they were to apply to income years ending after 21 September 1999.

Likewise, the AAT found that the continuity of ownership test applicable for the other years (the 1996 to 1997 years and the 1998 to 1999 years) had not been satisfied either for similar reasons.

The AAT noted the taxpayer's concern that the burden of proof it bore in the circumstances placed "a weight upon the taxpayer similar to that placed upon Atlas, who carried the whole weight of the heavens as well as the globe of the earth upon his shoulders". However, the AAT said this does "not excuse a taxpayer from the obligation to make good its case on some satisfactory basis other than speculation, guesswork or corner-cutting". The AAT further noted that "even allowing for the fact that the first claimed loss year (1990) is now over a quarter of a century ago, it is surely not unreasonable to expect that a case put forward in support of tax losses of almost $5 million should be supported by more than assertions and broad-brush submissions" – especially considering the taxpayer was part of a large, sophisticated corporate group that would be expected to keep proper accounting and corporate records.

The AAT then found that the taxpayer had not met the requirements of the "same business" test as it variously applied to the years in question. The Tribunal noted that the company's originally stated objective in the loss years was "investment in shopping centre and building construction", but by the time of the recoupment years its stated objective was "investment in units in a trust", with no element of property development. Furthermore, from the time the shopping centre was sold in 1993, there was no evidence of business activity being carried on until some three years later, when the taxpayer began to invest in a number of service stations to be leased to a major oil company and from which it derived rent.

Finally, the AAT found that the shortfall penalties the Commissioner of Taxation had imposed for "intentional disregard of the law" should be reduced to penalties for "recklessness", although it agreed to retaining various uplift components. The Tribunal noted an anomaly in the penalty calculation in these circumstances which resulted in a 100% increase in the uplift factor for certain years, but left this matter for the Commissioner to address when recalculating the penalties.

Re RGGW and FCT [2017] AATA 238, AAT, File Nos: 2015/4095-4102, Frost DP, 20 February 2017, http://www.austlii.edu.au/au/cases/cth/AATA/2017/238.html.

Overseas income not exempt from Australian income tax

The Administrative Appeals Tribunal (AAT) has affirmed the ATO's decision that income a taxpayer earned working for the United States Army in Afghanistan is not exempt from Australian income tax under s 23AF of the *Income Tax Assessment Act 1936* (ITAA 1936).

The taxpayer was an electrician and mechanic. During the 2010–2011 income year his American employer subcontracted his services to the United States Army in Afghanistan. He travelled there on at least four occasions, including for one period of at least four months. His role in "outside plant construction" was a critical part of the future power distribution network.

The taxpayer claimed that his 2010–2011 earnings were exempt from income tax under s 23AF of ITAA 1936. That section exempts personal services income (including salary and wages) that is attributable to a period of qualifying service on an "approved project". The period must be continuous for 91 days or more.

An "approved project" is an "eligible project" that the Trade Minister (or their delegate) is satisfied is or will be in the national interest and has approved in writing. There are various categories of "eligible project", including

- the design, supply or installation of any equipment or facilities;
- the construction of works; or
- the development of an urban or a regional area.

The AAT decided that the s 23AF exemption did not apply in this case, because the taxpayer had not worked on an approved project. Although the particular project satisfied the first two categories in the definition of an eligible project, the Trade Minister (or delegate) had not approved it in writing for the purposes of s 23AF, so it was not actually an approved project. The AAT pointed out that although the Trade Minister has the discretion to approve eligible projects, the approval must be given in writing.

The AAT also commented that there was no evidence indicating that the Trade Minister (or any delegate) considered the United States Army project in Afghanistan where the taxpayer worked to be in the Australian national interest.

Re Wilson and FCT [2017] AATA 119, AAT, Ref No 2016/3489, Tavoularis SM, 1 February 2017, http://www.austlii.edu.au/au/cases/cth/AATA/2017/119.html.

GST on low-value imported goods

The Government has introduced legislation to impose goods and services tax (GST) on supplies of imported goods worth less than $1,000. The measures are scheduled to commence on 1 July 2017.

The *Treasury Laws Amendment (GST Low Value Goods) Bill 2017* was introduced into the House of Representatives on 16 February 2017.

Context and background

GST is imposed on goods that are subject to taxable importation. The importer pays the GST in this case. Currently, goods brought into Australia from overseas that are valued at less than the $1,000 threshold do not attract duty or GST. This is because they are low-value goods, a category that Australian taxation law specifies as non-taxable importations. Additionally, goods brought into Australia by a supplier from overseas fall outside the current definition of “connected with Australia” in s 9-25 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), which means their supply is not captured by the Act’s Div 9 rules. The combined effect of these factors is that consumers can buy low-value goods from overseas, for example by ordering them online from an international store, without the transaction being subject to GST.

The low-value goods GST measures use a very similar approach (and similar terminology) to the “Netflix tax” legislation enacted by the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016*. The system proposed in the GST Low Value Goods Bill moves the GST payment responsibility from the customer to the overseas supplier. This means, if the Bill is passed, that overseas suppliers would be required to register for and pay Australian GST if their GST turnover exceeds $75,000. This system aims to overcome the logistical problems involved in making customers pay GST.

Alternatively, the GST liability for low-value imported goods may fall to the operator of an electronic distribution platform (EDP) – as is the case for the Netflix tax – or to goods forwarders (transport and freight companies), which are described as “redeliverers” in the Bill. The latter consideration does not apply to digital supplies like Netflix, as no physical movement of goods is required.

Note: the GST legislation refers to the “indirect tax zone”, rather than “Australia”. This is the same as the term “Australia”, except that it excludes the areas where GST does not apply (such as the external territories).

Broad overview

Broadly, the GST Low Value Goods Bill sets out the following measures which, if the Bill is passed, will come into effect from 1 July 2017:

- GST will be imposed on supplies of goods valued at $1,000 or less at the time of supply to Australia, if those goods are purchased by “consumers” and brought to Australia with the assistance of the supplier (ie the vendor);
- only supplies made to private consumers will be affected – importations by businesses will not be subject to these rules;
- the GST liability will rest with the vendor, but may extend to the operator of an EDP (if the sale is made through that platform) or the redeliverer;
- supplies will be subject to GST regardless of their small value – for example, even a supply worth $10 will be caught by the rules;
- GST will be calculated in the usual manner, imposed at a rate of 10% on the value of the supply;
- there is scope for GST to be imposed on the end consumer by reverse charge should they claim to be a business (so that the overseas supplier charges no GST) but then use the goods wholly or partly for private purposes;
- non-resident suppliers will be offered a limited registration option; and
- such importations will be deemed non-taxable to prevent double taxation (ie for the purposes of customs entry).

These rules would largely be contained in new Subdiv 84-C of the GST Act, entitled “offshore supplies of low value goods”.

Note: The GST Low Value Goods Bill introduced on 16 February 2017 does not include changes to the *Customs Act 1901* (Customs Act) or any related legislation.

What goods are subject to the proposed measures?

Three general requirements must be met for goods to become subject to GST under the low-value importation rules.

Firstly, the goods must be brought into Australia and the vendor must assist in arranging their delivery to Australia. If the vendor does not, the entity that does deliver the goods (the redeliverer) may instead be liable for the GST.

The second requirement is that the goods are of low value (worth $1,000 or less) based on their customs value. If the value is more than $1,000, the goods will remain subject to the ordinary importation rules currently in place. The customs value is determined as though the goods were exported at the time the consideration for the supply was first agreed upon, rather than at the time the goods were exported/imported into Australia or considered by a customs official. There is also scope for the Commissioner of Taxation to develop alternative exchange rate calculation methods (by legislative instrument), rather than using the fixed process mandated by the Customs Act.

Also, see below (under the heading “Other matters”) for information about the Bill’s treatment of a single supply involving multiple goods; for example, the purchase of a product costing less than $1,000 as well as a product costing more than $1,000.

The third requirement is that the entity to which the goods are supplied (the purchaser/customer) must use the goods in a private capacity (the Bill defines this as a “consumer”). In other words, genuine business purchases will not be subject to GST under the low-value importation rules. This third requirement will extend mostly to purchasers who are not registered or required to be registered for GST, but also includes purchases where a registered entity acquires certain goods solely for private purposes. This generally reflects the approach taken for the Netflix tax – under those rules, no GST liability arises if the consumer is otherwise entitled to an input tax credit for the acquisition.

If these three requirements are satisfied, the goods supply will be connected with Australia for the purposes of s 9-25 of the GST Act, and therefore potentially subject to GST (proposed s 9-25(3A) of the GST Act).

Who is proposed to be liable for GST?

The supplier will be liable for GST, providing that its GST turnover is in excess of $75,000. The GST turnover is determined by reference to its Australian sales only. For example, if an overseas vendor has turnover of $1 million per annum, but that turnover only includes sales of $50,000 to Australia, it will not be required to register and so will not be liable for GST on any of its sales.

If the vendor does not assist in delivery of the goods to Australia, it will not be liable for GST. If delivery is handled by a redeliverer, then that entity will be liable for GST on the supply (providing, of course, that the redeliverer’s Australian GST turnover exceeds $75,000). The explanatory memorandum to the GST Low Value Goods Bill indicates this provision intends to capture the services of a class of businesses often referred to as mail, post and package forwarders, or redeliverers, which assist purchasers to obtain goods from foreign suppliers.

Finally, if the sale of low-value goods is made through an EDP, then responsibility for the GST on the supply is shifted to the EDP operator. The most obvious examples of EDPs are the App Store and Google Play. This provision reflects the approach taken in the Netflix legislation.

The limited registration option will be available for all categories of suppliers.

There is scope for a customer to reverse-charge GST if it acquires low-value imported goods partly for private purposes and partly for business purposes. Additionally, if a customer falsely represents that it is acquiring goods for a business purpose (and so no GST is imposed), it may also have to reverse-charge the GST liability (and will be subject to penalties).

Other matters

As already noted, a consumer may sometimes purchase several goods as part of one supply. In such a case, the low-value goods test applies to each of the several goods supplied. Two obvious scenarios arise from this provision.

Firstly, where several goods valued under $1,000 are bought together and delivered together and the total value is in excess of $1,000, each product will be treated as a supply of low-value goods, regardless of the total value of the supply.

Secondly, where individual goods have a value below $1,000 but goods with a value above $1,000 are also purchased, the part of the supply that has a value of more than $1,000 is treated as not a supply of low-value goods. The explanatory memorandum to the GST Low Value Goods Bill provides an example where a consumer buys a dress valued at $1,300 from a supplier in the United Kingdom, as well as a shirt valued at $200. The sale of the dress and the sale of the shirt are treated as separate supplies, despite the items being purchased in a single transaction.

This approach could pose something of a logistical nightmare. When goods arrive at customs, likely in a single parcel, part of the contents will have to be carved out as a supply on which the vendor has paid GST and part will require GST to be imposed on the purchaser.

Other points of note:

- Under the current rules, international transport services are GST-free. The transport costs are factored into the goods' value when they are imported for home consumption, and the importer pays GST upon their entry to Australia. Under the new rules, such costs will not be GST-free. GST will be applied to the value of the goods supplied and any other costs included as part of the supply of goods (eg transport and insurance).
- Tax invoices and adjustment notes will not be required for an offshore supply of low-value goods to a consumer. This is sensible, as by definition consumers will not be able to claim input tax credits.
- The new rules include a safe harbour for overseas suppliers. A supply will not be connected with Australia if, at the time the consideration for the supply is set, the supplier (or the entity liable for the GST) reasonably believes that the goods will be imported as a taxable importation.
- As well applying for goods ordered online (or by telephone), the new rules will apply where a consumer buys goods in person in a store overseas and makes an arrangement with the vendor's assistance for the goods to be brought to Australia.
- Tobacco, tobacco products and alcoholic beverages are specifically excluded from the definition of "goods" for the purposes of the low-value goods rules.

Source: Treasury Laws Amendment (GST Low Value Goods) Bill 2017, 16 February 2017, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar5819%20Recstruct%3Abillhome.

Draft ATO guideline

The ATO released Draft Law Companion Guideline LCG 2017/D2 on 24 February 2017. It discusses the amendments proposed in the GST Low Value Goods Bill.

The Draft Guideline discusses:

- how to calculate the GST payable on a supply of low-value goods;
- the rules to prevent double taxation of goods, and to correct errors or deal with changes in the GST treatment of a supply; and
- how the rules interact with other rules under which supplies are connected with Australia.

The ATO intends to issue separate guidance about determining which entity is responsible for GST on supplies of low-value imported goods. This is expected to address issues such as when an EDP operator or redeliverer will be responsible for GST – and the rules where more than one EDP operator or redeliverer is involved in the supply.

The Draft Guideline draws heavily on the explanatory memorandum to the GST Low Value Goods Bill. It also offers additional examples and covers the following important details.

Currency conversion

Under proposed s 84-79(4)(e) of the GST Act, there will be two ways to work out the equivalent value in Australian currency of goods sold in a foreign currency:

- under the provisions in s 161J of the Customs Act; or
- in a manner determined by the Commissioner of Taxation.

The ATO is creating a draft legislative instrument which specifies that the Australian dollar amount to be used in working out a customs value can be calculated using the relevant Reserve Bank of Australia currency exchange rate for the date the price of the goods is first agreed upon.

Supplies not connected with Australia

Even if a supply satisfies the requirements for a supply of low-value goods, the supply will not be connected with Australia under proposed s 84-83 of the GST Act if:

- the supplier has taken reasonable steps to obtain information about whether the goods will be imported as a taxable importation; and
- after taking these steps, the supplier reasonably believes the goods will be imported as a taxable importation.

The Draft Guideline provides some helpful examples to illustrate the test's two elements (reasonable belief and reasonable steps).

Australian consumer law requirements

Generally speaking, Australian consumer law requires retailers to provide prices inclusive of GST, where GST is applicable. However, it may be difficult for offshore suppliers to be certain whether a supply of goods will be liable for Australian GST. To address this, the Draft Guideline states that if it is initially considered less likely that GST will apply to Australian recipients, a supplier can display a message that notes the potential for additional taxes to apply.

However, when an offshore supplier is aware that they are offering low-value goods for sale into Australia to consumers, the price displayed should be GST-inclusive. This would be the case where the supplier's website advertises consumer goods in Australian dollars and/or uses a ".com.au" domain name, or where location services show a goods recipient is in Australia.

Supplies of low-value goods not subject to GST at the border

Under s 42-15 of the GST Act, an importation of goods will be a non-taxable one to the extent that:

- the supply is an offshore, taxable supply of low-value goods (under s 9-5);
- the supply is connected with Australia only because the new provisions apply to it; and
- before the time when a taxable importation would have been made, notification that the supply is taxable is provided to the Comptroller-General of Customs in the approved form.

The requirement to notify Customs for the purposes of s 42-15 will presumably be met where the relevant fields are completed on the import declaration for the goods.

To switch off the taxable importation, notification will need to be provided by the time at which the taxable importation would otherwise have been made. Using the terms in the customs legislation, this means the notification must be provided before goods are delivered into home consumption in accordance with an authority to deal, by including the information in the import declaration or in an amended import declaration.

Supplies incorrectly treated as taxable supplies

If the supplier (or entity treated as the supplier) discovers that the supply should not have been a taxable one, because of information about the nature of the goods or about the recipient, an adjustment event will arise.

If the supplier has already included the GST payable on such a supply in its assessed net amount in a return, the amount will be "excess GST" for the purposes of Div 142 of the GST Act. This applies so that an amount of excess GST is only refundable to the supplier if either it has not been passed on to the recipient or the recipient has been reimbursed for the excess GST passed on. Once a reimbursement is made to the recipient, the supply ceases to be a taxable one and the supplier can make a decreasing adjustment.

If the excess GST has not been passed on to the recipient, s 142-10 does not apply and the supplier may request an amended assessment or claim a refund in a later tax period (if the conditions set out in Legislative Determination GSTE 2013/1 are satisfied).

Source: ATO, Draft Law Companion Guideline LCG 2017/D2, 24 February 2017, https://www.ato.gov.au/law/view/view.htm?docid=%22COG%2FLCG20172%2FNAT%2FATO%2F00001%22.

Alternative assessments not tentative: Federal Court decision

The Federal Court has found that a company's tax assessments were not tentative and provisional, and therefore were valid. The taxpayer company was the trustee of a discretionary trust (the Whitby Trust). The beneficiaries were the five children of the company's director. One of the children was a minor and thus under a legal disability.

For the 2011 to 2014 income years, the Commissioner of Taxation had notified the taxpayer it was liable to pay tax assessed in two different amounts, calculated by two different methods.

The "primary assessments" for each year were calculated on the basis that the four adult beneficiaries were each presently entitled to equal shares totalling 80% of the net income of the Whitby Trust, relying on s 99A of the *Income Tax Assessment Act 1936* (ITAA 1936) and the beneficiary who was a minor was presently entitled to a 20% share of the net income of the trust, but was subject to a legal disability, relying on s 98 ITAA 1936. The primary assessments were issued in April 2014 after the Whitby Trust undertook an audit of transactions.

The "alternative assessments" were made with reference to the same 80% and 20% proportions, but on the basis that none of the beneficiaries were presently entitled to a share of the net income of the trust for each relevant year. The alternative assessments were issued in October 2015. The total tax shortfall over the four income years was just over $23.5 million. The Commissioner also imposed administrative penalties.

When issuing the alternative assessments, the Commissioner explained in a letter to the taxpayer that if the primary assessments were invalid then the alternative assessments were original assessments, but if the primary assessments were valid then the alternative assessments affirmed or amended the primary assessments. The Commissioner asserted in the letter that “on any view, these are valid assessments”.

The Commissioner sent further letters to the taxpayer stating that he would apply Law Administration Practice Statement 2006/7, which deals with the collection of tax where there are primary and alternative assessments.

The taxpayer sought relief under s 39B of the *Judiciary Act 1903*, arguing that the primary and alternative assessments were invalid because they were tentative and provisional. The taxpayer said that the assessments were tentative because, for each year, they imposed two separate and different income tax liabilities on its single trustee capacity. As a result, the taxpayer owed different debts in each relevant year in circumstances where payment of one did not abate the other, and each debt was an independent debt owed to the Commonwealth and payable to the Commissioner (with interest accruing on each debt).

The Commissioner, on the other hand, argued that a trustee’s liability to pay income tax is of a “representative character” and the relevant provisions in the ITAA 1936 (ss 98 and 99A) envisage that a trustee might be liable to multiple assessments in respect of different beneficiaries’ entitlements to a share of the net income of the trust. The primary and alternative assessments were therefore comparable to assessments for two or more taxpayers in relation to the same income in the same year. Such assessments are not liable to be set aside as tentative or provisional.

Decision

Justice Jagot considered the interaction between the ITAA 1936 provisions that deal with the taxation of trusts (in particular ss 98 and 99A) and the ITAA 1936 provisions that concern assessments and amended assessments (in particular ss 166 and 169). In finding for the Commissioner, her Honour advanced various propositions.

1. Section 166 of ITAA 1936 is concerned with making an assessment on the “taxable income” of any taxpayer. Under ss 4-10(4) and 9-5 item 6 of ITAA 1997, however, the liability of a trustee in that capacity to income tax is not worked out with reference to the trust’s net income for the income year, under the process established by ss 98, 99 and 99A of ITAA 1936, or with reference to taxable income. Accordingly, in making the assessments in this case, the Commissioner was not exercising his power under s 166.
2. Sections 98, 99 and 99A of ITAA 1936 contemplate that a trustee will be assessed and liable to pay tax in respect of the different beneficiaries depending on their status. As a result, a trustee’s position in this context is different from the position of an individual or corporate taxpayer who is liable to be assessed and pay income tax on their taxable income for the year.
3. The assessments specified the amount of tax income assessed and the amount of tax payable on it. Nothing in the evidence otherwise undermined the definite character of the liability imposed. It was merely that one set of assessments assumed a present entitlement of the beneficiaries and the other set assumed no such present entitlement.
4. The Commissioner had taken a view of the facts and made assessments for each year based on that view (the primary assessments). The alternative assessments were not issued for the purpose of double recovery, but performed a protective function in case the Commissioner’s view about the operation of the trust was incorrect.

In conclusion, Jagot J was not persuaded that “the statutory scheme precludes the approach the Commissioner has taken or, of necessity, renders that approach tentative or provisional in the sense that the assessments are no assessments at all”.

Whitby Land Company Pty Ltd (Trustee) v Deputy Commissioner of Taxation [2017] FCA 28, 30 January 2017, http://www.austlii.edu.au/au/cases/cth/FCA/2017/28.html.

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