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

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Draft Goods and Services Tax Ruling

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*

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What this Ruling is about

1. This draft Ruling explains the Commissioner's view on the meaning of the terms 'passed on' and 'reimburse' for the purposes of determining whether section 142-10 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) applies to an amount of excess GST.

2. Part A of the draft Ruling sets out the Commissioner's views on when an amount of excess GST has been passed on to another entity.

3. Part B of the draft Ruling discusses the circumstances in which the Commissioner considers an amount of excess GST, which has been passed on to another entity, has been reimbursed to that other entity.

4. The draft Ruling does not discuss the circumstances in which the Commissioner may exercise the discretion in subsection 142-15(1) of the GST Act.

5. The draft Ruling also does not consider the operation of section 105-65 in Schedule 1 to the *Taxation Administration Act 1953* (TAA). The Commissioner's views on that provision are contained in Miscellaneous Taxation Ruling MT 2010/1 *Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953*.

6. All legislative references in this draft Ruling are to the GST Act unless otherwise specified.

Background

Operation of Division 142

7. Division 142 was inserted into the GST Act by the *Tax Laws Amendment (2014 Measures No. 1) Act 2014* and applies to tax periods starting on or after 31 May 2014. It replaces existing section 105-65 of Schedule 1 to the TAA, which applies to tax periods starting before 31 May 2014.

8. Under Division 142, an entity self-assesses their entitlement to a refund of an amount of excess GST according to objective criteria.

9. The object of Division 142 is to ensure that excess GST is not refunded if this would give an entity a windfall gain. Generally, the Division operates so that an entity is not entitled to a refund of an amount of excess GST where the entity has passed on the GST to another entity, and has not reimbursed that other entity (the recipient) for the passed-on GST. Where an entity is uncertain whether it has passed on the GST or reimbursed, it may apply for a private ruling.

10. The policy behind Division 142 needs to be understood in the context of the scheme of the GST Act[1], which is based on the following principles:

- GST is remitted by suppliers who make supplies in carrying on their enterprise. Suppliers do not bear the GST because the tax is included in the price of what they supply,
- GST is effectively borne by private consumers when they acquire anything that is subject to GST, and
- to ensure that GST is effectively borne by private consumers, registered entities are generally entitled to an input tax credit for the GST on what they acquire or import for the purpose of their enterprise.

11. If GST is passed on but there is a refund of the GST to the supplier, the supplier will generally have a windfall gain unless it reimburses the recipient of the supply[2]. Accordingly, a provision to restrict refunds of excess GST is appropriate to prevent windfall gains.

[1] See Chapter 1 – Executive Summary in the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.
[2] See paragraphs 3.40 and 3.41 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1998 and paragraph 2.2 of the Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008.

Is there an amount of excess GST?

12. 'Excess GST' is an amount of GST that has been taken into account in an entity's assessed net amount and is in excess of what was payable by the entity in the relevant tax period prior to taking into account or applying the provisions of Division 142.[3]

13. Excess GST does not include:

- an amount of GST that was correctly payable but is later subject to a decreasing adjustment; and
- an amount of GST that is payable but is correctly attributable to another tax period.[4]

14. Division 142 may apply regardless of how the excess GST arose. For example, excess GST can arise as a result of a mischaracterization, a miscalculation, or a reporting or administrative error.

Does section 142-10 apply?

15. An amount of excess GST will only be refundable if:

- it has not been passed on to the recipient, or
- it has been passed on to the recipient, and the recipient has been reimbursed.

Excess GST not passed on

16. If the excess GST has not been passed on, section 142-10 does not apply and the entity may, subject to the period of review[5], request an amendment to their assessment for the relevant tax period to reduce the amount of GST attributable to that tax period.[6] Any resulting refunds will be paid or applied in accordance with Divisions 3 and 3A of Part IIB of the TAA.[7]

Excess GST passed on

17. If the excess GST has been passed on to the recipient, section 142-10 applies to treat the excess GST as always having been payable, and payable on a taxable supply, until the excess GST has been reimbursed to the recipient. Once section 142-10 ceases to apply, the entity can claim a refund of the excess GST.[8]

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[3] Subsection 142-5(1).
[4] Subsection 142-5(2).
[5] See section 155-35 in Schedule 1 to the TAA, which provides for a time limit within which assessments may be amended.
[6] Alternatively, if the conditions set out in the *Correcting GST Errors Determination* GSTE 2013/1 are satisfied, the entity may choose to claim a refund of the excess GST by taking it into account in working out its net amount for a later tax period.
[7] See Note 2 in section 142-10 and section 155-75 in Schedule 1 to the TAA.
[8] See Note 1 in section 142-10.

18. In cases where the entity actually makes a supply, an adjustment event arises when the entity reimburses the recipient as the reimbursement has the effect of changing the consideration for the supply[9], or causing the supply to stop being a taxable supply.[10] In these cases, the entity has a decreasing adjustment under section 19-55 (about decreasing adjustments for supplies) which is attributable to the tax period in which the reimbursement is made to its recipient. The recipient has an increasing adjustment under section 19-80 (about increasing adjustments for acquisitions) where it is registered for GST and has claimed an input tax credit in relation to the acquisition.[11] The Commissioner's view on the operation of Division 19 is explained in Goods and Services Tax Ruling GSTR 2000/19 *Goods and services: making adjustments under Division 19 for adjustment events*.

19. If the excess GST arises because something that is not a supply is treated as a taxable supply, no adjustment event arises on reimbursement, and instead the entity may, subject to the period of review, request an amendment to their assessment for the relevant tax period.[12] Any resulting refunds will be paid or applied in accordance with Divisions 3 and 3A of Part IIB of the TAA.[13] Where the recipient is registered (or required to be registered), any entitlement to input tax credits in relation to the excess GST will be reduced to nil.[14] Registered recipients who have already claimed an input tax credit in relation to the excess GST will need to amend their BAS accordingly.

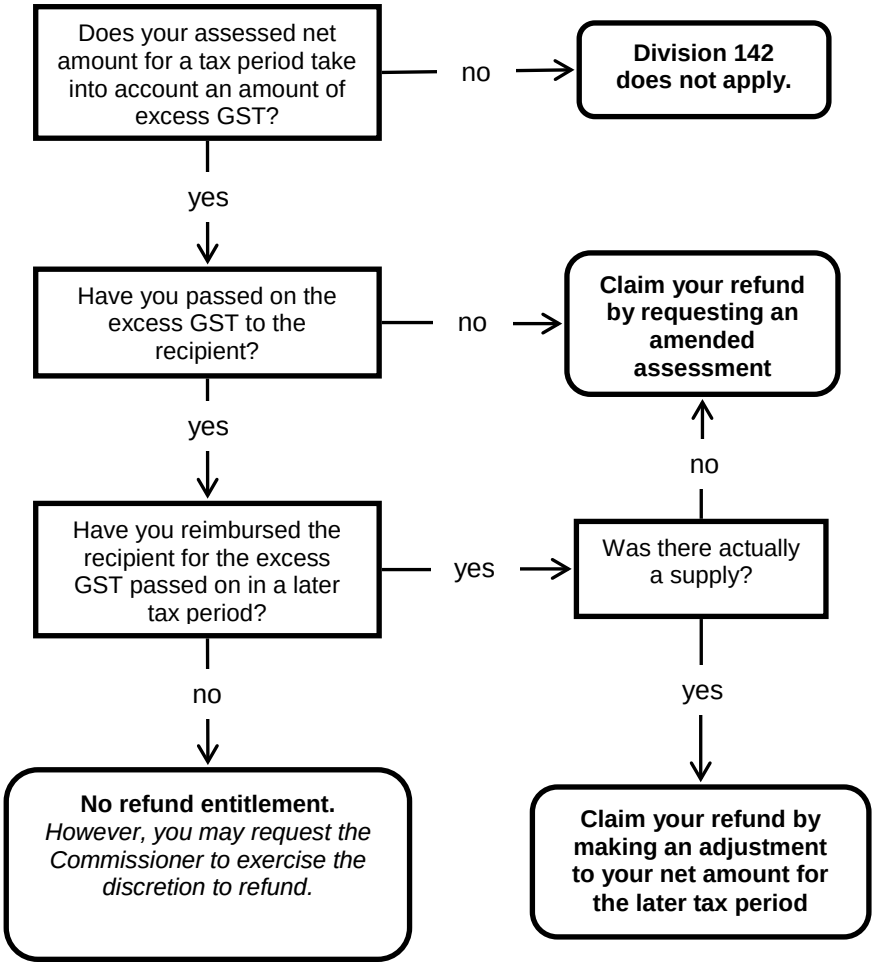
Commissioner's discretion

20. If section 142-10 applies (that is, where an entity has passed on the excess GST and has not reimbursed the recipient), the entity may request that the Commissioner exercise the discretion under section 142-15 to treat section 142-10 as not applying.

21. The Commissioner may only exercise this discretion if he is satisfied that applying section 142-10 would be inconsistent with the principle that excess GST may not be refunded where this would give an entity a windfall gain.[15]

[9] Paragraph 19-10(1)(b).
[10] Paragraph 19-10(1)(c).
[11] See Note 1 in section 142-10.
[12] Subsection 142-15(3).
[13] Section 155-75 in Schedule 1 to the TAA.
[14] Section 11-25
[15] Subsection 142-15(1).

22. An overview of the operation of Division 142 may be illustrated as follows:



Ruling

PART A – THE MEANING OF 'PASSED ON'

When is excess GST passed on?

23. Whether the excess GST has been passed on is a question of fact and must be determined on a case by case basis taking into account the particular circumstances of each case. However, section 142-25, and the policy and scheme of the GST Act more generally, give rise to an expectation that the excess GST will be passed on in most cases.

Expectation that excess GST has been passed on

24. The Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014 states that the GST Act envisages that the supplier 'passes on' the GST to the recipient of the supply.[16] This simply reflects the design of the GST as an indirect tax which is generally expected to be passed on to the customer when a supply is treated as a taxable supply.

25. If excess GST is included on a tax invoice, this is *prima facie* evidence that the excess GST has been passed on.[17]

26. However, while there is a general expectation that, in ordinary circumstances, excess GST has been passed on, the particular facts and circumstances of an individual case may demonstrate that excess GST has not in fact been passed on.

27. An entity claiming a refund, because it considers that the excess GST has not been passed on, will need to clearly substantiate the grounds on which it claims the refund. In any dispute, the taxpayer would have the onus of proving that its circumstances are outside the ordinary and that it did not pass on the excess GST.

Matters relevant to determining whether GST has been passed on

28. An entity should have regard to the following matters when determining whether or not it has passed on the excess GST, including whether or not its circumstances are out of the ordinary:

(i) the manner in which the excess GST arose

(ii) the entity's pricing policy and practice

(iii) the documentary evidence surrounding the transaction, and

(iv) any other relevant circumstances.

29. The question of passing on is one of fact and not of fairness – considerations of fairness may be relevant in deciding whether the Commissioner exercises the discretion under subsection 142-15(1), but are not relevant to whether excess GST has been passed on.

(i) the manner in which the excess GST arose

30. An amount of excess GST may arise in a variety of fact situations. The manner in which the excess GST arises is relevant in considering whether or not the excess GST was passed on.

[16] See paragraph 1.7 of the Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014.
[17] In the circumstances set out in subsection 142-25(2).

31. This draft Ruling considers four common circumstances:

- incorrectly treating something which is not a supply as a taxable supply
- miscalculating a GST liability under the GST law
- incorrectly reporting an amount of GST on a GST return
- incorrectly treating a GST-free or input taxed supply as a taxable supply (including incorrectly apportioning the taxable and non-taxable components of a mixed supply).

32. Where an error occurs after the transaction has taken place, for example through a simple transcription error, this may point towards a finding that excess GST has not been passed on.

33. On the other hand, where the excess GST arises as a result of an error made before setting the price (for example, where an entity incorrectly treats a GST-free or input taxed supply as a taxable supply), this error will generally flow through to the sale price paid by the recipient and is likely to point towards a finding that excess GST has been passed on.

Example 1: incorrectly reporting an amount of GST on a GST return

34. *Diana provides personal aquatic survival skills courses and swimming lessons. She holds qualifications issued by a relevant accrediting association. Diana's supply of the personal aquatic survival skills course is a GST-free supply of an education course under section 38-85 and Diana issues each student of this course with a tax invoice showing the amount of GST on the supply as nil.*

35. *When preparing her GST return, Diana mistakenly reports supplies of personal aquatic survival skills course as taxable and remits GST on each course.*

36. *As the excess GST arose when Diana filled out her GST return and she had issued tax invoices showing the amount of GST as nil, this would indicate that Diana has not passed on the excess GST.*

Example 2: excess GST arising as a result of an audit

37. *Rehka runs a small business and treats a particular supply as GST-free. She issues tax invoices to her customers which indicate that the particular supply is GST-free. Subsequently she is audited by the ATO, which determines that she should have remitted GST on that supply. An amended assessment is raised and Rehka remits the outstanding amount assessed as GST. Contractually Rehka cannot recover the GST amount from the recipient of the supply.*

38. *Rehka later objects to the assessment on the basis that the supply was not taxable, providing new facts and evidence regarding the supply. The Commissioner reverses the audit decision and decides that the particular supply is GST-free.*

39. *The facts and circumstances in this case indicate that Rehka has not passed on the excess GST to her customers. Rehka initially treated the supply as GST-free and the tax invoices indicate that no GST was passed on. Further, Rehka did not pass on the GST after the Commissioner's audit. Therefore, in deciding the objection, the Commissioner would determine that section 142-10 does not apply and that Rehka is entitled to a refund of the overpaid amount.*

(ii) The entity's pricing policy and practice

40. This involves considering the entity's conduct and knowledge at the relevant time of setting the price of a supply, and whether there have been any changes in the price to account for GST.

Was GST considered in setting the price?

41. Where an entity sets a price with the knowledge or belief that the transaction is subject to GST, including a belief that the GST which later proves to be an overpayment is a real cost of doing business, that will point towards a finding that the excess GST has been passed on.

42. This may be demonstrated where the price charged is calculated so as to exceed costs (including GST) by a profit margin. Even if there is very little, or no profit margin, this will not necessarily mean that the GST was not taken into account as a cost.

43. Similarly, a GST liability calculated under either the margin scheme or the general rules is likely to be a foreseeable cost which forms part of the cost recovery and pricing structure of doing business.

44. On the other hand, where an entity sets a price on the basis that no GST is payable on the transaction, and subsequently pays the GST liability without seeking (or being able to seek) recovery from the recipient, this may point towards a finding that the entity has absorbed and not passed on the cost of the excess GST.

45. An entity may seek to demonstrate that GST was not considered when setting the price it charged its customers. This is not, of itself, sufficient to establish that the excess GST has not been passed on. For example, where an entity is a 'price taker' in a market that primarily makes taxable supplies, this usually indicates that the entity has passed on the excess GST. The fact that the entity may not have been aware of the GST cost when setting its prices is not enough by itself to demonstrate that GST has not been passed on.[18]

[18] In *Gregrhon Investments Pty Limited & Ors v. FC of T* (1986) 18 ATR 50; 86 ATC 4906 at 4927 the Court stated that '…where a man wilfully refuses to make himself

46. On the other hand, where an entity sets its prices to a market that primarily makes non-taxable supplies, this may tend to support a conclusion that the entity has not passed on the excess GST.

Changes in price

47. An entity's conduct in adjusting the price of a supply may also reflect a change in the entity's knowledge regarding the GST treatment of a transaction, and whether or not excess GST was passed on.

48. The fact that the entity has reduced or increased the price of supplies by 10% is relevant, but not determinative of the fact that they have absorbed or passed on the excess GST.

49. Where an entity increases its price on discovering that a supply it has treated as not being subject to GST is actually a taxable supply, this will point towards a finding that the GST has been taken into account in setting that higher price and has been passed on.

50. On the other hand, the fact that the price remains the same may indicate that excess GST has not been passed on.

51. However, the mere fact that the entity has not increased the price is not determinative in deciding whether the excess GST has been passed on. There may be other circumstances, such as a reduction in other business costs, which allow the entity to retain its profit margin and allow the price to remain constant.

Example 3: changes in price

52. *Big-mart sells a range of food and retail products. Big-mart sets its prices at a level that is lower than its competitors for equivalent products. Big-mart contends that GST was not factored into its pricing methodology, despite the fact that it sets prices then adds GST at the end.*

53. *Big-mart realises that one of its products is GST-free, but has been treated as taxable. Big-mart immediately reduces the price of the product by 1/11th. The price reduction points towards a finding that the excess GST has been passed on.*

Example 4: changes in price

54. *Eric runs a pharmacy. He believes that all his products are GST-free and does not charge GST on them. Some months later, Eric hears from a neighbouring pharmacist that some of his products are actually taxable. He identifies the products concerned and treats them as taxable. However, he does not increase prices for these products, given he can maintain profit margin by lowering other costs.*

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aware of facts…the law will infer that he has the knowledge which he refuses to make available to himself.'

55. *Eric subsequently discovers that he has mistakenly treated one of those products as taxable.*

56. *The fact that Eric did not increase the price of that product to take account of the GST is not determinative in deciding whether GST has been passed on. As Eric was able to maintain his profit margin through the reduction in his other business costs, this indicates that the excess GST has been passed on.*

(iii) The documentary evidence surrounding the transaction

57. Whether GST is included in the price of a supply may be demonstrated by the documentary evidence surrounding that transaction. This evidence may be in any form, including a tax invoice, a contract of sale, other correspondence between the parties or internal pricing policy documents and other relevant manuals.

58. In most cases, a supplier will have issued a tax invoice, or received a recipient created tax invoice, for the transaction which gave rise to the excess GST. In other cases where a supply is made under contractual obligations (such as a supply of real property), a contract of sale may disclose that GST has been included in the price of the supply.

59. Subsection 142-25(2) provides that a tax invoice issued to or by another entity, that contains enough information to allow the amount of GST payable in relation to the supply to be clearly ascertained, is *prima facie* evidence of the excess GST having been passed on (although in cases where the taxpayer must pay an assessed net amount, the invoice is only *prima facie* evidence if the amount has been paid).

60. However, the tax invoice is only *prima facie* evidence. It is not conclusive evidence and there may be other documentary evidence to indicate that the excess GST has not been passed on. For example, a written agreement entered into by the supplier and recipient on the basis that a supply is GST-free provides other documentary evidence to indicate that the excess GST has not been passed on even though a tax invoice showing an amount of GST was inadvertently created and issued by the supplier. Under these circumstances, the recipient would not be entitled to claim an input tax credit.

61. Where a tax invoice has been issued, but the amount on the invoice has not yet been paid by the recipient, the non-payment is evidence that the excess GST has not yet been passed on.[19]

[19] See, for example, paragraph 2.71 of the Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014.

62. For example, an entity accounting on the accruals basis (rather than cash[20]) can demonstrate that the excess GST has not yet been passed on to the recipient where the entity:

- issues a tax invoice to the recipient
- remits the excess GST to the Commissioner in the tax period in which the tax invoice was issued
- but can show that the recipient has not paid the amount shown on the tax invoice.

63. However, excess GST may have been passed on even if there is no tax invoice, or if a tax invoice has been issued but it does not contain enough information to enable the GST amount to be clearly ascertained.[21]

64. If the entity has not passed on the excess GST, then section 142-10 does not apply and the recipient is not entitled to an input tax credit in relation to the excess GST amount.

Example 5: tax invoice accidentally issued

65. *Taylor Co and David Co enter into an agreement for David Co to purchase Taylor Co's business as a GST-free supply of a going concern. All the requirements of section 38-325 are met and the contract of sale is clear that the supply is a GST-free supply.*

66. *As Taylor Co regularly makes taxable supplies, Taylor Co's new accounts manager does not realise that the supply of the business is a GST-free supply. The accounts manager issues a tax invoice to David Co showing an amount of GST payable, and includes the GST on the GST return.*

67. *Even though Taylor Co has issued a tax invoice for the supply showing an amount of GST payable, it has other documentary evidence including the contract of sale and other written correspondence with David Co which indicate that the excess GST has not been passed on.*

(iv) Any other relevant circumstances

68. There may be other facts and circumstances which are relevant to the question of whether excess GST has been passed on.

[20] This situation does not arise where the entity is accounting on a cash basis because of the operation of subsection 29-5(2).

[21] Subsection 142-25(1). Under subsection 29-70(1A), this document may be treated as a tax invoice.

PART B - REIMBURSEMENT AND ADJUSTMENTS

What constitutes reimbursement?

69. The Commissioner considers that, for the purposes of section 142-10, an amount of excess GST that has been passed on to the recipient is appropriately reimbursed when the recipient has been compensated an equivalent amount by the entity for the amount of excess GST passed on to the recipient. This reimbursement may be made voluntarily by the entity or in satisfaction of a contractual obligation.

70. Where the entity makes multiple supplies to many recipients and excess GST was passed on, all the recipients must be compensated.[22] The reimbursement to each recipient must be an equivalent amount to the passed-on excess GST they each paid.

71. For the purposes of section 142-10, an entity has reimbursed the recipient for the passed-on excess GST where:

- the reimbursement takes the form of a payment of money[23], or the setting off of mutual liabilities;
- the amount of the reimbursement corresponds to the amount of excess GST passed on to the recipient and the method of reimbursement ensures this is achieved;
- the reimbursement or journal entry under an agreement to set-off the liabilities between the parties has actually been made, and is not merely planned to be made.

Circumstances where only part of the excess GST has been reimbursed

72. There may be situations where an entity does not reimburse recipients the full amount of the excess GST it has passed on. For instance when the entity charges recipients an 'administration fee', which reduces the amount reimbursed.

73. Where an entity only reimburses the recipient for part of the excess GST it has passed on, section 142-10 ceases to apply only to that part of the excess GST which was reimbursed. The section continues to apply in respect of the excess GST passed on that it has not reimbursed to the recipient.

[22] But see also paragraphs 79 to 84 of this Ruling.
[23] See section 195-1 for a definition of 'money' for the purposes of the GST Act. This includes a payment by way of credit card or debit card, or by crediting or debiting an account.

74. When an entity imposes an administration fee before reimbursing the recipient, the entity will only be entitled to a refund of the excess GST passed on less the administration fee, whether that amount is deducted from the reimbursement, or separately imposed in a different transaction. An administration fee is one charged for the recovery of the excess GST and not another pre-existing liability owed to the entity that the reimbursement can be set off against.

Example 6: when only part of the excess GST is reimbursed to a recipient

75. *Patel Co is registered for GST and makes a supply to Kim which it believes to be taxable. Kim pays $3,300 for the supply which includes GST of $300 and receives a tax invoice. Kim is not registered or required to be registered for GST.*

76. *In its quarterly GST return, Patel Co includes GST payable of $300 for the supply to Kim. The $300 is taken into account in Patel Co's net amount for the relevant tax period.*

77. *Subsequently Patel Co realises that the supply was not taxable and that the $300 is excess GST. The excess GST is taken to have always been payable until Patel Co reimburses Kim. However, Patel Co decides that it will only reimburse Kim if he agrees to pay a $30 administration fee which can be offset against the amount of excess GST to be reimbursed. Kim agrees to pay the fee and Patel Co only reimburses Kim $270 of the excess GST Kim paid.*

78. *Consequently, Patel Co is only entitled to a refund of $270. The remaining $30 (being the difference between the excess GST and what has been reimbursed) is taken to have always been payable under section 142-10. Patel Co is entitled to a decreasing adjustment of $270 in the tax period in which it became aware of the adjustment.*

79. Another situation where only part of the excess GST is reimbursed arises is when only some of the recipients are able to be identified, so that the excess GST can only be reimbursed to known recipients. Where this occurs, section 142-10 ceases to apply to that part of the excess GST which the entity was able to reimburse. The provision continues to apply to the excess GST passed on but not reimbursed to the unidentified recipients.

Example 7: excess GST only able to be reimbursed to identified customers

80. *Frank's Food Cooperative has a number of regular customers who have joined the store's 'Fresh 'n' Friendly' Club. Frank's Food Cooperative also has a number of non-member customers who do not have cards.*

81. *Frank's Food Cooperative discovers that it has been selling a GST-free product as a taxable product. As Frank's Food Cooperative point of sale software records each member customer's purchases against their membership card, it is able to identify which customers have purchased the particular product. Frank's Food Cooperative emails each of these customers and offers to refund the excess GST they paid.*

82. *Customers can elect to receive their refund of the excess GST in cash, or to receive a prepaid debit card credited with the equivalent amount. All member customers who purchased the product are reimbursed the equivalent amount by the end of the month.*

83. *Frank's Food Cooperative is unable to identify the non-member customers who purchased the product and is unable to reimburse them.*

84. *As Frank's Food Cooperative has reimbursed its member customers for the passed-on GST, section 142-10 no longer applies to that part of the excess GST. Section 142-10 continues to apply to the excess GST that was passed on to the non-member customers who have not been reimbursed. Frank's Food Cooperative is able to self-assess its entitlement to a refund, equivalent to the amount reimbursed.*

Example 8: excess GST passed on and appropriate reimbursement – section 142-10 ceases to apply

85. *Expo Co is registered for GST and treats a supply to Darcy, an entity registered for GST, as a taxable supply and issues a tax invoice showing an amount of GST included in the price of the supply. A few months later, Expo Co discovers that the supply is in fact GST-free. Expo Co has passed on an amount of excess GST to Darcy. Darcy has an outstanding liability owed to Expo Co.*

86. *In order to claim a refund of the excess GST, Expo Co must reimburse Darcy. Rather than reimburse Darcy in money, Expo Co and Darcy enter into an agreement to set-off their mutual liabilities and Expo Co and Darcy make journal entries in their accounts to reflect this agreement. The set-off of the liabilities represents reimbursement of the amount of excess GST that was passed on to Darcy.*

87. *Expo Co has reimbursed Darcy. Therefore, section 142-10 ceases to apply. Expo Co has a decreasing adjustment corresponding to the excess GST that it has reimbursed and Darcy has an increasing adjustment.*[24]

[24] See Note 1 in section 142-10.

Example 9: excess GST passed on and no reimbursement – section 142-10 applies

88. *Gavin Co is a large retailer that has introduced a new stock item, supplies of which it treated as taxable. Tax invoices were issued to customers showing an amount of GST on these supplies. Gavin Co later discovers that the supplies should have been treated as GST-free.*

89. *Gavin Co has an excess GST amount of $135,000 which was passed on to its customers.*

90. *In order to claim a refund of the excess GST that was passed on, Gavin Co must reimburse the excess GST that was passed on to its customers. However, Gavin Co is not able to identify those customers and so is unable to reimburse them.*

91. *Section 142-10 applies so that the excess GST is treated as always having been payable. Accordingly, Gavin Co is not entitled to a refund of the excess GST.*[25]

Date of effect

92. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to entities to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
24 September 2014

[25] However, Gavin Co may choose to request that the Commissioner exercise the discretion under section 142-15 to allow a refund of the excess GST despite passing on having occurred and no reimbursement having been made.

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

PART A – THE MEANING OF 'PASSED ON'

When is excess GST passed on?

Meaning of 'passed on'

93. The term 'passed on' is not expressly defined[26] and therefore takes on its ordinary meaning. An analysis of Court decisions which considered the term 'passed on' in relation to sales tax will be examined below. Unlike sales tax, GST is a value added tax charged on the supply of goods and services at every stage of the supply chain, with the tax burden on business being relieved through input tax credits, and the tax ultimately being borne by the consumer.

94. While there are differences between the two tax systems, many observations made by the Courts in relation to sales tax are applicable in a GST context because both systems are designed on the basis that the entity liable to remit the tax is not the entity that actually bears the cost of the tax. That is, both tax systems involve the concept of passing on.

95. Hill, Lehane & Hely JJ stated in *Amway of Australia Pty Ltd v. Commonwealth of Australia* [1999] FCA 283; 99 ATC 4359; (1999) 41 ATR 443 (*Amway*):

> The phrase `passed on' and comparable variations, is not a technical expression. It says no more than that the tax is borne (although not paid) by the end consumer of the goods, who purchases them in a retail transaction.[27]

96. Their Honours further observed that the phrase had been carefully considered by the Federal Court in *Otto Australia Pty Ltd v. Commissioner of Taxation* (1990) 25 FCR 257 (at first instance) *and Otto Australia Pty Ltd v. Commissioner of Taxation* (1991) 28 FCR 477 (*Otto*) (on appeal to the Full Court), and concluded that those decisions were authority for the following three propositions:[28]

> 1. The question whether sales tax is passed on requires no separate identification of sales tax in the price.
>
> 2. Sales tax would clearly be passed on in circumstances where the evidence was that the price was calculated so as to include within it the sales tax component.
>
> 3. Where the evidence in the case falls short of (2) the finder of fact may be satisfied that the sales tax has been passed on unless satisfied that the sales tax was not in fact included in the price. Sales tax will not have been passed on where the taxpayer bears the tax personally.

[26] Under section 195-1, however, 'passed on' has a meaning affected by section 142-25.
[27] *Amway* at [51].
[28] *Amway* at [55].

97. While the decisions in *Amway* and *Otto* are about passing on in the context of sales tax, these propositions are equally relevant when determining whether excess GST has been passed on, and provide additional support for the matters set out in this draft Ruling being relevant to determining whether GST has been passed on.

The policy and scheme of the GST Act

98. The expectation under the GST Act that excess GST is passed on is similar to under the former sales tax system, in that the entity liable to remit the tax is not intended to be the entity that actually bears the cost of the tax.

99. This was recognised by the High Court in *Avon Products Pty Ltd v. Commissioner of Taxation* [2006] HCA 29 (*Avon*) where it was noted that 'The central feature informing this character of the sales tax is that the economic burden of the impost is generally not intended to be borne by the person liable to remit it; it is passed on.'

100. In *Avon*, the High Court further stated in regard to subsection 51(1) of the *Sales Tax Assessment Act 1992* (ST Act), 'In this way, the Act evinces a stance against automatic recovery of sales tax merely upon proof that it has been overpaid'. The reason for this in an indirect tax system is the underlying premise that a supplier who remits the tax is not bearing the cost of the tax, and would receive a windfall gain if permitted to automatically receive a refund of an overpaid amount.

101. The following key principles are derived from the observations made in *Avon*, and from the policy intent of the GST Act:

- in an economy geared to making a profit, businesses set up pricing structures to cover their foreseeable costs, which include GST[29],
- GST is remitted by suppliers who make supplies in carrying on their enterprise. Suppliers do not bear the GST because the tax is included in the price of what they supply[30],
- GST is effectively borne by private consumers when they acquire anything that is subject to GST[31],
- to ensure that GST is effectively borne by private consumers, registered entities are generally entitled to an input tax credit for the GST on what they acquire or import for the purpose of their enterprise[32],

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[29] See *Avon* at [9] and [14].
[30] See the Executive Summary of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 and paragraph 2.6 of the Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014.
[31] See the Executive Summary of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 and paragraph 2.6 of the Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014.
[32] See paragraph 2.6 of the Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014.

- generally, there should not be a refund of excess GST to a supplier if this would give an entity a windfall gain[33],
- it will be comparatively seldom that an entity will be able to establish a circumstance out of the ordinary to show that the GST was not passed on.[34]

102. While there is an expectation that in ordinary circumstances excess GST is passed on, the facts and circumstances of each particular case will be determinative. As was stated by Hill J in *Avon Products Pty Limited v. Federal Commissioner of Taxation* [2004] FCA 475:

> […] it is a hallmark of an indirect tax that the economic burden of it is passed on to the ultimate consumer. That may readily be accepted: [...] but if taken at face value may lead to the conclusion that sales tax is always passed on to purchasers in the price for which the goods are sold. While that will ordinarily be the case it is implicit in the provisions with which we are here concerned that there will be circumstances where the sales tax will not have been passed on to the purchaser.[35]

103. In this context, an entity will need to have convincing grounds to demonstrate that its circumstances are outside the ordinary. An entity will need positively to demonstrate that it did not pass on excess GST.

104. This is consistent with the High Court's observations in *Avon* that:

> […] once it is appreciated that it is in the nature of sales tax to be passed on, there is nothing remarkable in the consequence that proof to the contrary will occur comparatively seldom.[36]

> […] it is for the entity to establish a circumstance out of the ordinary, namely that the amount of the overpayment … has not been passed on.[37]

Matters relevant to determining whether excess GST has been passed on

(i) The manner in which the excess GST arose

105. In considering the manner in which the excess GST arose, regard should be had to when, how and why the error resulting in the excess GST occurred.

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[33] See paragraph 2.7 of the Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014.
[34] See *Avon* at [9] and [14].
[35] *Avon Products Pty Limited v. Federal Commissioner of Taxation* [2004] FCA 475 at [40].
[36] *Avon* at [12].
[37] *Avon* at [10].

When the error arose

106. When the error arose may be relevant to whether the entity had the opportunity to pass on the excess GST.

107. Where an error occurs before the transaction takes place, it may be more likely that the entity will have taken the excess GST into account in setting the price of a supply (or arrangement) or be in a position to recover the cost of the GST from the recipient.

108. For example, where the entity mischaracterises a supply by incorrectly treating an input taxed or GST-free supply as a taxable supply, the costs of the GST will generally be embedded in the price of the supply, and be passed on to the recipient.

109. Where an error occurs after the transaction has taken place, the entity is less likely to have passed on the excess GST. For example, the entity may have incorrectly reported an amount of GST on a GST return through a simple transcription error in an entity's internal reporting systems. Where the error is contained to the reporting on the GST return, and that error does not affect the transaction between the entity and its recipient, then this will generally demonstrate that the excess GST has not been passed on.

The reason for the error

110. An error may occur because an entity mischaracterises a supply, for example, incorrectly treating a supply or arrangement as a taxable supply in the ordinary course of business and then including the excess GST in the relevant BAS. Subsequent audit activity or an internal review may later reveal that the supply was not taxable, or that the arrangement did not give rise to a taxable supply. Where the entity mischaracterises a supply or arrangement in this manner, it is likely to have taken the GST into account, and is therefore likely to have passed on the cost of the GST.

111. Similarly, where an entity miscalculates its GST liability under the margin scheme due to an error in calculating the cost base (lower than it should be) when determining the valuation of the subject property, the erroneous margin is likely to have been taken into account in determining the sale price of the property. This is likely to show that the excess GST has been passed on to the purchaser of the property.[38]

[38] Although each case must be considered on its own facts and circumstances. 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 illustrate a number of possible scenarios involving the margin scheme. See also example 12 and example 13 of this Ruling.

(ii) The entity's pricing policy and practice

112. In a competitive market, businesses ordinarily set their prices taking into account a wide number of variables, which may include:

- costs of production
- availability of product or materials
- operational cash flow
- economic factors, such as supply and demand
- customer preferences, loyalty and goodwill
- location of neighbouring business premises
- price matching in order to offer advantageous discounts, and
- specific market conditions.

Was GST considered in setting the price?

113. Where an entity is registered for GST and knows of the imposition of GST on what it understands to be taxable supplies, it is likely that the entity will adopt a pricing policy and structure for the recovery of GST and other costs from the recipient. It is not necessary for the GST to be a separately identifiable component of the price.

114. In *Otto*, Sheppard J remarked that:[39]

> Once it is conceded, as it has been, that the charge for each bin was computed by reference to costs which included sales tax, that cost was passed on. The fact that the sales tax was not passed on in an identifiable form is not in my opinion of relevance.

115. However, depending on the economic and competitive environment the business operates in, this may not always be the case. A taxpayer may be able to show that its prices were not set with regard to cost, which may lead to a finding that the excess GST has not been passed on.[40]

116. In *Avon*, the taxpayer operated a door-to-door selling enterprise. Each product was analysed and a regular price was set to ensure a profit margin which covered their costs and sales tax. Up to 85% to 95% of their products were sold at a discount price. However, the discounted price was also set at a level to ensure that each sales campaign would achieve a desired profit margin averaged over a range of products and a desired volume of sales. The lowest figure which Avon would price products at was cost, where cost included sales tax. Avon did not sell products at a loss.[41] Avon attempted to claim a refund of overpaid sales tax and argued that it had not passed on the sales tax in question.

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[39] *Otto* at 480.
[40] *Avon Products Pty Limited v. Commissioner of Taxation* [2004] FCA 475 at [63].
[41] *Avon Products Pty Limited v. Commissioner of Taxation* [2004] FCA 475 at [32].

117. In upholding the findings of the Federal Court[42] and Full Federal Court[43] that Avon had failed to establish that it had not passed on the sales tax, the High Court noted that:[44]

> […] it is unsurprising that a seller's intention, whether subjective or objectively ascertained, will generally be to pass the burden of the impost on to the purchaser. Since the onus of proof lies upon the taxpayer, it will be for it to establish that a price which is set so as to ensure that it recovers its cost *does not include* the economic burden of the sales tax.
>
> (emphasis retained)

Changes in price

118. Where an entity subsequently discovers that a supply mistakenly treated as input taxed or GST-free is taxable, that entity is likely to attempt to increase the price of the supply to take account of the GST.

119. The fact that prices remain the same might be thought to point towards a finding that excess GST has not been passed on. However, 'there will need to be more proven than merely that prices remained constant'.[45]

120. In *MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd and Commissioner of Taxation* [2011] AATA 769, the taxpayer leased a building to a government department for a term which began before 8 July 1999 (when the transitional rule took effect) and terminated after 30 June 2005 (when the transitional rule ended). From 1 March 2001, the rent increased by 10% on account of GST. The taxpayer reported and paid the GST on the rent. The Tribunal found that:

> The amounts of GST claimed to have been overpaid were passed on by the partnership to the Department through increases in rent charges.[46]

121. In *Amway*, the taxpayer calculated the taxable value of a product as 'cost plus 20%'. However, the taxpayer was subsequently required to utilise a taxable value of 'cost plus 35%'. The taxpayer argued that the increased sales tax had not been passed on because it had maintained the same prices on the products. The Court noted:[47]

> When sales tax on a particular item of goods is increased, it may well be that a taxpayer can not increase prices above retail prices at which the goods are offered by competitors. It may be open to reduce the costs of the goods from the wholesaler and thus retain the same retail margin it had formerly made, passing the increased sales tax on to the purchaser rather than absorbing the increased sales tax by reducing its margin and perhaps reducing the retail

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[42] *Avon Products Pty Limited v. Commissioner of Taxation* [2004] FCA 475.
[43] *Avon Products Pty Limited v. Commissioner of Taxation* [2005] FCAFC 63.
[44] *Avon* at [11].
[45] *Avon Products Pty Limited v. Commissioner of Taxation* [2004] FCA 475 at [58].
[46] *MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd and Commissioner of Taxation* [2011] AATA 769 at [60].
[47] *Amway* at [64].

price. Why should the price paid by the consumer, in such a case, not include a component for sales tax?

122. The Full Federal Court further noted that the evidence showed that the taxpayer in *Amway* had reduced its other costs with the effect of allowing profit margins to remain the same. The Court concluded that the sales tax was absorbed in the cost reduction which ordinarily would have been passed on to the consumer.

Not-For-Profit entities

123. While it is common for not-for-profit entities to set prices so as to not recover all costs, each case must be assessed on its merits to determine whether the cost of GST has been passed on to recipients. Similar to other entities, it is appropriate to consider the conduct of the not-for profit entity in setting prices based on their knowledge at the relevant time, including any belief that GST is a real cost. Often, not-for-profit entities operate similarly to a normal commercial enterprise and, where this is the case, those entities should be considered in that context.

(iii) The documentary evidence surrounding the transaction

124. The fact that a tax invoice is *prima facie* evidence that an amount of GST has been passed on[48] means that the existence of, and the contents of, that document will generally provide evidence that GST is included in the price of a supply.

125. However, there may be other documentary evidence showing that, despite the tax invoice, excess GST was not passed on in the price of a particular supply. Or, despite the lack of a tax invoice, there may be other evidence indicating that excess GST was passed on.

126. For instance, GST is usually dealt with in contracts for a sale of real property. A common instance of this is the sale of land where the seller chooses to apply the margin scheme provisions to calculate the taxable amount of the supply (see Division 75). In the absence of a tax invoice, a written contract may provide evidence that the excess GST has been passed on.

Examples

127. The following examples illustrate how consideration of these matters is relevant in determining whether excess GST was passed on. It is important to note that whether excess GST has been passed on is highly dependent on the individual facts and circumstances of each case, and facts which are different to those in an example may give rise to a different outcome.

[48] Section 142-25.

128. In the examples where the excess GST has been passed on but not reimbursed, the entity may request that the Commissioner exercise his discretion under subsection 142-15(1) to treat section 142-10 as never having applied.

Example 10: accounting error – incorrectly reporting an amount of GST on a GST return – excess GST not passed on

129. *Olivia subleases her restaurant to Koffees 2 Go while she is away overseas for a year. The lease payments are $11,000 per month including GST. Koffees 2 Go makes the lease payments regularly and a tax invoice is issued to Koffees 2 Go each month correctly showing the amount of $11,000, including GST. However, Olivia's bookkeeper incorrectly records the June lease payment twice and shows it as $22,000 in her accounts, which is in turn reflected in her GST return for that tax period.*

130. *Some months later Olivia discovers the accounting error leading to the excess GST in the tax period ending 30 June.*

131. *In this situation, the excess GST arose as a result of an accounting error after Koffees 2 Go has paid the June lease payment of $11,000. The tax invoice issued also reflects the correct amount of the payment. As such, the excess GST has not been passed on because only one amount of GST was passed on for that particular taxable supply.*

Example 11: computer coding error – excess GST not passed on

132. *Marky Market sells a GST-free product and sets its price to match those of its competitors. Other retailers are also selling the same product on a GST-free basis for the same price. The computer system in Marky Market erroneously coded the product as taxable which was shown on the tax invoice that issued to customers. The price the customer paid remained the same and the product was treated as taxable in Marky Market's GST return.*

133. *A few months later, Marky Market altered its computer coding system to correctly code the product as GST-free, without changing its price.*

134. *In this situation, the excess GST arose as a result of an error in Marky Market's computer coding system despite Marky Market considering that the product was GST-free and setting its prices accordingly. Moreover, Marky Market did not increase the price of its product after it discovered the error and so it effectively bore the cost of the excess GST. That is, the excess GST was not passed on.*[49]

[49] As stated at paragraph 64 of this Ruling, if the entity has not passed on the excess GST, then section 142-10 does not apply and a registered recipient is not entitled to an input tax credit in relation to the excess GST.

Example 12: miscalculating GST liability under the margin scheme – excess GST not passed on

135. *A land developer, Emma Co, is registered for GST and subdivides a parcel of land into 20 individual lots. Emma Co apportions the acquisition cost for the parcel of land between each subdivided lot based on area. The business case for the development takes into account an amount of GST calculated under the margin scheme for each lot. Emma Co sells 18 of the lots of land at its predetermined sale price on the understanding that the purchaser agrees in writing to Emma Co's use of the margin scheme. Emma Co has trouble selling the remaining two lots. A decision is made to reduce the sale price of each lot by $25,000 and both lots are subsequently sold at the reduced price.*

136. *In relation to the sale of the last two lots, Emma Co mistakenly calculated its GST liability using the original expected sale price and not the reduced sale price. Emma Co's assessed net amount therefore includes an amount of excess GST.*

137. *Taking into account Emma Co's pricing policy and practice, the reduction in selling price and the application of the margin scheme, the amount of GST that Emma Co has passed on does not include the excess GST.*

Example 13: miscalculating GST liability under the margin scheme – excess GST passed on

138. *Max & Sons Ltd is a small family company which started land development operations in 2003 and first became registered for GST in that year. In 2012, Max & Sons decides to develop a small lot of land that it has owned since 1995. Max & Sons conduct a feasibility study, which includes taxation estimates (including GST) for the purposes of developing its business plan. The three townhouses in the project are completed in September 2014 and are sold under the margin scheme using a valuation day of 1 July 2000.*

139. *In September 2015, Max & Sons' business activities expanded and they engaged a new accountant who noticed an error was made in the calculation of the margin scheme in 2014 as it was entitled to use item 2 of subsection 75-10(3). That is, Max & Sons' was entitled to make a valuation for the calculation of the margin scheme at the date the company was registered for GST in 2003. The latter date resulted in a higher valuation and consequently a lower taxable margin. This meant that the margin on the sale of each of the three townhouses should have been lower and, consequently, Max & Sons has an amount of excess GST.*

140. *In order to establish whether Max & Sons will be able to claim a refund of the excess GST, it is necessary to determine if the excess GST has been passed on. Since Max & Sons considered the amount of GST applicable under the margin scheme (albeit using the lower valuation figure) in determining its pricing policy and practice, and the townhouses were sold at a price including the GST which was paid by the purchasers, the evidence shows that Max & Sons have passed on the excess GST.*

Example 14: incorrectly treating a GST-free supply as taxable – excess GST not passed on

141. *Sail Co sold international cruises and required deposits to be paid which could be forfeited if the purchaser cancelled their cruise within various periods of time before departure. Sail Co correctly treated the supply of the international cruises as GST-free exports. However, Sail Co treated the forfeited deposits as taxable and remitted GST for the deposits in their GST return.*

142. *Sail Co later realised that it should have treated the forfeited deposits for the supply of the international cruises as GST-free. The GST Sail Co paid on the forfeited deposits is excess GST.*

143. *While the excess GST arose as a result of a misclassification of the supply, Sail Co did not take this into account in setting its price for the international cruises and did not include GST in the price charged to customers.*

144. *It is considered that the excess GST remitted by the entity in relation to the forfeited deposits for the cancelled international cruises has not been passed on. Accordingly, section 142-10 does not apply and Sail Co may claim a refund of the excess GST by requesting an amended assessment (without the need to reimburse its customers).*

Example 15: not-for-profit – excess GST passed on

145. *The Sarah Foundation is an endorsed charity, registered for GST, which stages an annual event for the aged and disabled. Historically, supplies of tickets to this event have been treated as taxable.*

146. *The Sarah Foundation seeks to make a small surplus from the event each year, and determines the ticket prices for the 2015 event based on ticket prices of the 2014 event. Since the Sarah Foundation believed the supply of tickets did not meet the nominal consideration or market value tests in section 38-250, it treated the supply of tickets as fully taxable and included GST for this supply in its net amount for the relevant tax period.*

147. *The Sarah Foundation later realises that it made an error in calculating the cost of the event, and that the supply of tickets actually met the nominal consideration or market value tests in section 38-250 and so should have been treated as GST-free.*

148. *In determining the ticket prices, the Sarah Foundation operated in a business-like way and did so with a view to making a surplus. The Sarah Foundation operated in a similar fashion to a normal commercial enterprise. Accordingly, there is an expectation that the Sarah Foundation has passed on the GST as GST was a foreseeable cost of conducting its enterprise.*

149. *In the absence of evidence to the contrary, it was reasonable for the Commissioner to conclude that the process used to arrive at the price of the tickets took into account the belief that GST was payable and was a real cost of carrying on the enterprise.*

150. *As the Sarah Foundation had passed on the excess GST, section 142-10 applies to treat the excess GST as always having been payable on a taxable supply. The Sarah Foundation is unable to claim a refund until it reimburses ticket recipients for the passed-on GST.*

Example 16: margin scheme – no tax invoice - excess GST passed on

151. *Development Co is a property development company, registered for GST. Development Co makes a taxable supply of vacant land to Tim Co, another developer.*

152. *The parties agree in writing on a GST-exclusive amount and that an amount on account of GST can be charged using the margin scheme in calculating the GST liability on the supply.*

153. *The contract of sale confirms the GST-exclusive price and that the margin scheme is to apply to the sale. This indicates that some amount on account of GST is included in the total purchase price, which is later paid by Tim Co to Development Co.*

154. *Even though no tax invoice is issued in respect of the supply, the contract of sale is sufficient documentary evidence to show that an amount of GST has been passed on to Tim Co.*

PART B - REIMBURSEMENT

Reimbursement in a form other than a payment of money

155. Reimbursement may not necessarily take the form of a payment of money. An entity may reimburse the recipient by offsetting the amount of passed-on excess GST against a liability that is presently payable by the recipient to the entity.[50]

156. Reimbursement by set-off may be evidenced by way of a journal entry. However, the mere making of journal entries does not reflect reimbursement in the absence of an agreement to set-off between the parties.[51] It is the agreement that is the legal basis for discharging the liabilities between the parties, not the journal entry.

Circumstances where only part of the excess GST has been reimbursed

157. Section 142-10 does not expressly provide for a scenario where the entity only reimburses its recipient for part of the passed-on GST.

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[50] *VN Railway Pty Ltd & Anor v. FC of T* [2013] FCA 265; 2013 ATC 20-381 citing *FC of T v. P Iori & Sons Pty Ltd* (1987) 15 FCR 363; (1987) 19 ATR 201; 87 ATC 4775 and *Lend Lease Corporation Ltd v. FC of T* (1990) 95 ALR 427; (1990) 21 ATR 402; 90 ATC 4401.

[51] *Manzi and Others v. Smith and Anor* (1975) 132 CLR 671; *Brookton Co-operative Society Ltd v. FC of T* (1981) 147 CLR 441; 11 ATR 880; 81 ATC 4346.

158. The language of section 142-10 envisages that there may be situations where not all of the excess GST will have been passed on. The words 'so much of the excess […] as you have passed on to another entity' implies that it is possible for the section to stop applying to some of the excess GST but continue to apply to the remaining part.

159. As mentioned in paragraph 97 above, the Court in *Amway* observed that the phrase 'passed on' says no more than that the tax is borne by the end consumer of the goods. In that context, where an entity reimburses its recipient for an amount of tax it has passed on, the end consumer no longer bears the burden of the GST and it can be said that that amount is no longer 'passed on'.

160. It should also be noted that this principle was reflected in section 5 of the ST Act, which stated that:

> ***passed on***, in relation to an amount of tax that has been borne by a person, does not include an amount that the person has passed on to another person, but has later refunded to that other person.

161. This view is also consistent with the policy intent of the amendments which inserted Division 142, one of which was to simplify the process for obtaining a refund of excess GST by allowing taxpayers to self assess their entitlement. A narrower interpretation of section 142-10 would not allow taxpayers to self-assess their entitlement to a refund where only part of the passed-on excess GST had been reimbursed. Rather, entities would need to ask the Commissioner to exercise his discretion under section 142-15. This would appear to frustrate the legislative purpose.

162. Therefore, an entity may self assess its entitlement to a refund of the excess GST to the extent that it has reimbursed the recipient.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.

Section 142-10 only ceases to apply if the recipient has been fully reimbursed

163. An alternative view to that set out at paragraphs 72 to 74 and 79 is that section 142-10 can only cease to apply when all recipients have been fully reimbursed. That is, where an entity only reimburses the recipient for part of the passed-on excess GST, section 142-10 continues to apply to the whole amount.

164. Accordingly, the entity may not self-assess its refund entitlement when the passed-on excess GST has not been fully reimbursed. However, the entity may instead request that the Commissioner exercise his discretion under section 142-15, to treat section 142-10 as not applying to that part of the excess GST that has been reimbursed.

Explanation

165. The opening words of section 142-10, stipulate that only 'so much of the excess' as an entity has passed on is to be treated as having always been payable and on a taxable supply. However, there is no similar stipulation in the closing words 'until you reimburse the recipient for the passed-on GST'.

166. Further, the words of the provision treat 'the passed-on GST' as a singular component. That is, the section applies until the entire amount of passed-on excess GST is reimbursed.

Reason for not adopting the view

167. The Commissioner considers that while the alternative view is arguable, the view set out at paragraphs 72 to 74 and 79 is also open and is preferable as it better promotes the purpose of the legislation. It allows an entity to self assess their entitlement to a refund to the extent that they have reimbursed the passed-on excess GST to the recipient. This also reduces compliance costs for taxpayers.

Appendix 3 – Your comments

168. You are invited to comment on this draft Ruling including the proposed date of effect. Please forward your comments to the contact officer by the due date.

169. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**7 November 2014**
Contact officer:	**Patrick Giovannelli**
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Address:	**Australian Taxation Office** **PO Box 9977** **CHERMSIDE QLD 4032**

Appendix 4 – Detailed contents list

170. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; GSTR 2000/19; MT 2010/1

Subject references:

- adjustment
- assessed net amount
- excess GST
- GST payable
- passed on
- refunds
- reimburse

Legislative references:

- ANTS(GST)A 1999 11-25
- ANTS(GST)A 1999 Div 19
- ANTS(GST)A 1999 19-10
- ANTS(GST)A 1999 19-10(1)(b)
- ANTS(GST)A 1999 19-10(1)(c)
- ANTS(GST)A 1999 19-55
- ANTS(GST)A 1999 19-80
- ANTS(GST)A 1999 29-5(2)
- ANTS(GST)A 1999 29-70(1A)
- ANTS(GST)A 1999 38-250
- ANTS(GST)A 1999 38-325
- ANTS(GST)A 1999 38-85
- ANTS(GST)A 1999 Div 142
- ANTS(GST)A 1999 142-5(1)
- ANTS(GST)A 1999 142-5(2)
- ANTS(GST)A 1999 142-10
- ANTS(GST)A 1999 142-15
- ANTS(GST)A 1999 142-15(1)
- ANTS(GST)A 1999 142-25
- ANTS(GST)A 1999 142-25(1)
- ANTS(GST)A 1999 142-25(2)
- ANTS(GST)A 1999 195-1
- STAA 1992 5
- STAA 1992 51(1)
- TAA 1953 Pt IIB Div 3
- TAA 1953 Pt IIB Div 3A
- TAA 1953 Sch 1 105-65
- TAA 1953 Sch 1 155-35
- TAA 1953 Sch 1 155-75
- TAA 1953 Sch 1
- Tax Laws Amendment (2014 Measures No. 1) Act 2014

Case references:

- Amway of Australia Pty Ltd v. Commonwealth of Australia [1999] FCA 283; (1999) 41 ATR 443; 99 ATC 4359
- Avon Products Pty Ltd v. Commissioner of Taxation [2006] 230 CLR 356; [2006] HCA 29; 2006 ATC 4296; 62 ATR 399
- Avon Products Pty Limited v. Commissioner of Taxation [2005] FCAFC 63; 2005 ATC 4451; 59 ATR 592
- Avon Products Pty Limited v. Federal Commissioner of Taxation [2004] FCA 475; 55 ATR 520; 2004 ATC 4442
- Brookton Co-operative Society Ltd v. FC of T (1981) 147 CLR 441; (1981) 11 ATR 880; 81 ATC 4346
- Gregrhon Investments Pty. Limited & Ors v. F.C. of T. 86 ATC 4906; (1986) 18 ATR 50
- Lend Lease Corporation Ltd v. FC of T (1990) 21 ATR 402; 90 ATC 4401
- Manzi and Others v. Smith and Anor (1975) 132 CLR 671
- MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd v. Commissioner of Taxation [2011] AATA 769; 2011 ATC 10-213; 84 ATR 334
- Otto Australia Pty Limited v. Federal Commissioner of Taxation (1991) 28 FCR 477; (1991) 21 ATR 1453; 91 ATC 4305
- Otto Australia Pty Ltd v. Commissioner of Taxation (1990) 25 FCR 257; 21 ATR 567; 90 ATC 4604
- VN Railway Pty Ltd & Anor v. FC of T [2013] FCA 265; 2013 ATC 20-381

Other references:

- Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998
- Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1998
- Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008

- Explanatory Memorandum to the Tax Laws Amendment (2014 Measures No. 1) Bill 2014
- Correcting GST Errors Determination GSTE 2013/1

ATO references
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