MT 2009/1EC - Compendium

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Ruling Compendium – MT 2009/1

This is a compendium of responses to the issues raised by external parties to draft MT 2008/D4 – Miscellaneous taxes: notification requirements for an entity under section 105-55 of Schedule 1 to the *Taxation Administration Act 1953*

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	Tax Office Response/Action taken (references to the final ruling)
1.	This Draft Ruling is complimented by Draft Practice Statement PS LA 2529 (Draft) dealing with the requirements of section 105-50 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). Section 105-55 (a) of Schedule 1 to the TAA requires an entity to '…notify the Commissioner…' while section 105-50(a) of the TAA provides that '… the Commissioner has required payment …by giving a notice to you…'. The separate requirements of imposed by an obligation to 'notify' (section 105-55) and 'giving a notice' would tend to indicate that similar requirements apply to each section. We would therefore strongly recommend that the Draft Ruling expressly acknowledge that the same standards and principles of 'specificity' which are being applied to section 105-55 (a) in the Draft Ruling will be applied to section 105-50 when the Commissioner requires payment by giving a notice since the provisions of section105-55 are essentially a mirror image of those applicable to section 105-50. The second dot point in paragraph 9, Examples 1 & 2 and the comments in Appendix 1 of MT 2008/D4 explain the requirements of a valid notification for the purposes of section 105-55.	This issue is clarified in Law Administration Practice Statement PS LA 2009/3, which is about section 105-50 of Schedule 1 to the TAA. The requirements are not necessarily the same. However the Commissioner proposes to meet the same notification standards as in the MT when he issues section 105-50 notices during a tax audit.

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	Paragraphs 40-42 of PS LA 2529 (draft) appear to be the only directions that are given about the specificity that is required in a notice that is given to an entity under section 105-50. Those directions appear to be much less onerous than the requirements that are imposed on entities by MT 2008/D4.	
2.	The Draft Ruling makes the comment that the ruling when finalised will apply to both a notification of an entitlement to a refund etc for the purposes of section 105-55 and to a notification for the purposes subitem 16(2) of Schedule 2 to the *Taxation Laws Amendment (2008 Measures No. 3) Act 200* (subitem 16(2) notifications). It is assumed, although it is not positively asserted, that paragraph 24 of the Draft Ruling will apply for notifications for the purposes of subitem 16(2). Of necessity those notifications were required to be lodged before 1 July 2008. At paragraph 24 the Commissioner advises that notifications that are received before the issue of the Draft Ruling would not be treated as invalid merely because the language was not definite in asserting a refund entitlement or only a brief description of the nature of the entitlement has been given. However, the comments at paragraphs 60 to 62 seem to apply the strict notification requirements of the Draft Ruling to notifications for the purpose of subitem 16(2).	Change accommodated – paragraph 7. The final ruling clarifies that subitem 16(2) notifications received before the issue of the draft Ruling will not be treated as invalid merely because: • it uses language that is not definite in asserting the entitlement, for example a notification which states that the entity 'may' have an entitlement; or • it provides only a brief description of the nature of the entitlement, provided it gives some information about the specific factual circumstances under which the entitlement arises.
3.	The comments at paragraphs 49 and 50 of the Draft Ruling are difficult to understand and seem to be contradictory. In paragraph 49 there is a requirement to positively state that there is an entitlement to a refund. The final sentence of that paragraph seems to regard a claim that that there will be an entitlement if a court interprets a decision in a particular way as being an equivocal statement.	Change made. The final ruling has been revised to make it clear that correspondence that is equivocal about the factual basis of an entitlement, for example advising that an entity might be entitled to a refund if certain facts are subsequently established, does not meet the requirements of section 105-55 – paragraph 36.

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	By comparison, paragraph 50 states a notification that an issue '…may be affected by a pending court decision…' which is not an equivocal statement. However, the final sentence of paragraph 50 seems to impose the additional requirement of not only outlining the relevant arguments but also asserting that the argument giving rise to the refund entitlement is the correct position or the better view of the law. Consideration should be given to redrafting paragraphs 49 and 50 of the Draft Ruling to provide a clearer view of the notification requirements for entities.	However a notification or accompanying documentation may advise that an issue is contentious, or that the entity's claim is contrary to the Commissioner's view of the law or that the matter is contingent on the outcome of a pending court case. This will not affect the validity of the notification provided the entity asserts the factual basis upon which it is entitled to the relevant refund, payment or credit – paragraph 39.
4.	MT 2008/D4 takes the view that a valid notification should specify the tax period or tax periods in which the entity has an entitlement to a GST refund etc. That view is said to be supported by section 105-55 (2)(a). There is no dispute that when a refund entitlement etc is quantified, the entitlement relevant to each tax period must be identified. However, where a single issue applies across various tax periods the requirement to specify each of those tax periods is questionable. It appears that if the same issue arises in each tax period within a time span then it acceptable to specify that time span. However, where that issue arises in some but not all tax periods within a time span, there is a requirement to specify individual tax periods. The requirement to specify particular tax periods in the circumstances where there is an on-going single issue is most problematic in circumstances that would have applied to notifications lodged prior to 1 July 2008 where the refund entitlement was limited to the net amount that was paid by an entity in a tax period. The ATO would be aware from its own records of the tax period where the entity has a positive net amount and should have been aware from that fact that the refund entitlement arose only in those tax periods.	Partial change made – paragraphs 44-45. The example in the final ruling clarifies that if the same issue arises in each tax period within a time span then the entity only needs to specify the time span. Where the same issue arises in some but not all tax periods within a time span, it is the Commissioner's view that there is a requirement to specify individual tax periods. This is because section 105-55 of Schedule 1 to the TAA clearly provides that the refund, other payment or credit must be **in respect of a tax period.**

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5.	It would also be beneficial if clarity was provided on the specific application of the four year time limit under section 105-55. In our view the provision should apply so that this four year cap commences after the end of a tax period such as the end of a month for an entity that lodges a Business Activity Statement on a monthly basis. Hence, the four year time limit for the tax period ended 30 November 2004 would be 1 December 2008 being four years after the end of the relevant tax period being 20 November 2004. However, we understand that the Commissioner adopts a contrary view in practice such that the 4 year cap in the above circumstances would commence on 1 November 2008. We believe that the Draft Ruling should be amended to provide clarity as to the application of the four year period.	Change made – paragraph 19. The final ruling clarifies the application of the four year period. Using the example provided, the Commissioner's view is that the four year time limit would start on 30 November 2004 and end on 30 November 2008.
6.	The circumstances of the recent decision of the Full Court of the Federal Court of Australia in *Brady King Pty Ltd v Commissioner of Taxation* [2008] FCAFC 118 ('the *Brady King case'*) provide ideal material for the basis of a further example of the requirements of section 105-55. The decision of the Full Federal Court overturned the ATO view about the application of section 75-10(3) of the *A New Tax System (Goods and Services Tax) Act 1999*. The decision also potentially called into doubt the ruling that have been issued by the ATO about the application of section 6(3) of the *A New Tax System (Goods and Services Tax Transition) Act 1999*. The decision in the *Brady King case* was handed down on 26 June 2008. The ATO did not issue its Decision Impact Statement where it accepted the Full Court's interpretation of section 75-10(3) until 12 August 2008.	No change made. The proposed example is likely to be of limited value. It is very specific and would only be relevant to subitem 16(2) notifications, which are a transitional matter.

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	Entities had overpaid GST (or had potentially overpaid GST) throughout the period 1 July 2000 to 31 May 2008 in the following circumstances: • Where GST had been calculated under the margin scheme using section 75-10(2) instead of section 75-10(3); and • Where GST had been paid on transfers of real property that had been made available to a purchaser before 1 July 2008. The example could examine how an entity that had overpaid GST in these circumstances could satisfy the requirement of section 105-55 as detailed in MT 2008/D4 particularly the requirements of subitem 16(2).	