GST REFUNDS

1 OVERVIEW

Five years ago at this conference I made a number of comments about GST refunds.[1] Life seemed much simpler then; the Commissioner regularly paid refunds in respect of overpaid GST. That happy situation has changed dramatically. Why?

At the same conference I discussed a legislative anomaly that limited some taxpayers to a four year refund period while others enjoyed an unlimited refund period based around an arbitrary criterion, namely, whether they happened to have a positive net amount in the relevant tax period. I said at the time that "section 105-55 should be amended to provide a four year time limit on claiming refunds in all circumstances." The authorities were painfully slow to act.

Proposed amendments to the four year limitation period were announced by the Treasurer on 6 May 2008, with the amending Bill introduced into Parliament on 29 May 2008.[2] The commencement date was expressed to be 1 July 2008, thereby giving taxpayers several weeks to notify the Commissioner of any refunds which would extend back beyond four years. The ATO had recommended against this but Treasury did not support the recommendation.

Many refund claims were made in the weeks before 1 July 2008 and the Commissioner became concerned about the revenue implications. Many of the refund claims related to GST said to be overpaid on long-term agreements pursuant to which supplies should have been GST-free.[3] Taxpayers had already succeeded in such claims in earlier litigation.[4] The ATO initially advised Treasury that it estimated the Commissioner's decision not to appeal the *DB Rreef* case would result in refunds in the order of $380m. The Commissioner had paid out more than $50m in refunds before the Treasurer's announcement.

In order to prevent paying out further refunds the Commissioner embarked upon a strategy of policy u-turns. First, he withdrew Practice Statement PSLA 2002/12 with effect from 15 September 2008. This Practice Statement had previously set out how the Commissioner would exercise his discretion to pay refunds.[5] Second, he took a much narrower view of what would constitute a valid notification of refund.[6] For good measure he also issued Taxpayer Alert 2008/17 on 27 August 2008, presumably in an effort to taint anyone involved in making such refund claims.

The restrictive approach taken by the Commissioner in paying refunds has inevitably resulted in litigation, which is continuing. The current state of play is discussed below, together with a brief discussion on what it means for taxpayers.

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[1] O'Rourke, GST Administration Issues, Taxation Institute National GST Intensive, November 2006

[2] Tax Laws Amendment (2008 Measures No.3) Bill 2008

[3] See *A New Tax System (Goods and Services Tax Transition) Act 1999*, s13

[4] See *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2006] FCAFC 115; and *DB Rreef Funds Management Ltd v FCT* [2006] FCAFC 89

[5] The more restrictive approach is now contained in MT 2010/1

[6] The more restrictive approach is now contained in MT 2009/1

2 LEGISLATIVE OVERVIEW

2.1 Statutory authority to refund

Division 35 of the *A New Tax System (Goods and Services Tax) Act 1999* ("GST Act") is headed "Refunds" and "is about the Commissioner's obligation to pay to you your entitlements to input tax credits that remain after off-setting amounts of GST. The obligation to pay arises for any of your net amounts that are less than zero."[7]

If the net amount for a tax period is less than zero, the Commissioner must, on behalf of the Commonwealth, pay that amount to you.[8] The entitlement to the refund arises when you give the Commissioner a GST return.[9]

The current version of section 35-5 was substituted before the GST Act commenced operation.[10] The Explanatory Memorandum which accompanied the amending Act stated that the section "is being amended to subject the refund to the generic refund rules in s 8AAZLF(1) of the TAA 1953."[11]

Accordingly, the statutory authority to refund will be found in either section 35 of the GST Act or section 8AAZLF of the *Taxation Administration Act 1953* ("TAA").

2.2 Restrictions on claiming refunds

Section 105-65 of Schedule 1 to the TAA, headed 'Restriction on GST refunds', applies to so much of any net amount or amount of indirect tax as you have overpaid in certain defined circumstances, or to so much of any net amount that is payable to you under section 35-5 of the GST Act as the Commissioner has not paid to you or applied under Division 3 of Part IIB of the TAA.[12]

If you overpaid an amount, or the amount was not refunded to you, because a supply was treated as a taxable supply to any extent, and the supply is not a taxable supply to that extent (for example, because it is GST-free), then the Commissioner need not give you the refund, or apply the amount under Division 3 or 3A of Part IIB, if the Commissioner is not satisfied that you have reimbursed a corresponding amount to the recipient of the supply, or if the recipient is registered or required to be registered.[13]

When section 105-65 is engaged, the Commissioner "need not" give you a refund. This has been interpreted as "need not, but may",[14] which is often referred to as the Commissioner's "residual discretion" to pay refunds.

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[7] GST Act, s35-1
[8] GST Act, s35-5(1)
[9] GST Act, s35-10
[10] See Act 179 of 1999
[11] Explanatory Memorandum to Act 179 of 1999, paragraph 7.51
[12] *Taxation Administration Act 1953 (Cth)*, s105-65(2)(a)
[13] *Taxation Administration Act 1953* (Cth), s105-65(1)
[14] See MT 2010/1, paragraph 27

2.3 Time limit on claiming refunds

You are not entitled to a refund, other payment or credit in respect of a tax period unless you notify the Commissioner that you are entitled to the refund, other payment or credit within four years after the end of the tax period.[15]

Before 1 July 2008, section 105-55 imposed no time limit on the claiming of a refund if there was a positive net amount for the tax period in which the overpayment occurred. This was because section 105-55 required you to identify the particular tax period to which the refund under section 35-5 of the GST Act related. Section 35-5 in turn provided for a refund if 'the net amount for a tax period is less than zero'. Section 105-55 had no application if there was a positive net amount for the tax period in which the overpayment occurred as there was neither a refund under section 35-5 of the GST Act nor any input tax credit foregone. An ATO Fact Sheet confirmed this.[16]

Similarly, if an input tax credit was mistakenly excluded from a GST return, the interaction of section 105-55 of the TAA and section 29-10 of the GST Act operated to defer the four year rule indefinitely. As above, section 105-55 of the TAA required you to identify the particular tax period to which the refund under section 35-5 of the GST Act related, and section 35-5 of the GST Act in turn provided for a refund if 'the net amount for a tax period is less than zero'. This would usually relate to a period in which an input tax credit was payable such that the four year rule commenced at the end of the period. However, section 29-10(3)(b) of the GST Act deferred attribution of an input tax credit if a tax invoice was not held at the time the GST return was lodged. The input tax credit was instead attributed to the first tax period for which you gave the Commissioner a GST return that took this into account.[17]

This was a lamentable position. There have always been sound public policy reasons for limitation periods which go to the finality of disputes or potential disputes, and to certainty of financial position. In the case of the Commonwealth, it is entirely reasonable that the books be ruled off after four years in the certain knowledge that no further refunds will be due. It was also inequitable that some taxpayers were limited to a four year refund period while others enjoyed an unlimited refund period based around an arbitrary criterion, namely, whether they happened to have a positive net amount in the relevant tax period.

The amendments to the four year limitation embodied in section 105-55 were announced by the Treasurer on 6 May 2008, with the amending Bill introduced into Parliament on 29 May 2008.[18] The commencement date was expressed to be 1 July 2008, thereby giving taxpayers several weeks to notify the Commissioner of any refunds which would extend back beyond four years.

In addition, Division 93 now provides an effective four year limitation on claims for previously unclaimed and unattributed input tax credits.

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[15] *Taxation Administration Act 1953* (Cth), Schedule 1, s105-55(1)(a)
[16] The ATO Fact Sheet has now been substantially rewritten; see www.ato.gov.au/businesses/content.asp?doc=/content/47026.htm
[17] GST Act, s29-10(4)
[18] Tax Laws Amendment (2008 Measures No.3) Bill 2008

2.4 Notification requirements

As discussed above, you are not entitled to a refund, other payment or credit in respect of a tax period unless you notify the Commissioner that you are entitled to the refund, other payment or credit within four years after the end of the tax period. But what constitutes a valid notification?

Section 105-55 provides no specific form or requirements for notification of a refund. In an effort to prevent the payment of refunds following a significant number of claims in 2008, the Commissioner adopted a more restrictive approach to what constituted a valid notification. The recent decision in *Central Equity* has provided some clarity on this issue and will come as a welcome relief for taxpayers.[19]

Central Equity lodged a Notification of Entitlement to Refund covering the tax periods from 1 July 2000 to 31 May 2008. It described the circumstances of the refund as follows:

> The entity noted above has mistakenly paid GST in error in relation to the supply of real property transactions where the contract was entered into prior to 1 July 2000, and has overpaid GST on supplies made where the GST was calculated under the margin scheme as the acquisition price was used rather than a 1 July 2000 valuation.
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> The entity is currently in the process of quantifying the amount by which it has overstated its net amount and will notify the ATO of the precise amount of the GST refund it will be seeking in due course.

The Commissioner attacked the validity of the notification based on a "lack of specificity" that was said to arise from five matters, each of which was rejected by the Court.

First, that the time period covered the entire span of the completed tax periods since the GST was introduced on 1 July 2000 through to 31 May 2008. Gordon J stated: "The fact that the claim spanned eight years does not detract from the fact that the time period was specified."[20]

Secondly, that the notice did not describe with any specificity the nature or number of contracts in question or the developments to which they related. Gordon J was of the view that the description set out above contained sufficient information and added: "The specificity sought by the respondent was unnecessary."[21]

Thirdly, that the notice did not specify that the entitlement arose from supplies having been made under those contracts before 1 July 2000, taking them outside the GST regime. Gordon J simply described this as "wrong", adding: "The Notification did specify that the entitlement arose from supplies having been made under real property contracts before 1 July 2000. If that assertion was correct, then it was at least arguable that it took them outside the GST regime."[22]

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[19] *Central Equity Ltd v Commissioner of Taxation* [2011] FCA 908
[20] *Central Equity Ltd v Commissioner of Taxation* [2011] FCA 908 at [77] per Gordon J
[21] *Central Equity Ltd v Commissioner of Taxation* [2011] FCA 908 at [77] per Gordon J
[22] *Central Equity Ltd v Commissioner of Taxation* [2011] FCA 908 at [77] per Gordon J

Fourthly, that the notice was internally inconsistent because it suggested both that GST was mistakenly paid and that the margin scheme was misapplied. This suggested that the notice was a speculative or ambit claim on what could only have been alternate bases. Gordon J rejected this, stating: "The fact that [Central Equity] had alternate, albeit inconsistent, claims was the fact. That both were made does not detract from the fact that the Notification identified both claims."[23]

Fifthly, that by referring simply to "real property transactions", the notice was unclear as that expression could refer to sales of land, leases or any number of other transactions related to land. This proposition was likewise rejected.

While the comments of Gordon J are strictly obiter dicta, they are considered comments after full argument. The comments do not sit easily with the Commissioner's restrictive approach outlined in Miscellaneous Tax Ruling MT 2009/1. That ruling should now be amended.

3 IMPORTANT CONCEPTS AND ISSUES

3.1 Windfall gain

The underlying premise of the various positions taken by the Commissioner on section 105-65 is that the provision is there to prevent windfall gains to suppliers.

The former sales tax law, which preceded the GST, operated on the basis that the Commissioner would refund overpaid sales tax to a supplier provided the supplier passed on the refund to the recipient. There was no separate enquiry into whether a recipient would receive a windfall gain as a result of the passing on.

The Explanatory Memorandum which accompanied the Bill for the *A New Tax System (Goods and Services Tax Administration) Act 1999*, which included section 39(3), the predecessor of section 105-65, stated, at paragraph 3.41:

> Because GST is payable by suppliers but is ultimately borne by the consumers of goods and services, a refund of overpaid GST would ordinarily result in a windfall gain to the supplier. A supplier will need to satisfy the Commissioner that an amount corresponding to the refund will be passed on to the persons who ultimately bore the cost of the overpaid GST.

The first thing to note about this paragraph is that it is talking about a windfall gain to the supplier at the expense of the consumer. It is not really talking about a windfall gain to the supplier at the expense of anybody else. That distinction is important because the legislation itself can create a windfall gain to a supplier without any loss to a consumer. For example, a supplier may receive a windfall gain in circumstances where a recipient is protected through reliance on a public ruling. It cannot be said that the windfall gain is at the expense of the consumer.

The Explanatory Memorandum that accompanied the *Tax Laws Amendment (2008 Measures No.3) Bill 2008*, identifies the target of section 105-65 more generally as a

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[23] *Central Equity Ltd v Commissioner of Taxation* [2011] FCA 908 at [77] per Gordon J

"windfall gain to arise to businesses that receive the refund of GST but have not borne the incidence of the tax". That statement might be seen as a little self-serving, having been drafted with a particular outcome in mind, but is not inconsistent with the prevention of windfall gains only at the expense of the consumer.

An application of the principle that section 105-65 is about preventing a windfall gain to the supplier at the expense of the consumer can be found in the decision of the Administrative Appeals Tribunal ("AAT") in *Luxottica*.[24] In that case, the residual discretion to pay a refund was exercised in favour of the taxpayer having regard to the following factors: the customer would otherwise walk away from the transaction having paid, in net terms, less than he or she contracted with the applicant to pay (such that a windfall would flow to the "undeserving customer"); the amount reimbursed would need to be allocated to the separate components of the supply, causing an adjustment to price, and hence a consequential adjustment on an iterative basis; and the section should not be given an expansive construction.[25]

The second thing to note about the extract from the Explanatory Memorandum is that it doesn't shed much light on the identification of the consumer. Is it the immediate consumer in the transaction (that is, the recipient), or is it some distant consumer in a long supply chain? The Commissioner would prefer the latter. But there is an obvious difficulty if a supplier is expected to look through an entire supply chain beyond the recipient of the supply. It remains an open question.

There is support for the view that a taxpayer who makes input taxed supplies is in effect the consumer. Perram J has commented that: "The practical effect of [input taxation] is to cast the ultimate economic burden of the tax not on the end user but on the immediately preceding supplier."[26]

The boundaries of section 105-65 were judicially tested for the first time in *KAP Motors*.[27] It was a matter conducted on the basis of agreed facts which included that the taxpayer had overpaid GST under the mistaken belief that it had made taxable supplies. KAP Motors neither agreed nor undertook to reimburse its customers.

The Commissioner contended that section 105-65(1) should be construed as though the word "supply" included a purported or putative supply, such that it referred to any transaction that was incorrectly treated as a taxable supply. He attached significance to the proposition that a refund of overpaid GST would ordinarily result in a windfall gain to the supplier. In response to that proposition, Emmett J stated:

> Section 105-65 should not be given an expansive construction. While its object may be commendable, in seeking to avoid windfall gains for taxpayers, it is, in a sense, a paternalistic interference with the rights of taxpayers. It proceeds on the basis

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[24] *Luxottica Retail Australia Pty Ltd v Commissioner of Taxation* [2010] AATA 22
[25] *Luxottica Retail Australia Pty Ltd v Commissioner of Taxation* [2010] AATA 22 at [58]-[60] per Block, Deputy President, and Frost, Senior Member
[26] *Sunchen Pty Ltd v Commissioner of Taxation* [2010] FCA 21 at [8] per Perram J
[27] *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159

> that GST that should not have been paid has been paid by a taxpayer. Its operation is to ensure that the Commissioner receives a windfall rather than a taxpayer.[28]

His Honour continued:

> There may be circumstances in which a taxpayer who obtains a refund from the Commissioner will derive a windfall gain, if the provision is construed literally. However, that is not a reason for construing the words of the provision as meaning something that they do not say because the explanatory memorandum says that the purpose of the provision is to preclude a windfall in connection with a supply.[29]

His Honour held that section 105-65 had no application in circumstances where there was no supply.[30]

Following that decision, the law was amended to extend the restriction on refunds to 'no supply' situations[31], that is, to situations in which tax was overpaid where there was no underlying supply.[32]

3.2 Reimbursement

Section 105-65 refers to you having 'reimbursed a corresponding amount to the recipient of the supply' (or putative supply). That is, where the burden of the tax has been passed on to a recipient who is neither registered nor required to be registered, reimbursement of the recipient is generally required before a refund will be made. The decision of the High Court in *Avon Products*[33] on the meaning of 'passing on' under the sales tax law has direct relevance to the meaning of 'reimbursement' under the GST law.

The High Court noted that a 'central feature' of sales tax was that 'the economic burden of the impost is generally not intended to be borne by the person liable to remit it; it is to be passed on.'[34] This statement is true for indirect taxes generally and is what distinguishes them from direct taxes, such as income tax.

The High Court noted that 'there is nothing extraordinary in the proposition that in the usual course of things sales tax will be passed on.'[35] The Court stated that, 'leaving aside rare cases where sales tax is separately identified and superadded to the invoice price after sale, sales tax can only be passed on indirectly through the price mechanism.' That is of course quite different from GST which is often separately

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[28] *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159 at [33] per Emmett J
[29] *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159 at [37] per Emmett J
[30] The Commissioner also contended that the refund claim by KAP Motors could be resisted because any such refund would be subject to a constructive trust in favour of its customer. That contention was rightly rejected on the basis that an action for money had and received is not defeated simply because the claimant has recouped the outgoing from others: *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159 at [44] per Emmett J
[31] *Taxation Administration Act 1953* (Cth), s105-65(2)(b)
[32] An earlier example of a 'no supply' case arose in *TAB Ltd v Commissioner of Taxation* [2005] NSWSC 552, in which Gzell J held that dividends and refunds unclaimed for 12 months constituted a windfall gain without GST consequence
[33] *Avon Products Pty Limited v Commissioner of Taxation* [2006] HCA 29
[34] [2006] HCA 29 at [7]
[35] [2006] HCA 29 at [9]

identified and 'superadded' to the price after sale and therefore most clearly passed on to a recipient.

The relevant statutory provision in Avon applied in cases of 'Tax Overpaid', where the 'claimant has paid an amount as tax that was not legally payable.' The amount of the credit was 'the amount overpaid, to the extent that the claimant has not passed it on.'[36] The legislation did not provide a comprehensive definition of 'passed on', which therefore had to be determined according to its ordinary meaning.[37]

A number of propositions emerge from the decision of the Court:

1. The onus of proving that the taxpayer has not passed on the overpayment lies upon the taxpayer.[38] This will occur comparatively seldom.[39]

2. The question whether sales tax has been passed on is a question of fact.[40]

3. Where the facts disclose that the taxpayer has set prices at a level to ensure that they exceed cost (including tax), it will be difficult for the taxpayer to satisfy its onus of proof that it has borne the tax burden itself.[41]

4. The contention that a tax is only passed on if the price at which the goods are sold is increased by the amount of the tax is flawed.[42]

In my opinion, these propositions are equally applicable to reimbursement under GST.

3.3 'Wash' transactions

A GST 'wash' transaction is an expression used to describe the situation where a GST-registered supplier wrongly treats a taxable GST supply as non-taxable, hence underpaying its GST. However, the supply in question is made to a recipient who is registered for GST and would have been entitled to claim back from the ATO a full input tax credit if the transaction had been correctly treated as taxable by the supplier. The term 'wash' refers to the fact that the effect on primary GST revenue is neutral.[43]

The GST is designed to have a self-policing element and an audit trail. It should be understood that this was a deliberate policy choice. This is why the ATO does not take kindly to arguments that, in business to business transactions, it is a 'wash' for GST with a liability and an offsetting credit. If business to business transactions were meant to be ignored, we could have had a retail sales tax or an 'additive' GST. But we do not, so business to business transactions matter.

However, the ATO has long recognised that reversing transactions and revising every activity statement to correct errors between registered entities amounts to a paper

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[36] *Sales Tax Assessment Act 1992* (Cth), s51(1), Schedule 1, Table 3, Credit Ground CR1
[37] [2006] HCA 29 at [6]
[38] [2006] HCA 29 at [5]; see also *Taxation Administration Act 1953* (Cth), s14ZZO(b)
[39] [2006] HCA 29 at [12]
[40] [2006] HCA 29 at [20]
[41] [2006] HCA 29 at [21]
[42] [2006] HCA 29 at [23]
[43] See generally PS LA 2008/9, dealing with GST 'revenue neutral' corrections

'round robin' among the registered recipient, the supplier, and the ATO. Significant compliance costs are incurred with no change to the financial result. Accordingly, the ATO has accepted an alternative solution that results in no detriment to GST revenue.[44]

When input tax credits are claimed in good faith before it is discovered that non-taxable supplies were treated as taxable, the ATO will adopt the alternative solution, but only where both the supplier and the recipient meet specified conditions.[45] Further, neither party is obliged to adopt the solution, even if they both meet the criteria.

The General Interest Charge (GIC) that would otherwise be payable by the recipient is effectively waived under this solution.[46]

The alternative solution cannot be extended to any circumstances outside of those covered by section 105-65 of the *Taxation Administration Act 1953* (Cth). For example, the solution cannot be applied to the reverse scenario of the incorrect treatment of a taxable supply as non-taxable. Such errors must be corrected.[47]

3.4 Application to margin scheme and gambling

In broad terms, section 105-65 only applies if a supply was treated as a taxable supply "to any extent" and the supply is not a taxable supply "to that extent". This raises an issue about the application of the section to supplies made using the margin scheme,[48] and to gambling supplies.[49]

The issue is relatively straightforward, though the answer may not be. Suppose a taxpayer has used the margin scheme for the supply or real property but has paid too much GST by using a larger margin than is necessary. Paraphrasing section 105-65, the taxpayer might say that the supply was always treated as a taxable supply to the extent of 100% and the fact that an incorrect margin was used does not alter that fact. The Commissioner on the other hand might say that the supply was treated as a taxable supply to the extent of the amount paid and that the supply was not a taxable supply to the extent of any overpayment.[50] Both views have merit and it remains an open question.

The same issue arises for gambling supplies where a margin approach to calculation is also used. The application of section 105-65 to certain gambling supplies has arisen for judicial consideration recently, albeit in a slightly different context. In *International All*

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[44] PS 2002/12, para 17. This Practice Statement was withdrawn with effect from 15 September 2008 but continues to have continuing relevance to 'wash' transactions. A note to the withdrawn document states that '. . . the Commissioner will continue to abide by the approach described in PS LA 2002/12, that is not to require reversal of transactions where a supply or arrangement that occurs solely between registered entities has been incorrectly treated as a taxable supply, provided certain conditions are met.' A draft Practice Statement replacing PS LA 2002/12 is expected to issue shortly

[45] PS 2002/12, paras 22-23

[46] PS 2002/12, para 20

[47] See generally PS LA 2008/9, dealing with GST 'revenue neutral' corrections

[48] *A New Tax System (Goods and Services Tax) Act 1999*, Division 75

[49] *A New Tax System (Goods and Services Tax) Act 1999*, Division 126

[50] See MT 2010, paragraph 71

Sports,[51] GST was overpaid because the taxpayer took the view that it was only prizes paid to gamblers whose wagers had been by way of gambling supplies that were to be subtracted as "total monetary prizes" in the formula set out in section 126-10(1). It was common ground that those supplies were neither taxable nor ever treated as taxable (being supplied to non-residents and treated as GST-free).[52] Jessup J stated: "Despite the persistent endeavours of counsel for the Commissioner, I confess to a complete inability to appreciate how it might be said, on the assumed facts of the present case, that the overpayments made by the applicants arose because supplies were treated as taxable supplies, or arrangements were treated as giving rise to taxable supplies, to any extent. . . .In my view . . . s 105-65(1)(a) is quite irrelevant to the circumstances of the present case.[53]

Jessup J continued: "Counsel for the Commissioner sought to extract themselves from the reality of what s 105-65(1)(a) actually says by relying upon the concluding words of the paragraph – "to any extent".[54] His Honour then made four observations: "First, the reading of s 105-65(1)(a) which I prefer is not "too literal a reading" – it is the only reading which the words of the paragraph sensibly convey. Secondly, the subsection is not "concerned simply with an overpayment", but with an overpayment of a particular kind, made in the circumstances referred to. Thirdly, the words "to any extent" at the end of the paragraph, and the corresponding words "to that extent" in para (b), address the situation in which a particular supply might have been treated as a taxable one to some extent only. It is not concerned to expand beyond its sensible meaning the wording of the main operative part of the paragraph. And fourthly, the "evident purpose of the section", in my view, is to deal with the situation in which the recipient of a particular supply has been charged an amount from which one eleventh was included in the calculation of the supplying entity's "net amount", but has not been reimbursed a corresponding sum in anticipation of a refund being received from the Commissioner. That purpose, and the circumstances which are before the court in the present case, pass each other like ships in the night.[55]

It should be remembered that it was common ground between the parties that the gambling supplies in issue were neither taxable nor ever treated as taxable. The decision does not therefore deal with supplies that were treated as taxable but too much GST was paid by using a larger margin than necessary. Nevertheless, the comments of Jessup J, and particularly those relating to the "evident purpose of the section" are likely to return in future litigation.

3.5 GST Transition Act

In a matter currently before the AAT, the applicant is submitting that section 105-65 can have no application where transitional relief is available under section 13 of the *A New*

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[51] *International All Sports v Commissioner of Taxation* [2011] FCA 824
[52] *International All Sports v Commissioner of Taxation* [2011] FCA 824 per Jessup J at [55]
[53] *International All Sports v Commissioner of Taxation* [2011] FCA 824 per Jessup J at [55]
[54] *International All Sports v Commissioner of Taxation* [2011] FCA 824 per Jessup J at [56]
[55] *International All Sports v Commissioner of Taxation* [2011] FCA 824 per Jessup J at [56]

Tax System (Goods and Services Tax Transition) Act 1999 (which rendered GST-free certain supplies made under contracts which spanned 1 July 2000). The basis of the submission is that the intended purpose of the transitional relief, namely, to grant relief to a supplier who cannot pass on GST under the contract, would be frustrated.

3.6 Jurisdictional issue

An issue has arisen about whether the AAT has jurisdiction to exercise the residual discretion in section 105-65.

A recent decision of a Full Court of the Federal Court is of some significance. In *McMennamin's case,*[56] the taxpayers were each assessed to excess contributions tax in respect of superannuation contributions. Each then applied to the Commissioner for a determination for him to disregard the excess. The Commissioner refused to make the determinations sought. The central issue in the appeal was whether the AAT had jurisdiction to review the Commissioner's decision not to make a determination. The Full Court (in a split decision) found that it did not. At first glance, the decision tends to support the view that the exercise of the residual discretion would not form part of the assessment and hence would only be reviewable under, say, the *Administrative Decisions (Judicial Review) Act 1977* or section 39B of the *Judiciary Act 1903*, rather than in proceedings under Part IVC of the TAA. The dissenting judge was Downes J, who as a Presidential member in the AAT has heard both *Luxottica* and *Qantas*, in which section 105-65 was in issue.

To date both the Commissioner and taxpayers alike have submitted that the AAT has jurisdiction. However, agreement by the parties cannot ultimately govern the issue. The basis of the submissions is that sections 105-55 and 105-65 are not merely procedural, but are a necessary step in establishing a taxpayer's substantive liability.

The jurisdictional issue remains unresolved. While section 105-65 was considered by the Federal Court in *International All Sports*[57] and by the Tribunal in *Luxottica*,[58] there remains no decision on the jurisdictional point.

3.7 Proposed self-assessment regime

The Government has proposed a self-assessment regime for GST to implement recommendations 19, 21 and 42 of the Board of Taxation's Review of the Legal Framework for the Administration of the Goods and Services Tax. A revised Exposure Draft of the proposed legislation was released for comment on 22 August 2011, with a likely start date of 1 July 2012. The question of how section 105-65 might operate within the proposed self-assessment regime has been raised during the Treasury consultation process though the revised draft legislation does not deal with the point.

The issue is of no small significance given the Commissioner's current position under the existing 'self-actuating' regime. According to the Commissioner: "Taxpayers cannot

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[56] *Commissioner of Taxation v Administrative Appeals Tribunal* (McMennamin's case) [2011] FCAFC 37
[57] *International All Sports v FCT* [2011] FCA 824
[58] *Luxottica Retail Australia Pty Ltd v FCT* [2010] AATA 22

self-assess the discretion, and cannot assume that the Commissioner will always exercise the discretion in the circumstances described in these guiding principles."[59]

4 CONCLUSION AND TAXPAYER STRATEGY

It should be evident from what has been said above that there has been a dramatic shift in the Commissioner's attitude towards paying GST refunds. A large number of refund claims lodged in the weeks before 1 July 2008 led the Commissioner to make policy u-turns resulting in a more restrictive approach to the payment of refunds. Litigation has followed. But what does this mean for taxpayers? Apart from watching the litigation unfold in due course, allow me to make two practical suggestions.

First, have a close look at your GST clauses and amend where necessary to minimise your risk. Suppose a supplier enters into a contract with a recipient and mistakenly overcharges GST. The recipient may well have rights under the contract, or separately in an action for monies had and received, to recover the overpaid GST charged by the supplier. If the supplier cannot in turn recover the overpaid GST from the Commissioner, who may refuse to exercise the residual discretion to refund the overpaid GST, the supplier is out of pocket. This should be dealt with in your GST clauses.

Second, and with some significant qualifications, you should consider not paying GST in the first place (and note that we are here concerned with overpaid output tax rather than under claimed input tax). Before 1 July 2008, a taxpayer who might have overpaid GST would often notify the Commissioner of the refund entitlement and then seek a ruling on the technical issue involved. Most taxpayers would continue to overpay GST pending resolution of the issue which would often take some time. That strategy was appropriate in circumstances where the Commissioner routinely exercised his discretion to pay refunds. In the current environment, however, taxpayers should consider not paying GST provided they have a well documented and reasonably arguable position. Section 105-65 can never apply if GST is not overpaid in the first place. There are of course risks attached to such an approach but it is an entirely reasonable strategy.

I look forward to presenting again on this topic at this conference in another five years – I am confident there will be much to say.

[59] MT2010/1, footnote 48