GSTR 2009/3A2 - Addendum - Goods and services tax: cancellation fees

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Addendum

Goods and Services Tax Ruling

Goods and services tax: cancellation fees

This Addendum amends Goods and Services Tax Ruling GSTR 2009/3 to take account of the High Court decision in *Commissioner of Taxation v. Qantas Airways Ltd* [2012] HCA 41, which considered the GST treatment of fares received for flights booked but not undertaken by prospective passengers. In that case, the High Court held that the fares were consideration for a taxable supply.

The Addendum also amends GSTR 2009/3 to:

- make minor amendments to reflect legislative amendments made by Schedule 1 to the *Tax Laws Amendment (2010 GST Administration Measures No. 3) Act 2010* in respect of the GST treatment of cross-border transport. These amendments apply to supplies and taxable importations made on or after 1 July 2010;
- update the date of effect clause; and
- update the references sections of GSTR 2009/3.

GSTR 2009/3 is amended as follows:

1. Paragraph 7

Omit: '[to tax periods commencing]'.

After the paragraph; insert:

> 7A. Changes made to this Ruling by Addenda that issued on 31 October 2012 and 28 August 2013 have been incorporated into this version of the Ruling.[4A]

2. Paragraph 9

After the paragraph; insert:

> 9A. There will be cases where the intended supply is still made notwithstanding that the customer fails to take advantage of the arrangement by not showing up. Whether this is the case will depend on the specific terms and conditions of the arrangement.

[4A] Refer to each Addendum to see how that Addendum amends this Ruling.

3. Paragraph 24

In the third dot point; omit ', or a seat in an aircraft to enable the transport of a passenger'.

4. Paragraph 26

After the paragraph; insert:

> 26A. An example of this is *Commissioner of Taxation v. Qantas Airways Ltd* (*Qantas*),[8A] in which the High Court considered whether payments received by Qantas Airways Ltd from prospective passengers for flights booked but not taken constituted consideration for a taxable supply. After looking at the specific terms and conditions of carriage, the High Court held (4:1):
>
> > The Qantas conditions and the Jetstar conditions did not provide an unconditional promise to carry the passenger and baggage on a particular flight. They supplied something less than that. This was at least a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline. This was a 'taxable supply' for which the consideration, being the fare, was received.[8B]

5. Paragraphs 28, 171, 175, 183, 192, 195, 196, 198, 212, 216 and 220

Omit all occurrences of 'section 38-355'; substitute 'subsection 38-355(1)'.

6. Footnote 9

In the second sentence; omit 'section 38-355'; substitute 'subsection 38-355(1)'

7. Paragraph 30

Omit the paragraph; substitute:

> 30. The Commissioner considers that paragraphs 9-30(1)(b) and 9-30(2)(b) would apply to make a facilitation supply GST-free or input taxed if the facilitation supply includes a right for the customer to receive the intended supply, and the intended supply would have been GST-free or input taxed, respectively. The Commissioner does not consider that this view is affected by the mere fact the relevant rights might be

[8A] *Commissioner of Taxation v. Qantas Airways Ltd* [2012] HCA 41; (2012) 83 ATR 1; 2012 ATC 20-352.
[8B] *Commissioner of Taxation v. Qantas Airways Ltd* [2012] HCA 41; (2012) 83 ATR 1; 2012 ATC 20-352 at paragraph [33].

conditional. Further, the Commissioner considers that the right is the dominant part of the facilitation supply. For example, a supply of residential premises is an input taxed supply under Division 40. Therefore, a facilitation supply which includes a right to receive a supply of residential premises would also be input taxed.

8. Paragraph 76

After the paragraph; insert:

76A. Where consideration for an intended supply is also consideration for a facilitation supply, the mere fact that an intended supply does not proceed does not cause an adjustment. However, an adjustment can arise where the consideration is changed by a refund.

9. Paragraph 89

In the last sentence; omit 'sections 38-355 (item 7) and 38-360'; substitute 'subsection 38-355(1) (item 7) and section 38-360'

10. Paragraph 97

After the paragraph; insert:

97A. Further, in *Qantas*, the High Court found that the word 'for' in the phrase 'the supply *for* consideration':

> […] is not used to adopt contractual principles. Rather, it requires a connection or relationship between the supply and the consideration.[38A]

11. Paragraph 99

After the paragraph; insert:

99A. Further, the High Court stated in *Qantas*:

> That is not to deny that the one consideration may be received for more than one supply, although, as noted above, the GST will be payable once and will be attributable to the first tax period in which any of the consideration is received or invoiced.[39A]

[38A] *Commissioner of Taxation v. Qantas Airways Ltd* [2012] HCA 41; (2012) 83 ATR 1; 2012 ATC 20-352 at paragraph [14].
[39A] *Commissioner of Taxation v. Qantas Airways Ltd* [2012] HCA 41; (2012) 83 ATR 1; 2012 ATC 20-352 at paragraph [19].

12. Paragraph 176

After the paragraph; insert:

176A. When an airline ticket is issued and the terms and conditions of the ticket are accepted by the customer, the supplier (usually the entity operating the airline service) enters into a contract with the customer.

176B. Accordingly, where a fare is paid to secure an airline ticket governed by contractually binding conditions of carriage in which the airline promises (subject to exceptions) to transport the passenger, it is considered that the airline makes a supply for consideration even if the passenger is subsequently a no-show.

176C. This is consistent with *Qantas*, where the majority of the High Court described clause 9.2 of the Qantas Conditions of Carriage as 'critical'. That clause commenced with the words: 'We will take all reasonable measures necessary to carry you and your baggage and to avoid delay in doing so.'[69A] The majority went on to say:

> The Qantas conditions and the Jetstar conditions did not provide an unconditional promise to carry the passenger and baggage on a particular flight. They supplied something less than that. This was at least a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline.[69B]

13. Paragraph 177

Omit the paragraph; substitute:

177. Even in cases where there is not a comparable obligation undertaken by an airline, an airline may enter into other obligations, or do other things, that could also constitute a supply. Tickets for domestic or international transport (travel) may be purchased directly from an airline or through a travel agent. In booking the travel, the airline or travel agent arranges travel and in doing so makes a facilitation supply to the customer. For example, the airline or travel agent:

- checks the availability of seats on flights;
- checks the range of air fares available;
- informs the customer about available seats and fares;
- makes the relevant booking or reservation;

[69A] *Commissioner of Taxation v. Qantas Airways Ltd* [2012] HCA 41; (2012) 83 ATR 1; 2012 ATC 20-352 at paragraph [30].
[69B] *Commissioner of Taxation v. Qantas Airways Ltd* [2012] HCA 41; (2012) 83 ATR 1; 2012 ATC 20-352 at paragraph [33].

- if payment is not made immediately, holds the booking pending payment;
- issues the ticket upon payment of the full price; and
- makes other arrangements to facilitate the travel.

14. Paragraph 178

Omit the paragraph; substitute:

178. Contractual obligations typically entered into include obligations relating to carrying a customer's baggage, paying refunds, providing credits and assisting the passenger to travel, for example, rebooking if there is a change in travel plans or on cancellation of flights.

15. Paragraph 179 to 181

Omit the paragraphs.

16. Legislative references

Omit:

- ANTS(GST)A 1999 38-355

Substitute:

- ANTS(GST)A 1999 38-355(1)

17. Case references

Insert:

- Federal Commissioner of Taxation v. Qantas Airways Ltd [2012] HCA 41; (2012) 83 ATR 1; 2012 ATC 20-352

This Addendum amends GSTR 2009/3 to explain the Commissioner's view of the law as it applies both before and after the date of issue.

Commissioner of Taxation
28 August 2013

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