

Ruling Compendium – GSTD 2014/1

This is a compendium of responses to the issues raised by external parties to Draft GSTD 2013/D4 – *Goods and services tax; can you object to a private ruling that the Commissioner makes on the way in which section 105-65 of Schedule 1 to the Taxation Administration Act 1953 applies or would apply to you?*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the Draft ruling.

All legislative references in the ATO response are to Schedule 1 of the *Taxation Administration Act 1953* (TAA) unless otherwise indicated.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	Paragraph 1 - For clarity this binding part of the Draft Determination should also include a statement to the effect that for tax periods starting on or after 1 July 2012, it is not possible to object to a private ruling that the Commissioner makes on the way in which section 105-65 applies or would apply to you once you have lodged your GST return for that tax period.	We have inserted a footnote to paragraph 1 to make this point clearer. Paragraph 13 of the Final GSTD contains further discussion on this point.
2.	Paragraph 12 - For clarity, this paragraph could be expanded to include the observation that the assessment is treated as having been made on the day the GST return is given to the Commissioner – subsection 155-15(2). If considered necessary, the explanation could also clarify that where the GST return is lodged electronically, this will be the day of lodgment, and if the return is lodged by post, this will be the day it is received by the ATO (or otherwise, as appropriate).	We have amended the first sentence of the paragraph (paragraph 13 in the final version) to read 'For tax periods starting on or after 1 July 2012, the Commissioner is treated as having made an assessment of your net amount when you give your GST return to the Commissioner. The assessment is treated as having been made on that date.' We do not think it is necessary for the purposes of the GSTD to explain when a GST return is treated as being lodged.
3.	Paragraph 14 - This paragraph could be expanded for clarity. Under section 105-5, the Commissioner may indeed make an	In relation to the four year time limit, we have added some information in a footnote about the effect of subsection 105-10(2). We have also added further content to the explanation to clarify

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	assessment at 'any time' when it is initiated by him. However, under section 105-10, the Commissioner is obliged to comply with a taxpayer's request to make an assessment only if the request is made within 4 years after the end of the tax period or relevant importation. Outside of that 4 year time limit, there is a discretion for the Commissioner to comply with the request (and thereby make an assessment at any time) but no compulsion to do so. Further, section 105-5 provides that the Commissioner may make an assessment of 'any part' of the net amount. The Commissioner should clarify whether this means that even if the assessment of part of the net amount is in relation to matters which are not the subject of the private ruling, paragraph 359-60(3)(a) will still apply to deny the right to object. The criterion in paragraph 359-60(3)(a) is the existence of an assessment for the relevant accounting period. The provision does not contain any conditions stipulating that the requisite 'assessment' must relate to the entire net amount for that period or to the subject matter of the private ruling.	that, although a private ruling about section 105-65 does not concern the assessment of your net amount for the requisite tax period, the restriction on objections in paragraph 359-60(3)(a) does not depend upon there being any connection between the subject matter of the assessment and the subject matter of the private ruling. The restriction applies to deny the right to object against the private ruling where there is any assessment for the relevant accounting period (this would include an assessment for part of a net amount).
4.	In <i>Naidoo</i> it was concluded that the Tribunal did not have jurisdiction to review the Commissioner's decision under section 105-65 to not give it a refund of the overpaid GST. The Decision Impact Statement for <i>Naidoo</i> outlines that the Commissioner will (upon request) conduct an informal review of decisions involving the exercise of the discretion under section 105-65. The Commissioner should also undertake to conduct an informal review of the private ruling about section 105-65 and this should	We have added a footnote in paragraph 16 to the effect that a taxpayer may request an informal review of a decision in relation to a private ruling.

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	be clearly stated in the Draft Determination.	
5.	Alternative view An alternative view was put that the making of an assessment is irrelevant to the question of whether the taxpayer is entitled to object to ruling on section 105-65. This is because, irrespective of whether an assessment has been issued, the ruling will not relate to a tax period. It is argued that the Commissioner's obligation to pay a refund arises either as a consequence of common law (for example in respect of monies paid by mistake) or by operation of Part IIB, Division 3 of the TAA (to the extent monies are credited to the running balance account). Specifically, the Commissioner will have an obligation to refund monies under subsection 8AAZLF(1) or subsection 8AAZLF(3) of the TAA. The operation of subsection 8AAZLF(1) or subsection 8AAZLF(3) of the TAA also mean, that to the extent any entitlement to a refund arises, that refund only arises upon a request for a refund being made, or upon allocation of the tax credits. Typically, such allocation will be made to a date, not a tax period, and that date will not align with the tax period in which the original supply was made. It is argued that there is nothing which requires or suggests that	This alternative view advances a different argument to the alternative view discussed in the Draft Determination. We do not support this alternative view. For tax periods starting on or after 1 July 2012, subsection 105-65(2) makes it clear that the 'amount to which this section applies' includes 'so much of any assessed net amount or amount of GST as you have overpaid', or 'so much of any assessed net amount that is payable to you under section 35-5 of the GST Act as the Commissioner has not refunded to you'. A net amount is worked out for each tax period that applies to you* and the assessed net amount is the net amount assessed for the tax period.[†] This suggests that a private ruling relating to an amount to which section 105-65 applies, including the exercise of the discretion under section 105-65, must also 'relate to' a tax period where an assessed net amount was overpaid or not refunded. Similarly, for tax periods starting before 1 July 2012, subsection 105-65(2) makes it clear that the 'amount to which this section applies' includes 'so much of any *net amount or amount of GST as you have overpaid', or 'so much of any net amount that is payable to you under section 35-5 of the GST Act as the

* Section 7-5 of the GST Act provides that '[a]mounts of GST and amounts of input tax credits are set off against each other to produce a *net amount for a tax period'.

[†] Section 195-1 of the GST Act.

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	the exercise of the Commissioner's discretion under section 105-65 should be confined to a particular tax period or assessment. The section applies to the amount overpaid (or that has not been reimbursed) because the taxpayer treats a supply 'as a taxable supply or an arrangement ... as giving rise to a taxable supply'. The discretion in section 105-65 is accordingly exercised by the Commissioner in relation to the amount overpaid on a supply. The discretion is not exercised in relation to a particular period, a net amount and / or assessed amount. It follows that a ruling issued by the Commissioner in respect of section 105-65 will relate solely to the refund of an amount overpaid for a particular supply or arrangement, or particular supplies / arrangements. In so far as the ruling is related to a particular period of time, it will be related to the date on which a refund is payable pursuant to subsection 8AAZLF(1) or subsection 8AAZLF(3) of the TAA. As per <i>Naidoo</i>, the exercise of the discretion in section 105-65 operates after the net amount for a tax period is calculated for a tax period. The discretion is concerned with the refund, not the assessment. It follows, that a private ruling in respect of section 105-65 will be a ruling related solely to a refund of an amount in respect of a particular supply and referable to the particular day (not tax period) in which that refund becomes payable. Accordingly, taxpayers should not be precluded from objecting to a private ruling by operation of subsection 359-60(3) of Schedule 1 to the TAA. This means taxpayers will retain their objection rights, regardless of whether an assessment has been issued.	Commissioner has not refunded to you'. A net amount is worked out for each tax period that applies to you.[‡] This again suggests that a private ruling relating to an amount to which section 105-65 applies, including the exercise of the discretion under section 105-65, must also 'relate to' a tax period where a net amount was overpaid or not refunded. We also note that an entitlement to a refund does not arise merely because of a request for a refund. It arises, for example, if the Commissioner gives effect to the request and makes the necessary assessment / amendment.

[‡] Section 7-5 of the GST Act provides that '[a]mounts of GST and amounts of input tax credits are set off against each other to produce a *net amount for a tax period'.

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6.	The view expressed in the Draft Determination is that a party may only object to a private ruling if the Commissioner has not made an assessment of the net amount of GST. The concern raised is that the practical application of the Draft Determination is that no objection will be permissible. On 6 November 2013, the Treasurer and the Assistant Treasurer announced the Government's intention with respect to taxation measures that have been announced but not enacted. Included in the announcement was a statement that the Government is to proceed with amendments to the GST Act, as previously announced, and to include amendments 'to address a recent AAT finding [that] it doesn't have jurisdiction to consider refund matters.' Given this statement from the Government, and the concerns we have with the position expressed in the Draft Determination from a policy perspective, it is submitted that the Draft Determination be withdrawn until the Government has had an opportunity to make the announced amendments.	The concern expressed is noted, especially for tax periods starting on or after 1 July 2012. This is because for these periods the Commissioner is treated as having made an assessment of your net amount when you give your GST return to the Commissioner, so that a taxpayer cannot object against a private ruling about section 105-65 if it relates to a tax period for which the taxpayer has lodged a GST return. However, the ATO must administer the law as it is enacted. The Determination is considered necessary to provide advice to taxpayers in relation to their rights of review. Should changes to the law be enacted in future, the ATO will make any necessary changes to the Determination.
7.	It is suggested that the Draft Determination raises important questions about how rulings are sought, answered, objected to and made subject to AAT and judicial review. A fuller explanation of these matters would be beneficial. For example, it is questionable whether a private ruling could or should give an indication of the manner in which a discretion might be considered. If the request is for the Commissioner to exercise his discretion to pay the refund, can the Commissioner do that through a ruling? TR 2006/11 indicates that if it is about making a decision in	The Determination has been developed to specifically address taxpayers' rights of objection in particular circumstances. Consequently, it is not considered appropriate to address broader issues regarding how private rulings are applied for and reviewed in this Determination. The Commissioner can make a private ruling on how he or she would exercise a power or discretion (see paragraph 11 of TR 2006/11). When making a private ruling in relation to a power or discretion, the Commissioner does not actually exercise the power or discretion. The effect is that once the private ruling is

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	relation to the exercise of a power, the better approach is to make the decision, not do a ruling. The Draft Determination doesn't talk about what you can object to (where the discretion is involved), what grounds might be available and what the consequences are, for example is merits review by the Tribunal available. <i>Request for AAT review of the decision on the objection.</i> Even if the AAT review was successful, it doesn't exercise the discretion - does it? The Commissioner has to do that - or does he? The Draft Determination should include comment on whether the Commissioner can actually exercise the discretion in a private ruling. If so, does Part 5-5 of the TAA make the decision subject to an objection and the decision on the objection capable of Tribunal review. If the Commissioner considers a matter that is not a 'reviewable indirect tax decision' can he make it eligible for merits based review through a private ruling?	made, the Commissioner is, bound to act in accordance with it. However, in appropriate circumstances the Commissioner may just exercise the power rather than issue a private ruling. A footnote has been added to the determination to highlight that the Commissioner may decline to rule if the Commissioner simply decides to exercise the power. Once a private ruling is issued, section 359-60 provides rights of objection and review in accordance with Part IVC of the TAA if a taxpayer is dissatisfied with the ruling. The objection and review rights in relation to the private ruling apply notwithstanding that a decision in relation to the exercise of the discretion under section 105-65 is not separately a 'reviewable indirect tax decision' because section 105-65 does not affect the assessment of net amount. The private ruling is a 'taxation decision' within the meaning of Part IVC, and a person may object against it. The objection decision may in turn be reviewed by the Administrative Appeals Tribunal or appealed to the Federal Court.