MT 2010/1EC - Compendium

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Ruling Compendium – MT 2010/1

This is a compendium of responses to the issues raised by external parties to draft MT 2009/D1 – Miscellaneous tax: restrictions on GST refunds under section 105-65 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 final ruling)
1	Sec 105-65 should be interpreted as giving the Commissioner the power to deny a refund otherwise due, rather than the power to 'grant' a refund, as is stated in the draft Ruling.	No change made. The Ruling does not state that section 105-65 gives the Commissioner the power grant a refund. It explains: • That the Commissioner must give a refund or apply that amount in accordance with the running balance account (RBA) rules. (paragraph 9) • However where a refund arises from a reduction in the GST payable, subsection 105-65(1) modifies the general rules so that the Commissioner need not give a refund (or apply that amount) in certain circumstances (paragraph 10). • The Commissioner 'need not' give a refund but can exercise the discretion to do so (paragraphs 27 to 28)
2	The statement in paragraph 63 that 'both parties will need to revise their activity statements' is incorrect in cases where the recipient has not claimed the credit. The paragraph should be reworded to reflect that situation.	The paragraphs under the heading, 'Effect of a supply being treated as taxable on the registered recipient' including paragraph 63 have been deleted from the Ruling and the Commissioner is currently considering whether to include similar paragraphs in a separate Practice Statement (GA). The 'preserving the status quo' policy is more relevant to a product made under the Commissioner's general powers of administration rather than an interpretive product such as a public ruling.

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3	The draft uses the term reimburses and refunds when dealing with a supplier's need to provide funds back to the recipient. In the interests of clarity and certainty, the draft should state that the crediting of the recipient's account or offsetting the credit against liabilities is regarded as a reimbursement	Change accommodated. Paragraph 18 now defines the term 'reimburse' to include crediting etc.
4	In paragraphs 108 to 111 the draft does not consider a recipient who is not entitled to input tax credits, although paragraph 109 suggests that a concept of neutrality applies. The comments made above (at Issue 2) that relate to recipients who cannot claim input tax credits also apply to paragraph 108. The words 'and the recipient is entitled to a full input tax credit' should be added at the end of the paragraph 108 so that it reads: Notwithstanding the primary stated policy of preventing windfall gains, the drafting of subparagraph 105-65(1)(c)(ii) also appears to reflect a 'preserving the status quo' policy. In other words, there is nothing to be gained from reversing transactions where the supplier and recipient are both registered for GST and the recipient is entitled to a full input tax credit.	Change accommodated in part. The paragraphs under the heading 'Preserving the status quo' have been deleted from the Ruling and the Commissioner is currently considering whether to include similar paragraphs in a separate Practice Statement (GA). A situation where a recipient cannot claim a full input tax credits is referred to in example 11 (paragraphs 169 to 172).
5	In paragraph 112, the last reference to entity should be to recipient to provide clarity and consistency.	Change accommodated in part. This paragraph (current paragraph 133) is premised on paragraph 105-65(1)(a) which is about the supplier (paragraph 105-65(1)(a) uses the term 'you' rather than 'entity'). Accordingly, the reference to 'entity' in this paragraph is to the supplier not the recipient and the ruling has been amended to reflect this.

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6	In example 8, it would be unusual for a supplier to be unaware (as meant by subsection 29-20(1) of the GST Act) of the adjustment to input tax credits once they realise it is not liable to pay the tax on the supply. Nevertheless, example 8 deals with this but a variation is needed to deal with cases where there is not a supply at all but the supplier still charged tax on the invoice. This could be in cases where the supplier discharged someone's liability as agent (for example, paid Council rates and charged GST on the reimbursement sought). If this was charged to a residential rent supplier you have the circumstance where it is appropriate to restore the proper treatment as the recipient is not entitled to full input tax credits.	Change accommodated in part. This example is about determining the **quantum** of the refund rather than about recipients who are not entitled to input tax credits. A heading has been added to the example (see paragraph 141) to provide clarity as to the particular point the example is making. A footnote has also been added to further clarify the example (footnote 53). Regarding the suggestion to have an example covering agency, in the interests of maintaining a manageable product it is not practical for the ruling to cover every contingency with examples.
7	Example 10 produces a reasonable outcome, given the circumstances (ATO advice etc.) but the outcome in example 11, where a refund is not to be made, is inequitable. It seems quite reasonable that MC should be given a refund for the remaining 25% as it should not have been payable in the first place. It should not be assumed that FS has passed the unclaimed cost onto its customers. If it has not, then FS has incurred a cost and the Commissioner has received more than he should have. If the outcome is that a refund will not be given in these circumstances, the example should provide better reasoning as to why the refund would be denied. To close off with the comment suggesting that this example is more about the input tax credit claims of recipients and not sec 105-65 means that this example should be omitted altogether or changed to deal with the situation described.	No change made. Example 11 is illustrating the point that in cases where both parties are registered the clear words of the law, and the policy, mean that refunds need not be given. This aspect is elaborated upon at paragraphs 113 to 132.

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8	The draft Ruling should be amended to confirm that section 105-65 does not apply to margin scheme errors/recalculations.	No change made. As explained at paragraphs 23 and 68 to 82, the phrase 'to any extent' are words of wide import. This means that section 105-65 will apply to circumstances of a transaction in real property in which the GST liability was calculated using the margin scheme. Such matters concern the GST payable on a supply that was treated as a taxable supply to some extent and the 'extent' of that treatment as a taxable supply is different to the correct extent of the treatment under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
9	Supplies under the margin scheme should be included as another 'circumstance' in paragraph 106 of the draft Ruling in which it would be fair and reasonable for the Commissioner to exercise his residual discretion. That would mean including text along the following lines: [para 106(d)(v)] The overpayment of GST arises due to an incorrect calculation of GST under the margin scheme on a sale to an end purchaser. For instance, the sale has been made for an agreed price, inclusive of GST if any, but the vendor subsequently realises that the GST calculated and paid was incorrect due to the margin scheme cost base changing.	Change accommodated in part. Examples have been added dealing with the margin scheme and the exercise of the Commissioner's discretion (examples 16 and 17). Margin scheme cases will be treated the same way as any other case to which section 105-65 applies and where consideration is given to exercising the discretion. The exercise of the discretion to give a refund will apply on a case by case basis. The margin scheme represents another method by which the GST is calculated. The GST, as calculated either under the general rules or under the margin scheme, is a foreseeable cost that would normally be taken into consideration in the costing and pricing structures. In this regard there is nothing particularly special about margin scheme cases that warrant separate treatment to other situations of 'overpayment'.
10	An example of the Commissioner exercising his discretion in an overpayment of GST on a margin scheme sale should be included in Appendix 2 of the draft Ruling.	See comments at Issue 9 above and example 17.

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11	The Ruling should reflect the correct view that Section 105-65 has no application to the calculation of an entity's 'net amount'. The Commissioner's comments in paragraphs 83-96 and 133-138 (including Examples 6 and 9) should be amended accordingly.	Change accommodated in part. Paragraphs 83 to 96 in the draft are not about the net amount – those paragraphs illustrate the point that section 105-65 applies to individual transactions and may restrict the refund of overpaid GST even in a case where the overall revisions results in a liability and not a refund. Words added to the heading to the example to make this clear. The position taken regarding the net amount (at paragraphs 133 to 138 in the draft) is the ATO view. However paragraphs 150 to 161 have been modified to provide more detailed reasoning behind this view including stating the net amount issue has by implication been supported by recent court cases and outlining the benefit to taxpayers of taking section105-65 into account in determining the net amount.
12	The Commissioner's views on the impacts of the *Luxottica* case will need to be incorporated into the draft Ruling.	Change accommodated in part. *Retail Australia Pty Ltd v Commissioner of Taxation* [2010] AATA 22 *(Luxottica)* is largely a case that is specific to its facts. However *Luxottica* is referred to at paragraphs 58, 74, 75, 85, 88, 117, 130 and 155.
13	Comments of the approach to the interpretation of section 105-65 were also made by the Federal Court of Australia in *KAP Motors Pty Ltd v Commissioner of Taxation [*2008] FCA 159. In that case the provisions were interpreted strictly and were found not to apply in a circumstance where something had been incorrectly treated as a taxable supply but it was not a supply. The provision has been amended to overcome the effect of the decision by applying the section to an arrangement treated as giving rise to a taxable supply. However, the approach to the interpretation of section 105-65 is likely to remain a strict approach.	Change accommodated in part. The ruling addresses *KAP Motors Pty Ltd v Commissioner of Taxation [*2008] FCA 159 (*KAP Motors*) (at paragraphs 78 to 81) but also acknowledges that the comments that were made by the court in *KAP Motors* need to be understood in the context of that case. In that case the Commissioner sought to argue that the word 'supply' included a purported supply and that section 105-65 applied to the transaction when on the facts of the particular case there was no supply. Under the current Ruling, the ATO is interpreting the words that are already in the section under a purposive approach that accords with the broader policy intent.

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13. cont	It is submitted that to the extent that the draft Ruling takes a broad approach to the interpretation of section 105-65, it is likely that such an approach is unlikely to be supported in any judicial review.	
14	Paragraph 46 seems to limit the application of section 105-65 to circumstances where the amount of GST remitted for a supply in a relevant tax period exceeds the amount that was required to be remitted on that supply. With respect, the above analysis (and particularly the meaning of 'amount to which the section applies' in section 105-65(2)) seems to suggest that the section applies to any overstatement of a GST liability in the calculation of a *net amount.	Change accommodated in part. The analysis of 'overpaid' is sustainable but has been modified to provide further clarification in particular additional words have been added at paragraph 58 regarding 'overpaid' as it was discussed in *Luxottica.*
15	Section 105-65 does not deal nicely with circumstances where an entity other than the entity that made the supply or the arrangement treated as a supply is the entity that has the obligation to pay or receive a refund of the net amount.	No change made. The Ruling is interpreting section 105-65 and, as that provision does not deal with third parties arrangements, the ATO is unable to specifically extend its operation to these entities. However paragraphs 94 to98 and Example 12 do address third party scenarios that are capable of being caught within the parameters of section 105-65.
16	Paragraphs 64 to 77 of the draft Ruling consider the meaning of 'to any extent' as that phrase appears in section 105-65(1)(a) and the corresponding phrase 'to that extent' that appears in section 105-65(1)(b). The draft Ruling considers the meaning of the expression 'to any extent' in its own right. However, the words are used in section 105-65(1)(a) as part of a composite expression 'a taxable supply to any extent'. …..	No change made. As explained at paragraphs 23 and 68 to 82, the phrase 'to any extent' are words of wide import. This means that section 105-65 will apply to circumstances of a transaction in real property in which the GST liability was calculated using the margin scheme. Such matters concern the GST payable on a supply that was treated as a taxable supply to some extent and the 'extent' of that treatment as a taxable supply is different to the correct extent of the treatment under the GST Act

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	The most probable application of the words 'to any extent' as used in section 105-65(1)(a) will link that section to the similar expression in section 9-5 of the GST Act. That section provides that a 'supply is not a taxable supply to the extent that it is GST-free or input taxed' **Other examples where particular expressions are taken out of context** The ATO's view in MT 2009/D1 that the use of the words 'to any extent' would capture recalculations of GST liabilities on supplies that have been treated as taxable and remains taxable is incorrect. This is supported by the clear words of s 105-65 and the Explanatory memorandum which requires that a supply or arrangement is not a taxable supply to any extent. The provision clearly does not extend to situations where the incorrect amount of GST liability has been calculated in respect of taxable supplies (that is the provision requires all or part of a supply to not be taxable, such as in mixed supply situations).	On balance the Commissioner is of the opinion that the view expressed in the Ruling represents the better interpretation of the provision. The view in the Ruling accords with the policy and purpose of section 105-65 to ensure that registered suppliers in a supply chain do not obtain a windfall gain by claiming refunds of overpaid GST where that GST has been borne directly or indirectly by recipients of the supply.
17	The use of the phrase 'treated as a taxable supply' in section 105-65(1)(c) as authority for the Commissioner to allow the recipient of a supply incorrectly treated as a taxable supply to treat that acquisition as a creditable acquisition. The phrase in section 105-65(1)(c) is limited to an arrangement treated as giving rise to a taxable supply and is not authority for the broader proposition that has been claimed in the draft Ruling.	Change accommodated in part. The paragraphs under the heading 'Preserving the status quo' have been deleted from the Ruling and the Commissioner is currently considering whether to include similar paragraphs in a separate Practice Statement (GA).

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18	The application of section 105-65 to circumstances where the Commissioner has treated a supply as a taxable supply. The contention in the draft Ruling that section 105-65 can apply to circumstances where the Commissioner has assessed GST on a transaction where that assessment is subsequently withdrawn or proved to be incorrect is in our view incorrect and leads to an inappropriate outcome. The suggestion that the Commissioner can assess GST on transactions, can post those liabilities to a Running Balance Account and is only bound to reverse the effect of those incorrect assessments through the exercise of discretion is insupportable. It is inconsistent that this is the outcome if the Commissioner treats a GST-free supply as taxable or treats a supply that is out of scope (because the supplier was not required to be registered) as taxable, but not if the assessment has been raised because of the inappropriate denial of input tax credits.	No change made. Section 105-65 does not contain any words of limitation that would restrict its application to only situations where the *supplier treated* something as taxable to any extent. The Ruling has other examples of where the 'treating' is done by someone other than the supplier – see paragraphs 94 to 98 and example 12 at paragraph 173. Furthermore, the ruling states that in situations where the Commissioner has incorrectly treated a supply as taxable, the Commissioner is likely to exercise his discretion to give the refund (see footnote 28 and example 15). Section 105-65 is premised on a supply being incorrectly treated as taxable that is GST is incorrectly paid – it does not have application, per se, to input tax credits.
19	Equally insupportable is the attempt to interpret the provisions that relate to the Commissioner's discretion in the 'giv[ing]' of a credit or refund as applicable to situations where no refund is given at all.	No change made. Refer to issue 11 above.

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19. cont	A taxpayer's net amount for a tax period, as calculated under the relevant provisions in the GST Act is the amount it must pay (or be refunded). Only after the net amount is determined does section 105-65 operate (or 105-50 or 105-60). These are the clear opening words of section 105-65 and there is no ambiguity or uncertainty in their application. There is also no 'inconvenient or improbable' result as the Commissioner contends in paragraph 87 – that is exactly how the law is drafted. The ATO's view in paragraphs 83 to 89 and 133 to 136 that the application of section 105-65 goes towards ascertaining a taxpayer's net amount under the GST Act is in our view simply incorrect. We are of the view that section 105-65 is a mere recovery provision and cannot operate to 'taint' the net amount determined under the GST Act. We therefore consider the ATO's alternative view as expressed in paragraphs 192 to 197 should be adopted in the final Ruling.	
20	There are comments at paragraph 104 of the draft Ruling to the effect a refund of GST should generally apply to an entity that has borne the incidence of the tax.	Change accommodated in part. Further explanation of the rationale for provisions such as 105-65 (which restrict the giving of refunds in an indirect tax system) has been provided at paragraphs 113 -127.

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20. cont	There has previously been a general understanding that if a supplier bears the incidence of GST on a transaction and did not recover that cost from a recipient, the supplier is entitled to a refund of any overpayment. Whether this concept is implicit in section 105-65 or is an example of where the Commissioner is expected to exercise the residual discretion is not clear. There is no specific comment on this proposition in the draft Ruling and this proposition has not been referred to in the explanation of those circumstances where the Commissioner would exercise the discretion to give the refund, for example Appendix 2, Example 15.	
21	There should be specific comment on the proposition in the draft Ruling that the residual discretion would be exercised where the supplier bears the incidence of the tax (such as margin scheme sales to end users).	Change accommodated in part. An example has been added regarding the exercise of the Commissioner's discretion in a specific margin scheme case (example 17). However, the Commissioner cannot fetter his discretion and all cases must be treated on their own specific facts and merits.
22	Paragraph 10 – a refund may also arise from a reduction in an increasing adjustment.	No change made. Adding this term may create confusion as a 'reduction in an increasing adjustment' would be covered by the concept of 'decreasing adjustment'.

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23	Note changes in former application of discretion/ mandatory requirement to refund in s.39(3) ('The Commissioner need not give you the refund…unless: (c)…the Commissioner is satisfied that you have reimbursed… 'to new negative discretion in s.105-65(1) 'The Commissioner need not give you a refund if the Commissioner is not satisfied that you have reimbursed a corresponding amount. Arguably, same effect despite subtle changes as to application of discretion. Note also that standard is now Commissioner is 'not satisfied'. Query; is this the same standard/ proof requirements and, if so, who bears this, as the prior statutory requirement in s. 39(3) was that Commissioner is satisfied.	No change made. Paragraphs 36 to 45 and 113 to 127 of the ruling explain that given the scheme of the GST Act, the payment of a refund when an entity has not complied with the specific requirements of section 105-65 will be the exception rather than the norm. Therefore, the onus is on the supplier to demonstrate that their circumstances make it appropriate for the Commissioner to give a refund despite the fact that the Commissioner need not do so. The difference in wording does not alter the fact that in either case, the Commissioner needs to be provided sufficient information to conclude whether reimbursement has occurred. Paragraph 118 outlines this aspect in more detail. The GST is a self actuating system; therefore it is the supplier who is in the position to provide the relevant information regarding reimbursement.
24	Ruling will apply both before and after date of its issue. However, Ruling will not apply to entities to extent it conflicts with terms of settlement agreed before date of issue. Note nothing said about interaction with PSLA 2002/12, withdrawn with effect from 15 September 2008.	No change made. Practice Statements perform a different function to an interpretive product such as a public ruling and are generally not binding in a legal sense but are a statement of the Commissioner administrative practice. A separate Practice Statement (GA) is under consideration to deal with the issues of practical administration that were covered in PSLA 2002/12 but are no longer discussed in the ruling. Although PSLA 2002/12 has been withdrawn the Commissioner will not 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 (see Note at PSLA 2002/12)

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25	Is the Ruling, when finalised, confined to s.105-65 (first introduced 1 July 2006, later amended 1 July 2008) or will the ATO also use the Ruling for any refund claims under s.39 TAA or under s.105-65 before withdrawal of PSLA 2002/12?	No change made. The ruling addresses section 105-65 of Schedule 1 to the TAA. Until 1 July 2008, section 105-65 was intended to replicate section 39 (until amendments were made to address *KAP Motors* and 'arrangements'). The concepts in the ruling should apply to the application of section 39 to the extent that section 105-65 duplicated section 39.
26	Two important policy reasons behind s.105-65 are stated. But also see *KAP Motors*, Emmett J at para [33]. Note also that those policy reasons stated by ATO cannot be exhaustive of all circumstances as suppliers of input taxed supplies are effectively treated as end consumers but many are registered for GST for example banks. Also, there are certain taxable supplies, for example Division 126 gambling supplies to which s. 105-65 simply does not apply because of manner in which GST is calculated on profit from gambling activities. Does the ATO agree?	Change accommodated in part. Emmet J's comments at paragraph 33 of the decision have been addressed at paragraphs 78 to 81 of the ruling. The issue of recipients being input taxed is a consequence of the GST regime and not just specific to section 105-65. The issue is addressed in the Ruling – for example paragraphs 36 to 45 and 113 to 115. The ATO view is that section 105-65 does apply to gambling supplies under Division 126 as that Division simply represents another method by which the GST is calculated and the ATO position is that situations where the quantum of GST alters are caught by the section 105-65.
27	Does the ATO take the view that the statement by Emmett J at para [33] in *KAP Motors* case is confined to construction in that case, namely, case of 's.105-65 is limited to circumstances where there is a supply that is not a taxable supply' para [34]? As the ATO is practically silent on the *KAP Motors* case in the draft Ruling (see para 16 of draft Ruling), it is difficult to know what the ATO considers that statement to mean in the context of a consideration of policy issues and it would be better to provide an explanation in the Ruling	Change accommodated in part. Refer to issue 13 above.

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28	Is the ATO still concerned about windfalls to recipients? (the draft Ruling is silent).What is the ATO's view on when there are windfall gains for the recipient? Is the ATO concerned about 'arrangements in place for the supplier and recipient of the supply to share a percentage of the refund sought from the Commissioner' (refer TA 2008/17, para 5) (are the issues confined to input taxed recipients, time limits on ATO recovering overpaid credits from recipients, insolvent recipients or more generally).	No change made. The law and policy are silent with respect to windfalls to recipients. Though the underlying policy of the GST regime is symmetry between the GST payable and the input tax credit that may be claimed, the policy of provisions such as 105-65 is to prevent windfall gains to suppliers as they have not borne the cost of the GST and to ensure the entity that has actually borne the cost is the one actually reimbursed. Taxpayer Alert TA 2008/17 was a specific alert confined to its specific facts and must be read in this context. For these reasons the Ruling does not make reference to windfalls to recipients but rather places emphasis on maintaining the integrity of inherent symmetry indicated by the policy and law of a provision such as 105-65.
29	Meaning of treated as a taxable supply – the ATO discussion assumes that the (true) supplier has to have remitted GST but cf. with later paragraphs 78-82 where Commissioner invokes application of s.105-65 to circumstances where the wrong entity remits GST on a supply that was not made by that entity. See Example 4 where the ATO says s.105-65 applies, GST overpaid, supply was treated as a taxable supply to the extent of 100% but is in effect taxable to the extent of 0%. This appears to be a laboured extension of the meanings of 'treated' and 'to the extent'. Does the ATO take the view that in the above circumstances, the supply is 'treated' as a taxable supply for all purposes that is especially for recipients who have claimed input tax credits on that supply? Should there be cross reference to the GST wash transactions ruling?	Change accommodated in part. The Ruling has taken a broad interpretation of the words 'to the extent' and 'treated as' to ensure the policy of the provision is met. The Commissioner is currently considering whether to issue a separate Practice Statement (GA) to deal with the situation where a recipient has claimed an input tax credit on a supply that has been incorrectly treated as taxable.

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30	Note that requirement of supplier (whether the true or wrong entity) having remitted GST is a factor not known to the recipient. If the recipient's entitlement to claim ITC is based on a supply being 'treated' as a taxable supply *only* when GST is remitted according to the draft Ruling, then recipients may be exposed on their ITC claims. That cannot be intended.	Change accommodated in part. Recipients' entitlements to input tax credits are governed by the GST Act (for example Division 11 of the GST Act) and not by section 105-65. The Commissioner is currently considering whether to issue a separate Practice Statement (GA) to deal with the situation where a recipient has claimed an input tax credit on a supply that has been incorrectly treated as taxable.
31	Does the ATO permit the 'Preserving the status quo' policy apply to a scenario where the putative supplier is not the true supplier for the purposes of the GST Act (that is. the wrong entity paid the GST)?	No change made. The Commissioner is currently considering whether to issue a separate Practice Statement (GA) to deal with the various aspects of 'preserving the status quo'.
32	If supplier bears onus, what must the supplier *practically* demonstrate if it is to satisfy the Commissioner that supplier has borne the incidence of the tax and not the recipient? (for example, market review of competitors' prices, economic analysis, profitability analysis).	Change accommodated in part. The Ruling does not make any reference to the supplier having to demonstrate that it bore the incidence of the tax. Instead the Ruling points out that, in the context of an indirect tax system, the onus is on the supplier to demonstrate that their circumstances make it appropriate for the Commissioner to give a refund despite the fact that the Commissioner need not do so (see paragraph 118).
33	Refusal to exercise discretion to pay refund – is there an objection decision limitation for Part IVC proceedings/ is failure to exercise discretion in the nature of merits review or ADJR proceedings? Significance of s.43 *Administrative Appeals Tribunal Act 1975 (Cth)?* What if proceedings commenced in Federal Court? Assuming that Commr will not take issue about jurisdiction point in any Court proceedings, will Court still deal with issue if jurisdiction point arises?	Change accommodated in part. It is not within the scope of the Ruling to elaborate on various aspects of a taxpayer's review rights. However words have been added (at paragraph 159) setting out the review rights afforded by Part IVC of the Taxation Administration Act.

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34	Luxottica did not reimburse customers so appropriate case for consideration of residual discretion paragraphs 57 – 61; consider precedent implications for other cases and floodgates arguments? In finding this was the quintessential case for the exercise of the discretion, the same could be said about many similar cases where the price to the end customer is fixed (regardless of the GST implications). Any case where the price is inclusive of *any* GST, particularly where the GST component does not have to be disclosed to the end customer, falls into the same category. GST margin scheme cases likely fall into the same category for the same reason (both where the recipient is registered for example developer or, not registered, for example end consumer). Arguably, prices are set by reference to market conditions; not GST gross up, otherwise developers would not buy under margin scheme so as to be able to sell under margin scheme if they could recover 10% GST on sales. Why else give up the ITC on acquisition under the margin scheme if the GST was able to be fully recovered?	Change accommodated in part. Public Rulings are interpretative documents and are not intended to provide a commentary on the AAT's approach to exercising its discretion. However *Luxottica* is referred to in paragraphs 58, 74, 75, 85, 88, 117, 130 and 155. Discussion on this aspect can also be found in the Decision Impact Statement. Issues regarding broader pricing and market conditions are not appropriately discussed in a ruling about the interpretation of section 105-65 and are required to be considered on a case by case basis in relation to a taxpayer's particular circumstances.

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35	What are implications for Commissioner's exercise of residual discretion following statement by AAT at paragraph 60 of the Luxottica case? *'On the Commissioner's approach in this case, the windfall would flow to the undeserving customer. That is not the right outcome.'* The same reasoning would apply in any margin scheme cases or any other cases where the supplier priced the items on an inclusive of GST basis. Does Example 5 change after *Luxottica* case? What if Andrew Enterprises charged its customers $4400 (inclusive of the $400 wrong GST) but did not price the supply to the customer on the basis of $4000 plus GST, that is simply priced as an all inclusive price of $4400 – does that make a difference as to the Commissioner's exercise of the discretion to refund the GST?	Change accommodated in part. Paragraph 38 of the Ruling explains that the scheme of the GST Act, on which the section 105-65 policy outlined above is based, is premised on the following principles: • It is the supplier that determines if the supply it makes is taxable in the first instance. By determining that its supply is a taxable supply, GST is included in the price. • Double taxation is avoided by the registered recipient being entitled to claim an input tax credit for that taxable supply where it is acquired for a creditable purpose. • Once GST is embedded in the supply chain, it is the unregistered end consumer that bears the cost of the GST. The Commissioner's views on the specific comments made in *Luxottica* regarding the residual discretion are set out in paragraphs 130 to 131 and in view of these the Commissioner does not believe that Example 5 should be changed.
36	What is the meaning of 'you have reimbursed a corresponding amount to the recipient of the supply'? Will guidance be provided on admin fee arrangements charged by suppliers in procuring refunds? What if supplier (for example supermarket retailer) procures refund with a view to discounting particular product lines so as to 'reimburse corresponding amounts' to a particular class of purchasers, as they cannot identify specific recipients who were overcharged?	Change accommodated in part. Section 105-65 clearly provides that the Commissioner need not give a refund where unregistered recipients have not been reimbursed. Accordingly, in the circumstances described, a refund would only be given if the Commissioner was satisfied that appropriate reimbursement had occurred or if Commissioner exercised the residual discretion. As now pointed out in paragraph 18 'reimburse' encompasses not only an actual monetary payment but also crediting of the recipient's account such that it reduces the debt owed or offsetting the credit against liabilities. Nevertheless, cases involving the discretion or satisfactory reimbursement need to be dealt with on a case by case basis bearing in mind the policy intent of the provision.

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Issue No.	Issue raised	Tax Office Response/Action taken (references to final ruling)
37	Example 10 is an 'asymmetry' case based in part on the *DB Reef* case and an important fact revealed in para 145 of the draft Ruling that 'Kasey can establish that she could not and did not increase her prices'. What if facts are slightly different in that Supplier can and does increase prices say, by 11%, and pays GST 'under protest' to the ATO as some uncertainty whether it is making a GST-free or taxable supply. In the meantime, the recipient obtains a private GST ruling from ATO that the Supplier's supply is taxable supply to it and, therefore, a creditable acquisition. In the ATO private ruling to the recipient, the ATO also exercises discretion to treat a commercial invoice issued by Supplier as a tax invoice and recipient claims its ITCs. Three and a half years later Supplier wins in Court that its supply to recipient is not taxable. Will Commissioner exercise the discretion and pay the refund to Supplier? cf. with paragraph 146 of draft Ruling. Does payment of GST 'under protest' make any difference to the Commissioner? Suggest that this is the typical case that will arise for consideration (ie asymmetry caused by an ATO ruling).	No change made. The Ruling cannot provide examples to cover every contingency. In addition, the Commissioner cannot fetter his discretion by categorically stating that in certain cases the discretion will be exercised in a certain manner. Example 15 of the Ruling provides an example of where the Commissioner has contributed to the incorrect treatment and it is appropriate to exercise the discretion. It is not possible for the ruling to address the application of private rulings to recipients or suppliers and each of these types of cases would need to be considered on its particular facts. The payment of GST 'under protest' makes no difference to the outcome as the liability to remit GST arises by operation of law.