Australian Government
Australian Taxation Office

Taxpayer Alert

TA 2016/8

GST implications of arrangements entered into in response to the Multinational Anti-Avoidance Law (MAAL)

Alerts provide a summary of our concerns about new or emerging higher risk tax or superannuation arrangements or issues that we have under risk assessment.

While an Alert describes a type of arrangement, it is not possible to cover every potential variation of the arrangement. The absence of an Alert on an arrangement or a variation of an arrangement does not mean that we accept or endorse the arrangement or variation, or the underlying tax consequences.

Refer to PS LA 2008/15 for more about Alerts. See Alerts issued to date.

Overview

We are currently reviewing arrangements entered into in response to the Multinational Anti-Avoidance Law (MAAL). As part of this review, we are considering the Goods and Services Tax (GST) consequences of the arrangements involving the distribution of intangible products and services into Australia.

We have encountered arrangements which involve foreign and Australian entities swapping their roles via contracts. These contracts purport to make the Australian entity the distributor of the intangible products or services and the foreign entity an agent of the Australian entity, collecting the sales revenue from customers on its behalf.

Under this arrangement it is purported that while an Australian entity contracts with Australian customers to avoid the application of the MAAL, no GST is payable on the supplies. It is argued that no GST is payable on the basis the supplies are not made through an enterprise carried on in the indirect tax zone for the purposes of paragraph 9-25(5)(b) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

We caution companies to take care that structures or arrangements used in response to the MAAL consider the appropriate GST outcomes. We also caution companies to ensure that these structures or arrangements do not themselves amount to schemes to avoid GST.

Additionally, we caution intermediaries to make sure they are not promoting a scheme to avoid GST.

Description

The arrangements are discussed in Taxpayer Alert TA 2016/2, and may involve the following features:

- A foreign entity, which supplied intangible products or services to Australian customers prior to the arrangement, enters into a distribution agreement with an existing or newly formed associated Australian entity (the Australian distributor) with effect from 1 January 2016 (or some later date). The agreement purportedly authorises the Australian entity to distribute the

intangible products or services to Australian customers. The Australian distributor then purportedly becomes the 'supplier' of the intangible products or services. To avoid doubt, the parties are claiming the Australian distributor is supplying in its own right, not as agent for the foreign entity.

- The Australian distributor may be a new entity, notwithstanding that an existing associated Australian entity already provides marketing and other support services connected with the intangible products or services being distributed to Australian customers.
- The foreign entity and the Australian distributor may enter into an agency agreement, with effect from the same date as the distribution agreement, under which the foreign entity is purportedly appointed as the Australian distributor's agent.
- The foreign entity continues to distribute intangible products or perform services (albeit it now purportedly does so on behalf of the Australian distributor).
- Some or all of the income will be attributed to the Australian distributor in Australia.

It is argued that no supply is being made by the Australian distributor through an enterprise that it carries on in the indirect tax zone for the purposes of paragraph 9-25(5)(b) of the GST Act.

What are our concerns?

In addition to the concerns raised in Taxpayer Alert TA 2016/2, we consider these arrangements will not be effective in avoiding GST and are clearly inconsistent with the underlying policy intent of both the MAAL and the GST Act.

In relation to GST, we are concerned that these arrangements:

- are artificially structured to avoid the application of the GST
- adopt inconsistent positions for the purposes of income tax and GST
- do, insofar as they are legally effective, involve the intangible products or services being supplied through an enterprise the Australian distributor carries on in the indirect tax zone for the purposes of paragraph 9-25(5)(b) of the GST Act
- may, insofar as they are not legally effective, result in the foreign entity supplying intangible products or services that are connected with the indirect tax zone for the purposes of paragraph 9-25(5)(b) of the GST Act.

If the arrangements are legally effective in achieving the intended result of a supply being made by the Australian distributor, we consider the supply would be made by that entity through an enterprise carried on by it in the indirect tax zone (contrary to what is being purported) and that GST will apply to that supply.

What are we doing?

We are currently reviewing taxpayers' responses to MAAL for their GST consequences. We are engaging with taxpayers who have put forward these arrangements to explore the issues of concern and to ensure any restructuring arrangements do not seek to avoid the application of the GST and/or the MAAL in an artificial and contrived manner.

The ATO has processes in place to work collaboratively with taxpayers during the transition

to MAAL-compliant structures that address, among other things, the tax liabilities arising between the commencement of the MAAL, that is 1 January 2016, and the point at which a final structure is put in place. Information on these processes can be found in the MAAL client experience roadmap.

Taxpayers who adopt these types of arrangements and their advisors will be subject to increased scrutiny. This includes consideration of whether the distribution and agency structure is tax driven and legally effective, and whether the arrangement is inconsistent with the economic substance and commercial reality of the activities carried out in Australia.

We will initiate compliance review activities, if necessary, to address such arrangements. In respect of any GST shortfall, this may result in substantial penalties of up to 75% of the tax avoided being imposed.

Given the nature of the arrangements, any entity involved in the promotion of such arrangements may be considered a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953*. We will be allocating compliance resources to consider the effectiveness of the arrangements and the potential application of Division 290.

What should you do?

If you have entered into a similar arrangement to that described in this Taxpayer Alert, you may wish to seek advice as to the legal and tax consequences of the arrangement. We would also encourage you to email us at GSTmail@ato.gov.au (GST queries), MAAL@ato.gov.au (general queries), or contact the officer named in this Taxpayer Alert to discuss your arrangement.

Do you have information?

If you have any information about the arrangements described above, email us at GSTmail@ato.gov.au (GST queries), MAAL@ato.gov.au (general queries), or contact the officer named in this Taxpayer Alert with the relevant information or to arrange a meeting with us.

Tax agents who would like to provide information about individuals or companies potentially promoting arrangements covered by this Taxpayer Alert should also use the above contact details.

References

Legislative References:

A New Tax System (Goods and Services Tax) Act 1999
- Section 9-25
- Division 165

Income Tax Assessment Act 1936
- Section 177DA

Taxation Administration Act 1953
- Schedule 1, Division 290

Related Taxpayer Alerts:

- TA 2016/2

Related Practice Statements:

- PS LA 2008/15

Related Rulings/Determinations:

- GSTR 2000/31
- LCG 2015/2

Date issued:	**10 August 2016**
Authorised by:	**Tim Dyce** Deputy Commissioner, Indirect Tax **Mark Konza** Deputy Commissioner, International
Contact officer:	**Hilal Ali**
Business line:	Indirect Tax
Phone:	02 9374 1410