Ruling Compendium – GSTR 2015/1

This is a compendium of responses to the issues raised by external parties to Draft Goods and Services Tax Ruling GSTR 2014/D4 *Goods and services tax: the meaning of the terms 'passed on' and 'reimburse' for the purposes of Division 142 of the A New Tax System (Goods and Services Tax) Act 1999*.

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

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	The administrative fee is consideration for a separate taxable supply of services provided by the entity and the entity should receive a full refund of the excess GST passed on. GST will be remitted by the supplier for the supply of administration services. This is consistent with the principles in paragraph 125 of GSTR 2001/6. Applying this, Example 6 should show that the entity is entitled to a full decreasing adjustment for the GST payable (that is, $300). The entity will also be required to remit 1/11th of the administration fee it charges to the recipient. Alternatively, paragraphs 74 to 78 within GSTR 2014/D4 (the draft Ruling) under the heading 'Circumstances where only part of the excess GST has been reimbursed' should be removed.	Whether the administration fee is consideration for a separate taxable supply will depend on the specific facts and circumstances of the case. See GSTR 2006/9 for principles relevant to determining if an entity has made a taxable supply. Paragraphs 74 to 78 of the draft Ruling (paragraphs 72 to 75 of GSTR 2015/1 (the final Ruling)) and Example 6 have been amended to reflect the view that an entity will be entitled to a full refund of the excess GST, where the administration fee imposed is based on reasonable costs incurred in reimbursing the recipient, and the customer agrees to pay that fee.
2.	Suggest setting a safe harbour figure to ensure that the charging of an administration fee is not used in a manner for entities to receive a windfall gain.	We have not adopted the suggestion to allow a safe harbour figure for administration fees. This is because the reasonable costs of reimbursing the recipients will differ considerably depending on the circumstances.
3.	We refer to the use of the term 'must' in paragraph 70 of	Agreed. Paragraph 70 of the draft Ruling has been deleted as it is considered

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	the draft Ruling. We do not consider there to be any basis for including this term. There is no legislative source to require that the entity 'must' compensate all the recipients.	that paragraph 69 clearly explains the Commissioner's view.
4.	Paragraph 70 of the draft Ruling requires readers to refer to paragraphs 79 to 84 (footnote 22 of the draft Ruling). These paragraphs then go on to discuss situations where only some of the recipients are able to be identified. We query the consistency of paragraph 70 of the draft Ruling read together with paragraphs 79 to 84 of the draft Ruling. The principles in these paragraphs contradict what is required where the entity makes multiple supplies to a number of recipients. We suggest that this issue be clarified.	Agreed. Paragraph 70 of the draft Ruling has been deleted to remove any inconsistency with paragraphs 81 to 85 of the final Ruling.
5.	Vendors selling residential premises under the margin scheme are presumed to be 'price-setters' and always pass on GST to the purchaser. This does not reflect commercial reality. Rather, vendors selling new residential premises under the margin scheme are 'price-takers' in a market dominated by non-taxable supplies. This means the vendor bears the cost of any GST and the risk of a GST miscalculation. GST, of whatever amount and however calculated, is a matter for the vendor both in terms of contractual form and commercial substance – the purchase price is fixed irrespective of the quantum of the vendor's GST liability. The Ruling unfairly exposes property developers to increased tax regardless of whether there is any 'windfall gain'.	Noted. However, we do not believe that the Ruling suggests that vendors selling residential property under the margin scheme always pass on the GST. Example 12 in the Ruling illustrates a situation where excess GST is not passed on. To better address the concerns expressed, some additional words have been added to footnote 38 of the draft Ruling (footnote 44 of the final Ruling) and new footnote 55 has been inserted into the final Ruling to state that the fact that the margin scheme has been applied to a sale does not necessarily mean that GST has been passed on. Each case must be considered on its own facts and circumstances. Both footnotes also draw attention to Examples 2.15, 2.16, 2.17 and 2.18 of the Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014 (the Explanatory Memorandum) which illustrate a number of possible scenarios involving the margin scheme. Footnote 57 of the final Ruling has also been added to paragraph 155 in Example 16 of the final Ruling to re-emphasise these matters. Additional facts have been added to Example 16 to state at paragraph 153 of

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	For example, individual lots in a subdivision may fluctuate in price but the anticipated GST would have been apportioned over the whole development. GST actually paid cannot be recouped from purchasers, but under the Ruling, no refunds will be paid by the ATO. This results in more tax being paid by the developer. The Ruling also incorrectly assumes that property prices always rise. Property prices do not always rise and there have been situations where a property could be sold for no margin or a negative margin. The problem can be easily fixed by amending the examples (particularly Example 16 of the draft Ruling) to make it clear that GST is not 'passed on' to the purchaser, solely because the margin scheme has been applied to a sale.	the final Ruling that 'In 2001, Development Co acquired the vacant land which had significantly increased in value by the time of its sale to Tim Co.' This makes it clear that in this example, there was a positive margin on which GST was calculated. In situations where the developer feels that there has been no windfall gain, the developer may apply for the Commissioner to exercise the discretion under section 142-15 of the *A New Tax System (Goods and Services) Tax Act 1999* (GST Act).
6.	The Ruling should confirm that the Commissioner's discretion may be exercised in margin scheme situations where there is no windfall gain to the developer, as GST is not a factor in setting prices for sales of residential premises.	Refer to the discussion on the exercise of the Commissioner's discretion at paragraphs 20 and 21 of the final Ruling. Also, footnotes 44 and 55 (in addition to stating that the fact that the margin scheme has been applied to a sale does not necessarily mean that GST has been passed on) draw attention to Examples 2.15, 2.16, 2.17 and 2.18 of the Explanatory Memorandum which illustrate a number of possible scenarios involving the margin scheme. Example 2.18 of the Explanatory Memorandum deals with the exercise of the Commissioner's discretion in a case where there is no windfall gain.
7.	The Ruling should also include Examples 2.12 and 2.13 from the Explanatory Memorandum to provide greater certainty for taxpayers as to the circumstances in which the Commissioner may exercise the discretion in subsection 142-15(1) of the GST Act.	Noted. A Ruling is not the usual vehicle for any broad discussion of the exercise of the Commissioner's discretion. A decision to exercise the discretion will be made by having regard to the particular facts and circumstances of each case. It is considered sufficient that Examples 2.12 and 2.13 are outlined in the Explanatory Memorandum.

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8.	A statement should be included in the final ruling to the effect that *Avon Products Pty Ltd v. Commissioner of Taxation* [2006] 230 CLR 356; [2006] HCA 29 (*Avon*) and other sales tax authorities are relied on by the Commissioner in the absence of any authority in the context of GST. The Commissioner should acknowledge that the waters have yet to be tested in respect of GST and, as the High Court noted in *Avon*, the phrase must be interpreted with reference to the specific statutory regime in which it appears. It follows that the Commissioner's interpretation of 'passing on' with reference to *Avon* and other sales tax authorities is not free from doubt.	Noted and addressed by making changes to paragraph 97 of the draft Ruling (paragraph 99 of the final Ruling).
9.	Broadly agree with the Commissioner's interpretation of the concept of 'passing on' as set out in the draft Ruling. Nevertheless, we have some concerns with the principles and examples discussed therein and also consider that there are additional issues and examples that should be included. We suggest that the concept of passing on should be based on the following guiding principles: • Principle 1: Businesses normally set prices to cover foreseeable costs. • Principle 2: GST is normally a foreseeable cost and businesses normally set prices to cover GST. The four matters relevant to deciding whether a supplier has passed on excess GST (refer paragraph 28 of the draft Ruling) do not provide a helpful framework, are not based on the relevant authorities and are confusing. In particular, there is no central theme that assists taxpayers	Noted. While we do not disagree with the two guiding principles suggested, we consider that they alone do not provide sufficient practical guidance to taxpayers seeking to self-assess their entitlement to a refund, as they only repeat the underlying theme from the relevant authorities. The four matters set out in the Ruling were based on features that were discussed in relevant sales tax and GST authorities on passing on, including *Avon Products Pty Ltd v. Commissioner of Taxation* [2006] HCA 29, *MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd v. Commissioner of Taxation* [2011] AATA 769 and *DB Rreef Funds Management Ltd* (2006) 152 FCR 437. This approach is intended to assist taxpayers identify features in their own circumstances relevant to determining whether excess GST has been passed on.

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	in applying Division 142. There is significant overlap between each of the four relevant matters and, further, the lack of a cohesive approach makes it difficult for taxpayers to apply the draft Ruling in practice. Accordingly, it is recommend that the Commissioner consider revising the draft Ruling so it adopts a more principled approach to the issue of passing on, that it uses the two suggested guiding principles set out above as its central theme and structure the discussion around these principles.	
10.	It is recommended that Administrative Appeals Tribunal case *ST94-49 and Commissioner of Taxation* [1995] AATA 216 be included as an example in the final Ruling.	Noted, however we consider that it is more useful to try and draw out the approach taken by the Courts to the analysis of passing on than to include one particular example which, as Hill J observed in *Avon Products Pty Ltd v. FC of T* [2004] FCA 475 at [58], did not enunciate a rule of principle. The Ruling makes clear that each case must be determined on its own facts and circumstances and we think that the current examples in the Ruling sufficiently illustrate a range of scenarios where passing on may or may not occur.
11.	In relation to Example 4 of the draft Ruling, while the reference to Eric maintaining his profit margin is important, the reference to 'cost reductions' is vague and provides little practical guidance to taxpayers as to what is meant by 'cost reductions' (particularly in the context that taxpayers are required to self-assess whether they have passed on GST). It is recommended that the Commissioner clarify the example. We suggest the example be amended to state 'However, he does not increase prices for these products, given he can maintain profit margin by negotiating a	Paragraph 54 in Example 4 of the final Ruling has been reworded to provide clarity.

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	corresponding lower price for the product from his supplier'.	
12.	A particular issue arises in respect of taxpayers that incorrectly treat input taxed supplies as taxable. Over-claimed input tax credits need to be taken into account in working out whether the taxpayer has passed on excess GST. In particular, the over-claimed input tax credits constitute an unforeseeable cost and hence the taxpayer would not have set its prices to cover such a cost, that is, the taxpayer would generally have set its costs on the basis that it was entitled to claim input tax credits. An example illustrating this issue was suggested.	Noted but we consider that the question of whether excess GST has been passed on is something separate to the issue of over-claimed input tax credits not being factored in to the cost of the supply. However, this may be a relevant consideration where the entity requests that the Commissioner exercise the discretion in section 142-15 on the grounds that there may not be a windfall gain.
13.	The draft Ruling should canvass the circumstances where GST is passed on to an extent (rather than simply as a reference in the Reimbursement section of the draft Ruling).	Noted. The words 'so much of the excess […] as you have passed on to another entity' in section 142-10 mean that, in situations where only part of the excess GST has been passed on, the section will only apply to that part of the excess GST which has been passed on. The Commissioner considers that the law is clear and it is not necessary to add additional explanation on this point.
14.	The draft Ruling does not address reimbursement through payment in-kind, for example through the use of Division 100 vouchers. It is considered that the use of Division 100 vouchers to be an acceptable and practical method of reimbursement for the purposes of Division 142 as it facilitates the repayment of an amount corresponding to all or part of the excess GST. It is recommended that the Commissioner revise the draft Ruling to include the issue of Division 100 vouchers as a	The Commissioner considers that the use of Division 100 vouchers could, in some cases, satisfy the reimbursement requirement. Paragraph 71 of the draft Ruling has been revised (paragraph 70 of the final Ruling), and new paragraph 159 has been inserted into the final Ruling to cover situations where the issue of Division 100 vouchers would meet the requirement for the supplier to reimburse its customer.

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	form of reimbursement.	
15.	The position taken by the Commissioner in the draft Ruling places a potentially significant cash flow burden on suppliers who must reimburse recipients before receiving the refund of excess GST from the Commissioner. This issue was dealt with in the previous sales tax regime through the use of conditional credit notes. That is, credit notes which were actionable by the recipient on condition that the supplier actually received the money from the Commissioner. It is recommended that the Commissioner revise the draft Ruling to recognise that the issue of conditional credit notes is an acceptable method of reimbursement for the purposes of Division 142.	Noted. It is our considered view that providing a conditional credit note to the recipient is not an appropriate form of reimbursement for the purposes of section 142-10, because the intent of the provision is that an entity will not be entitled to a refund from the ATO until after reimbursement by the entity. Conditional credit notes cannot be used by the recipient until after the supplier has received the refund. However, a supplier issuing conditional credit notes may request that the Commissioner exercise his discretion under section 142-15 to treat section 142-10 as not applying.