MT 2009/1 - Miscellaneous taxes: notification requirements for an entity under section 105-55 of Schedule 1 to the Taxation Administration Act 1953

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There is a Compendium for this document: **MT 2009/1EC** .

This document has changed over time. This is a consolidated version of the ruling which was published on *24 June 2015*

Generated on: 4 June 2026, 06:36:14 AM

Miscellaneous Taxation Ruling

Miscellaneous taxes: notification requirements for an entity under section 105-55 of Schedule 1 to the *Taxation Administration Act 1953*

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Preamble

This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the TAA.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

[**Note:** This is a consolidated version of this document. Refer to the Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]

What this Ruling is about

1. This Ruling sets out the Commissioner's views on what constitutes notification by an entity to the Commissioner under paragraphs 105-55(1)(a) and 105-55(3)(a) of Schedule 1 to the TAA (section 105-55 notifications).

2. *Tax Laws Amendment (2008 Measures No. 3) Act 2008* amended section 105-55 of Schedule 1 to the TAA with effect from 1 July 2008. The application of the amendments to refunds, other payments or credits to which an entity was entitled before 1 July 2008 depends on whether a notification of the entitlement was provided before 1 July 2008.[1] The Commissioner's views in this Ruling in relation to the validity of section 105-55 notifications are also applicable to notifications for the purposes of the application of these amendments.

[1] Subitem 16(2) of Schedule 2 to the *Tax Laws Amendment (2008 Measures No. 3) Act 2008*.

3. Where a notified entitlement relates to goods and services tax (GST) that has been overpaid, any entitlement may also be affected by section 105-65 of Schedule 1 to the TAA, which provides for a restriction on refunds. This Ruling does not consider the operation of that section.[1A]

4. Except where otherwise indicated, all subsequent legislative references in this Ruling are to Schedule 1 to the TAA.

Date of effect

5. This Ruling applies both before and after its date of issue. However, the Ruling will not apply to taxpayers 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).

6. [Omitted.]

7. The Commissioner published, prior to the issue of this Ruling, a fact sheet *Time Limit on GST refunds* (NAT 11645) and a form *Notification of entitlement to GST refund* (NAT 11719). This Ruling is broadly consistent with the fact sheet and the form. Nevertheless, the fact sheet and the form do not expressly require that an entity assert an entitlement (see paragraphs 12 and 34 to 41 of this Ruling). Also, in practice the Commissioner has on some occasions accepted notifications that contain only a very brief description of an entitlement. Accordingly, the Commissioner will not treat a notification received before 29 October 2008 (the date this Ruling was issued in draft) as invalid merely because:

(a) it uses language that is not definite in asserting an entitlement, for example a notification which states that the entity 'may' have an entitlement; or

(b) it provides only a brief description of the nature of the entitlement, *provided* it gives some information about the specific factual circumstances under which the entitlement arises.[2]

Legislative context

8. Section 105-55 provides a four-year time limit for entitlements to refunds, other payments or credits in relation to GST, luxury car tax, wine tax and fuel tax in respect of a tax period or importation. The four-year time limit commences after the end of the tax period or importation.

[1A] MT 2010/1 sets out the Commissioner's views on section 105-65 of Schedule 1 to the TAA, which provides for a restriction on GST refunds that arise from the overpayment of GST.

[2] This approach is also applicable for the purposes of subitem 16(2) of Schedule 2 to *Tax Laws Amendment (2008 Measures No. 3) Act 2008*.

9. An entitlement does not cease to exist under section 105-55, if within the four-year time limit:

- an entity notifies the Commissioner that they are entitled to the refund, other payment or credit (paragraph 105-55(1)(a));
- the Commissioner notifies an entity that it is entitled to the refund, other payment or credit (paragraph 105-55(1)(b)); or
- in the case of a credit – the credit is taken into account in working out an amount that the Commissioner may recover from an entity only because of paragraph 105-50(3)(b) (paragraph 105-55(1)(c)).

10. There are similar time limits and exceptions under subsection 105-55(3) in relation to entitlements to fuel tax credits and net fuel amounts for entities that are not registered for GST or required to be registered for GST. References in this Ruling to tax periods should be taken to include references to fuel tax return periods where relevant. References to an importation should be taken to include a reference to an 'acquisition, manufacture or importation' within the meaning of subparagraph 105-55(3)(a)(ii).

10A. *Tax Laws Amendment (2009 GST Administration Measures) Act 2010* introduced subsection 105-55(2A), which provides that a request by an entity to the Commissioner to treat a document as a tax invoice for the purposes of attributing a credit to a tax period is taken to be a notification, for the purposes of paragraph 105-55(1)(a), of the entity's entitlement to the credit if:

(a) the entity made the request within the four-year period referred to in that paragraph in relation to the credit, and

(b) the Commissioner agrees to the request (whether or not the Commissioner's agreement occurs within that four-year period).

10B. The *Indirect Tax Laws Amendment (Assessment) Act 2012* introduced a self assessment regime for indirect taxes that commenced on 1 July 2012. The amendments inserted subsection 105-55(6), which provides that the section only applies to payments and refunds that:

- relate to tax periods commencing before 1 July 2012; or
- do not relate to tax periods but relate to liabilities or entitlements arising before 1 July 2012.[2AA]

Section 105-55 will be repealed on 1 January 2017.[2AB]

[2AA] Item 236 in Schedule 1 to the *Indirect Tax Laws Amendment (Assessment) Act 2012*.
[2AB] Item 259 in Schedule 1 to the *Indirect Tax Laws Amendment (Assessment) Act 2012*.

10C. Payments and refunds in relation to tax periods commencing on or after 1 July 2012, or other payments or refunds relating to liabilities and entitlements that arise on or after 1 July 2012 are dealt with under the self assessment provisions. Section 105-55 does not apply to amounts under the new regime – amendments in relation to these amounts are subject to a period of review instead. [2AC]

Ruling

11. There is no specific form that is required for a notification for the purposes of section 105-55. However, the notification must be received on or before the fourth anniversary of the end of the relevant tax period or the importation. The notification must also identify and assert the entitlement such that it brings to the Commissioner's attention the refund, other payment or credit to which the entity claims entitlement. This requires that the notification put the Commissioner on notice of the entitlement. If the notified entitlement is to be claimed at a later time, it needs to be possible to ascertain that the subsequent claim is covered by the notification.

12. The following are valid notifications for the purposes of section 105-55:

- an activity statement or revised activity statement which includes the relevant entitlement in the relevant tax period;
- an application for a private indirect tax ruling, an objection or other correspondence from an entity that asserts the entity has an entitlement and:
  - provides a description of the entitlement to a refund, other payment or credit, which is sufficient to bring the entitlement to the Commissioner's attention, such that when a subsequent claim is made it could reasonably be identified as being covered by the notification; and
  - specifies the tax period(s) or importation(s) to which the entitlement relates.

[2AC] See Subdivision 155-B in Schedule 1 to the *Taxation Administration Act 1953*.

13. A notification that is not by way of an activity statement or revised activity statement need not quantify the amount of the entitlement but the notification should specify:[2AD]

- the details of the tax period/s (or importation) to which 'the claim' relates, and
- the nature of the refund, other payment or credit claimed.

14. In contrast, correspondence will not be a notification under paragraph 105-55(1)(a) if it is speculative in nature, in the sense that it is directed at reserving an entity's rights in relation to possible future claim(s), rather than being directed at one or more particular entitlements.

15. In some cases an entity may provide correspondence purporting to be a notification for the purposes of paragraph 105-55(1)(a), but which is not a valid notification (for example, because it lacks the sufficient information to allow it to serve its purpose).[2AE] If the entity subsequently provides further information the correspondence may then be sufficient to meet the requirements of a valid notification. However, the notification will only be valid from the date the further information is received.

16. The requirements for a valid notification under subitem 16(2) of Schedule 2 to the *Tax Laws Amendment (2008 Measures No. 3) Act 2008* are the same as the requirements for a valid notification under paragraph 105-55(1)(a), with the exception that subitem 16(2) expressly requires the notification to be in writing.

16A. Under subsection 105-55(2A), a request an entity makes to the Commissioner to treat a document as a tax invoice for the purposes of attributing a credit to a tax period is taken to be a valid notification, for the purposes of paragraph 105-55(1)(a), of the entity's entitlement to the credit if:

- the entity makes the request within the four-year period referred to in that paragraph in relation to the credit;[2A]

[2AD] In *North Sydney Developments Pty Ltd v. FC of T* [2014] AATA 363 the Tribunal at [13], [28] and [30-31], held that section 105-55(1)(a) required no greater specification than the tax period(s) to which the notification relates and the nature of the refund or input tax credit claimed. The notification is not required to include a dollar amount or further explanation about the circumstances in which the refund arises.

[2AE] *In North Sydney Developments Pty Ltd v FC of T* [2014] AATA 363 the Tribunal at [34-35] held that it is the communication relied on as the section 105-55 notification itself that must provide the requisite notification information. Any deficiency in the notification cannot relevantly be overcome by pointing to any information previously provided to the Commissioner.

[2A] To ensure that an entitlement to an input tax credit does not cease under section 93-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), an entity must make the request not later than four years after the end of the tax period to which the credit would be attributable under subsection 29-10(1) or (2) of the GST Act (see paragraph 93-10(3)(b) of the GST

- the Commissioner agrees to that request (whether or not within that four-year period); and
- the request relates to an acquisition that is (or will be) taken into account in an activity statement that is lodged after 7.30 pm Australian Eastern Standard Time on 12 May 2009 or an acquisition that is (or will be) taken into account in an assessment made by the Commissioner under Subdivision 105-A after that time[2B] (it does not matter whether the request itself was made before, on or after 12 May 2009).

Explanation

17. Subsection 105-55(1) relevantly states:

> You are not entitled to a refund, other payment or credit to which this subsection applies in respect of a *tax period or importation unless:
>
> (a) within 4 years after:
>
> (i) the end of the tax period; or
>
> (ii) the importation,
>
> as the case requires, you notify the Commissioner (in a *GST return or otherwise) that you are entitled to the refund, other payment or credit; or
>
> (b) within that period the Commissioner notifies you (in a notice of assessment or otherwise) that you are entitled to the refund, other payment or credit…

18. Subsection 105-55(2) sets out those refunds, other payments or credits to which subsection 105-55(1) applies. Subsection 105-55(3) contains a comparable time limit and exceptions in relation to fuel tax credits for entities that are not registered for GST or required to be registered for GST.

19. To meet the requirements of subsection 105-55(1), a notification in respect of a tax period must be received on or before the fourth anniversary of the end of the relevant tax period. For example, if an entity has overpaid GST on a taxable supply it made on 12 November 2006 and the tax period to which the supply is attributable ends on 30 November 2006, the notification must be

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Act). To ensure that an entitlement to a fuel tax credit for an acquisition of taxable fuel does not cease to exist under section 47-5 of the *Fuel Tax Act 2006*, an entity must make the request not later than four years after the end of the tax period to which the credit would be attributable under subsection 65-5(1) of the *Fuel Tax Act 2006* (see paragraph 47-10(3)(b)).

[2B] Item 19 in Schedule 1 to the *Tax Laws Amendment (2009 GST Administration Measures) Act 2010*. Under this item, a request may also constitute a valid notification if it relates to an acquisition that is taken into account in an amendment of an activity statement that was lodged after 7.30 pm Australian Eastern Standard Time on 12 May 2009 or an amendment of an assessment that was made by the Commissioner under Subdivision 105-A after that time.

received by the Commissioner on or before 30 November 2010. Similarly, a notification in respect of an importation must be received on or before the fourth anniversary of the importation.

Form of the notification

20. There is no prescribed form for a notification or a particular form of words required to notify the Commissioner of an entitlement. The notification may be in the form of the *Notification of entitlement to GST refund* form (NAT 11719), but use of this form is not mandatory.

Should the notification be in writing?

21. Section 105-55 does not expressly state that a notification needs to be in writing in order to be valid.[3]

22. However, it would only be in rare circumstances that a statement made orally could sufficiently bring to the Commissioner's attention the matters necessary for a valid section 105-55 notification. Moreover, even if an oral statement were sufficient to constitute notification, there would potentially be formidable problems of proving the existence of the notification and determining what the parameters of the notification were. Accordingly, entities should only seek to make section 105-55 notifications in writing.

Example 1

22A. *Specter Bank (Specter) is a small retail bank that makes both financial supplies and taxable supplies. During the course of an audit, ATO officers investigate whether certain supplies Specter treated as input taxed financial supplies in tax periods from 1 January 2011 until 31 March 2011, are in fact taxable supplies. Specter's tax manager informs the auditors during a meeting that if the supplies in question are taxable supplies, then Specter is entitled to input tax credits for creditable acquisitions the bank made in relation to those supplies. The tax manager says that Specter intends to claim the further input tax credits for that period, but will wait until the audit is completed and the Commissioner's position on whether the supplies are taxable supplies or input taxed supplies is finalised. One of the officers notes Specter's statement in their record of the meeting.*

22B. *In this case, the tax manager's oral statement constitutes a section 105-55 notification as the statement identifies the relevant transactions (the supplies that are subject to the audit) and the relevant tax periods. It also explains the reason why Specter considers that it is entitled to the input tax credits. The fact that the notification has been noted in the contemporaneous record of the*

[3] Subitem 16(2) of Schedule 2 to *Tax Laws Amendment (2008 Measures No. 3) Act 2008* differs in this respect by expressly requiring the notification to be in writing.

meeting will assist in proving the existence of the notification and its parameters. Whether an oral statement is sufficient to constitute a notification will depend on the facts and circumstance of each individual case.

22C. *Whilst the notification in Specter's case is valid, this does not mean that Specter is actually entitled to the input tax credits – the Commissioner will still need to determine whether the supplies in question are taxable supplies or financial supplies, and whether the acquisitions made are creditable acquisitions, under the relevant taxation laws.*

Notification must bring the entity's entitlement to the Commissioner's attention

23. The entity's entitlement must be brought clearly to the Commissioner's attention.[3A] The notification from an entity might be contained within another document, for example a private ruling application, which serves another purpose. For such a document to constitute notification for the purposes of section 105-55, the assertion that there is an entitlement to a refund, other payment or credit must be sufficiently prominent. An oblique reference will not suffice.[4]

24. In *Federal Commissioner of Taxation v. Prestige Motors Pty. Ltd* (1994) 181 CLR 1, the High Court upheld an assessment, notice of which was given by a letter, which did not identify the taxpayer but was served upon the taxpayer. At CLR 14, Mason CJ, Brennan, Deane, Gaudron and McHugh JJ said:

> That is because, on the view which we take of the provisions, it is necessary that the notice should bring to the attention of the person on whom it is served that the assessment to which it relates is an assessment of that person to tax. The principal purpose of the notice of assessment is to bring to the attention of the person on whom it is served that such person is liable to pay on the due date the amount of tax assessed in the notice on the income stated in the notice (see *Federal Commissioner of Taxation v. Bayly* (1952) 86 CLR 506, at p. 509, per Williams J.

25. For the purposes of section 105-55, it is sufficient that the notification brings to the attention of the Commissioner that the entity has an entitlement to an identifiable refund, other payment or credit in respect of a tax period(s) or importation.

25A. In *North Sydney Developments Pty Ltd v. FC of T* [2014] AATA 363 (*North Sydney*), the Tribunal at [26] pointed to the significance of the entitlement being brought to the Commissioner's attention:

[3A] See *Secretary, Department of Family & Community Services v. Rogers* (2000) 104 FCR 272; [2000] FCA 1447 at [32].

[4] See *Secretary, Department of Family & Community Services v. Rogers* (2000) 104 FCR 272; [2000] FCA 1447 at [32].

> 26. The critical part of the 'unless' condition is merely that the taxpayer 'notify the Commissioner (in a GST return or otherwise) that you are entitled to the refund, other payment or credit'.

How specific must a notification be?

26. Where an entitlement is notified in a manner other than by including the entitlement in an activity statement or revised activity statement, there is a question of how specific the notification must be.

27. In *Deputy Commissioner of Taxation v. Woodhams* (2000) 199 CLR 370; [2000] HCA 10 (*Woodhams*), the High Court considered the validity of notices given under sections 222AOE and 222APE of the *Income Tax Assessment Act 1936*. At paragraph 33, Gleeson CJ and McHugh, Gummow, Kirby and Callinan JJ said:

> 33. It is the legislative purpose to be served by the giving of a s 222AOE notice that determines the nature and extent of the information necessary to satisfy the requirement to set out details of the unpaid amount of the company's liability under a remittance provision in respect of deductions. At this stage of the argument, the concern is with absence of information, rather than erroneous or misleading information. Absence of information will involve a failure to provide necessary details if, without such information, the notice will not fulfil the purpose for which it is required to be given.

27A. While *Woodhams* was concerned with director penalty notices, Gordon J in *Central Equity Limited v. Commissioner of Taxation* [2011] FCA 908 confirmed that a notice 'must fulfil its purpose and convey the information which it is intended to convey'.[4A] Citing Gordon J, the Tribunal in MTAA *Superannuation Fund (R G Casey Building) Property Pty Ltd v. Commissioner of Taxation* [2011] AATA 769 and *National Jet Systems Pty Ltd v. Commissioner of Taxation* [2011] AATA 766 stated 'the content of a notice must be sufficient to allow the notice to serve the purpose it was intended to serve'.[4B]

27B. In *North Sydney* the Tribunal specifically considered what a section 105-55 notice must tell the Commissioner. The Tribunal considered a number of decided cases where the issue had arisen and stated at [25]:

> 25. The common themes resonating through the decisions to which I have referred are the absence of any formal notification content requirement, a disavowal of amount specificity and the apparent sufficiency of a notice where it communicates a claim relating to a particular tax period in relation to a particular kind of tax liability. Implicit in the third theme, and variously expressed in the judgments and reasons, is a refusal to endorse any particular requirement for the details, grounds or even circumstances relied on to support the claim.

[4A] [2011] FCA 908 at paragraph [77] citing *Deputy Commissioner of Taxation v Woodhams* (2000) 199 CLR 370.
[4B] [2011] AATA 769 at paragraph [50]; [2011] AATA 766 at paragraph [59].

27C. The Tribunal went on to observe, at [29]:

> 29. In the taxpayer notification cases to which I have referred above, each of the taxpayers had provided GST returns, and paid the amounts for which they had provided. In cases of those kinds, where a taxpayer seeks to depart from the content of previous returns, it is perhaps understandable that a notification might be required to condescend to some aspect of the underlying details of the taxpayer's contention. But, as the cases show, whatever additional aspect might be required, it is not the kind of detailed specificity for which the Commissioner contended in those cases. And in the present case, where North Sydney had not submitted any Business Activity Statements for the two tax periods to which its notification related, there is little to support the view that the notification required any details of the 'circumstances' of the input tax credit claim.

28. The Explanatory Memorandum to A New Tax System (Goods and Services Tax Administration) Bill 1999, which introduced section 35 of the TAA (later replaced by section 105-50 of Schedule 1 to the TAA) and section 36 of the TAA (later replaced by section 105-55 of Schedule 1 to the TAA), stated:

> 3.27 Ordinarily, GST and penalty for late payment under new section 40 will not be payable if 4 years have passed after the due date for payment following the end of the tax period to which the net amount relates. The exceptions will be where the Commissioner has issued a notice requiring payment before the end of that 4 year period, or is satisfied that the absence of payment is due to fraud or evasion. An amount of GST on an importation will also cease to be payable if 4 years have passed after the due date for payment of the GST on the importation. [New section 35]
>
> 3.28 Similarly, entitlements to refunds, input tax credits and diesel fuel credits will expire 4 years after the end of the tax period to which they relate unless your claim to the refund or entitlement has been notified to the Commissioner before that time. [New section 36]

29. It is therefore apparent that section 105-55 is intended to ordinarily impose a four-year time limit on entitlements to refunds, other payments and credits, with an exception where an entity has notified the Commissioner of its entitlement before that time.

29A. In this context, the purpose of a section 105-55 notification is to ensure that the entity may still claim the refund, other payment or credit that is described in the notification once the four-year time limit has expired.

29B. For the notification to serve its purpose, it is considered necessary that the notification contains sufficient information about the entitlement to put the Commissioner on notice of the entitlement, such that when a subsequent claim is made it could reasonably be identified as being covered by the notification.

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[5] [Omitted.]

29C. A taxpayer will only be entitled to a subsequent refund to the extent that refund is covered by the notification. This would be the case if the refund is of the nature specified in the notice and relates to the periods covered by the notice.

29D. In this context, it is the communication relied on as the section 105-55 notification itself that must provide the requisite notification information. Any deficiency in the notification cannot relevantly be overcome by pointing to any information previously provided to the Commissioner.[5A]

Notification need not quantify amount

30. Section 105-55 does not expressly state whether a notification needs to specify the amount of the refund, other payment or credit to which the entity is entitled.

31. Notification may be by way of a 'GST return or otherwise'. The words 'or otherwise' are of broad application. It is implicit that the notification need not be the final step in claiming the refund, other payment or credit. Rather, the notification may set out the claim for the relevant entitlement, and be followed by subsequent action (for example, a revised activity statement or a request to issue an assessment). Therefore, it is considered that the notification need not specify the sum to which an entity is entitled to be a valid section 105-55 notification. The amount of the entitlement may be subsequently advised when the formal request for the refund, other payment or credit is made.

31A. In *North Sydney* the Tribunal confirmed that a notification of a specific amount was not required to satisfy the notification requirement in relation to 'the' refund, other payment or credit referred to in paragraph 105-55(1)(a), observing at [28]:

> 28. The use of the definitive article in both the Commissioner's contention and the statutory provision itself, would be most naturally construed as requiring specificity of amount. But a requirement of that kind is both disavowed by the Commissioner and contrary to authority.

Notification must identify the entitlement

32. Section 105-55 requires that a notification must bring to the Commissioner's attention the refund, other payment or credit to which the entity claims entitlement.

[5A] Refer to *North Sydney* at [34-35].

33. The mere fact that the Commissioner may disagree with an entity's entitlement to the claimed amount does not affect the validity of the notification. A notification does not have to go so far as to persuade the Commissioner of the entitlement to the claim. For example, a notification may be made for an entitlement that is dependent on the application of a particular provision in a way that is contrary to the weight of legal authority. What is necessary is that the notification brings to the Commissioner's attention a particular entitlement to a refund, other payment or credit.

The notification must assert an entitlement

34. To constitute a notification of an entitlement, the notification needs to assert that the entity has an entitlement. The context provided by the reference to notification by way of GST return (paragraph 105-55(1)(a)) indicates that a section 105-55 notification must state that the entity has an entitlement.

35. Where an entity notifies the Commissioner by way of GST return, the entity makes a statement about its entitlement by entering an amount in that return[6]. Where an entity notifies the Commissioner by way of correspondence, the entity makes a statement about its entitlement by asserting that it has an entitlement.[6A]

36. Correspondence that is equivocal about the factual basis of an entitlement, for example advising that an entity might be entitled to a refund if certain facts are subsequently established, does not meet the requirements of section 105-55. However, it is accepted that a notification would not be invalid merely because it acknowledges some controversy about the application of the law – for example that a particular interpretation of the law depends on the resolution of a case before the courts.

Example 1A

37. *NDTRA Financial Management Services Pty Ltd (NDTRA) explains in its notice that it 'may' have entered into a contract to supply certain input taxed financial services to Debbie and Frank's Events, and if it did so, it would have overpaid GST. The notification does not assert an entitlement because the factual basis of NDTRA's entitlement is equivocal – it is unclear whether NDTRA has even entered into a contract with Debbie and Frank's Events to make the supplies in question and whether it has overpaid GST.*

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[6] See paragraph 16 of Miscellaneous Taxation Ruling MT 2008/1.

[6A] Refer to *North Sydney* [at 30] where the notification required details of the tax period involved and the nature of the refund or input tax credit claimed.

Example 2

38. *Renpam Properties Pty Ltd (Renpam) states in its notice that it supplied residential premises to Andrew, and it is in the process of reviewing its records to determine whether it treated the supply as a taxable supply. Renpam says that it should have treated this supply as an input taxed supply. The notification does not assert an entitlement, because although Renpam states that it supplied residential premises it is not clear that it did in fact incorrectly treat the supply of residential premises as a taxable supply.*

39. However, a notification or accompanying documentation may advise that an issue is contentious, or that the entity's claim is contrary to the Commissioner's view of the law or that the matter is contingent on the outcome of a pending court case. This will not affect the validity of the notification provided the entity asserts the factual basis upon which it is entitled to the relevant refund, payment or credit.

Example 3

40. *Djurdja explains in her notice that she entered into a contract to provide certain administrative services and she treated these services as taxable supplies. She further explains that she is aware that there is a test case about whether the supplies of those services should have been input taxed. If this is found to be the case, Djurdja would have overpaid GST. In the event that a court finds that the supplies should have been input taxed, Djurdja will be seeking a refund of overpaid GST.*

41. The notification clearly asserts the factual basis of Djurdja's entitlement. She identifies the affected supplies and the GST treatment of those supplies. Although she is not certain about whether the GST treatment is correct, she provides an explanation as to why this is the case.

Notification must identify tax period or importation

42. The notification must also identify the tax period(s) concerned (except where it relates to an importation).[7] Subsection 105-55(1) and subsection 105-55(2) make this clear. For example, paragraph 105-55(2)(a) provides that the section applies to 'a refund in relation to a *net amount or *net fuel amount in respect of *a particular *tax period*' (emphasis added).

[7] Where the notification relates to importations, it must identify the particular importation or importations concerned.

43. Where a notification covers more than one tax period, it will be necessary for the notification to identify those tax periods.[7A] For example, where a notification relates to the GST treatment of a series of transactions over the course of several tax periods, the notice should specify the tax periods for which GST or input tax credits (as necessary) are attributable in respect of each transaction.

44. In some cases the manner in which the notification relates to each tax period may be obvious and not require detailed elaboration, particularly where the notification identifies a discrete error made by an entity in its activity statements over a period of time. For example, an entity explains in a letter to the Commissioner that it conducted an enterprise in which it acquired cans of soft drink and held tax invoices for each acquisition, but failed to claim input tax credits for those acquisitions on the mistaken understanding that the supplies of the soft drink to it were GST-free. The letter notes that these input tax credits were attributable to tax periods from 1 January 2007 to 30 September 2008. The letter does not need to further elaborate how the entitlement relates to each tax period, nor does it need to separately list each tax period between 1 January 2007 and 30 September 2008.

45. In *Central Equity Limited v. Commissioner of Taxation* [2011] FCA 908 at [77], Gordon J accepted that a notification which identified the periods of the claim sufficiently specified those periods even though the periods covered by the notification spanned eight years.

46. A notification will not apply to a tax period which is not identified in the noticification. For example, if an entity, a monthly lodger, overpays GST in January 2008, and subsequently notifies the Commissioner that it is entitled to a refund for the overpaid GST in respect of February 2009, that notification will not apply to a refund entitlement in respect of January 2008. The entity would need to notify the Commissioner within the four-year time limit that it was entitled to a refund in January 2008.

Notification may be on behalf of more than one entity

47. Because subsection 105-55(1) uses the term 'you' it might be interpreted as allowing for notification only by a single entity, and not permitting notifications for two or more entities in the one letter or form.[8] The Commissioner will accept notifications on behalf of more than one entity, provided the person lodging the notification has the authority to act on behalf of those entities. However, a notification will not meet the requirements for validity unless it is apparent how the relevant entitlement relates to each entity.

[7A] Refer to *North Sydney* [at 30] where it was stated that the notification required details of the tax periods to which the notification related.

[8] However paragraph 23(b) of the *Acts Interpretations Act 1901* provides that unless the contrary intention appears, words in the singular number include the plural.

Indicators that a notification may be speculative

48. Correspondence that is speculative, in the sense that it is intended to reserve the entity's right to make possible future claim(s), rather than being directed at one or more particular entitlements, is not a notification for the purposes of section 105-55. In many cases it will be apparent on the face of the notification whether it is speculative.

49. However, where there is some doubt on the face of the notice as to whether the notification is speculative, the surrounding facts and circumstances may be taken into account. If, for example, an entity cannot explain why it is not in a position to quantify an entitlement, or if there is unreasonable delay in making a formal claim following notification, these circumstances might tend to suggest that the entity did not have a particular entitlement in mind in lodging its notification. The Commissioner will take the overall context into account in determining whether such a notification was speculative.

50. The Commissioner's practice is to ask that within three months the entity either quantify the claim or provide an explanation why further time is required.

51. If an entity does not formalise their claim within a reasonable period of time and does not provide any reasonable explanation for the delay, this **might** be indicative of the original notification being speculative. Accordingly, the Commissioner may give further consideration to whether the original notification genuinely notifies the Commissioner of a particular entitlement.

52. Similarly, where the notification does not quantify the entitlement, it is expected that a taxpayer will provide a reasonable explanation for why the amount cannot be precisely quantified at that time. If an explanation is not provided, the Commissioner may seek one. Although a continued failure to provide an explanation does not *in itself* make a notification invalid, it might, depending on the circumstances, be indicative that the original notification was speculative.

Remedying a notification that is not valid

53. A question arises as to the effect of a notification that is deficient, but which an entity later corrects, for example by providing more information.

54. It may be that if an entity provides further correspondence that explains or corrects an earlier purported notification, that further correspondence will constitute sufficient notification for the purposes of section 105-55.

55. However, in these cases the notification will only be valid from the date that sufficient information is received. Section 105-55 does not either expressly or implicitly provide any right to retrospectively amend a notification or backdate a notification.[9]

56. On the other hand, if later correspondence merely corrects a minor or trivial error in the original notification, and the entitlement that was originally notified is clear, the error may not be such as to undermine the validity of the original notification. In these cases, the relevant date is that of the original notification. For example, if a letter advising of an entitlement includes a typographical error when setting out the dates of the relevant tax period, the error would not affect the validity of the notification, provided the period to which the taxpayer intends to refer is apparent in the context of the letter as a whole.

56A. It is the communication itself that must be relied on to provide the requisite notification information. Any deficiency in the notification cannot relevantly be overcome by pointing to any information previously provided to the Commissioner.[9A]

Application of amendments to section 105-55

57. Section 105-55 of Schedule 1 to the TAA was amended by *Tax Laws Amendment (2008 Measures No. 3) Act 2008* with effect from 1 July 2008 to ensure that the provision operates as intended. Prior to the amendment it was considered that the time limit may not apply if the refund resulted from a reduction in the amount of an entity's indirect tax liability or fuel tax credit related liability.

58. The commencement date for the amendment to section 105-55 of Schedule 1 to the TAA was 1 July 2008. Subitem 16(2) of Schedule 2 to the *Tax Laws Amendment (2008 Measures No. 3) Act 2008* provides:

> The amendments made to section 105-55 of Schedule 1 to the *Taxation Administration Act 1953* by this Schedule apply in relation to a refund, other payment or credit:
>
> (a) that is of a kind referred to in subsection 105-55(1) or (3) of Schedule 1 to that Act as amended by this Schedule; and
>
> (b) to which you became entitled before the commencement of this Schedule;
>
> unless, before that commencement, you notified the Commissioner in writing, or the Commissioner notified you in writing, that you were entitled to the refund, other payment or credit.

[9] See *White v. Herefordshire Council* [2008] 2 All ER 852 at 859; *Beard v. South Australia* (1991) 57 SASR 65, per Zelling AJ.
[9A] Refer to *North Sydney* at [34-35].

59. The exception for where an entity notified the Commissioner of an entitlement to a refund, other payment or credit before the commencement date (that is, 1 July 2008) is phrased in similar terms to paragraph 105-55(1)(b). Accordingly, the Commissioner considers that the requirements for a valid notification under this application provision are the same as the requirements for a valid notification under section 105-55.[10]

60. The Commissioner's approach to such notifications is subject to the exceptions about how the Commissioner will apply this Ruling to notifications received before this Ruling was issued in draft (see paragraph 7 of this Ruling).

Request for the Commissioner to treat a document as a tax invoice

60A. Under subsection 105-55(2A), a request an entity makes to the Commissioner to treat a document as a tax invoice for the purposes of attributing a credit to a tax period is taken to be a valid notification of the entity's entitlement to the credit if:

- the entity makes the request within the four-year period referred to in that paragraph in relation to the credit;[11]
- the Commissioner agrees to that request (whether or not within that four-year period); and
- the request relates to an acquisition that is (or will be) taken into account in an activity statement that is lodged after 7.30 pm Australian Eastern Standard Time on 12 May 2009 or an acquisition that is (or will be) taken into account in an assessment made by the Commissioner under Subdivision 105-A after that time[12] (it does not matter whether the request itself was made before, on or after 12 May 2009),

---

[10] With the exception that subitem 16(2) of Schedule 2 to *Tax Laws Amendment (2008 Measures No. 3) Act 2008*, expressly requires the notification to be in writing.

[11] To ensure that an entitlement to an input tax credit does not cease under section 93-5 of the GST Act, an entity must make the request not later than four years after the end of the tax period to which the credit would be attributable under subsection 29-10(1) or (2) of the GST Act (see paragraph 93-10(3)(b) of the GST Act). To ensure that an entitlement to a fuel tax credit for an acquisition of taxable fuel does not cease to exist under section 47-5 of the *Fuel Tax Act 2006*, an entity must make the request not later than four years after the end of the tax period to which the credit would be attributable under subsection 65-5(1) of the *Fuel Tax Act 2006* (see paragraph 47-10(3)(b)).

[12] Item 19 in Schedule 1 to the *Tax Laws Amendment (2009 GST Administration Measures) Act 2010*. Under this item, a request may also constitute a valid notification if it relates to an acquisition that is taken into account in an amendment of an activity statement that was lodged after 7.30 pm Australian Eastern Standard Time on 12 May 2009 or an amendment of an assessment that was made by the Commissioner under Subdivision 105-A after that time.

60B. Subsection 29-70(1B) of the *A New Tax System (Goods and Services Tax) Act 1999* provides that the Commissioner may treat as a tax invoice a document that would not otherwise be a tax invoice. Law Administration Practice Statement PS LA 2004/11 sets out the matters that the Commissioner will take into account in deciding whether to exercise this discretion in any given case. Amongst other things, the Commissioner considers that regard must be had to whether, on the available evidence, it is reasonable to conclude that a creditable acquisition has been made. For this reason, an entity that is considering making a request to the Commissioner to treat a document as a tax invoice should, if the entity would like that request to also constitute a valid notification for section 105-55 purposes, provide the same level of information required of other section 105-55 notices (summarised in the second dot point in paragraph 12 of this Ruling). Failure to do so may mean that the Commissioner does not agree to the request on the basis that it is speculative and there is not enough information to conclude that there has been a creditable acquisition. This, in turn, would mean that the request would not constitute a valid notification for the purposes of section 105-55.

60C. Subsection 105-55(2A) is not restricted to applying to input tax credits and may apply in relation to any type of credit for which a tax invoice is required in order to attribute the credit to a tax period. Paragraph 65-5(1)(a) of the *Fuel Tax Act 2006* provides that a fuel tax credit that an entity that is registered or required to be registered for GST is entitled to for a creditable acquisition of fuel is attributable to the same tax period that the input tax credit for the fuel is attributable to under the GST Act. If a tax invoice is required to attribute the input tax credit for the creditable acquisition of fuel to a tax period, it follows that the invoice would also be required to attribute the fuel tax credit. Accordingly, in such an instance, a request that an entity makes to the Commissioner to treat a document as a tax invoice may, if the requirements of section 105-55(2A) are met, be taken to be a valid notification of the entity's entitlement to both an input tax credit and a fuel tax credit. To avoid any doubt that the purpose of a request is to attribute a fuel tax credit to a tax period (in addition to an input tax credit), an entity should consider providing the same level of information about the fuel tax credit that it would be required to provide under other section 105-55 notices (summarised in the second dot point in paragraph 12 of this Ruling).

Should the request be in writing?

60D. Neither subsection 105-55(2A) nor subsection 29-70(1B) of the GST Act expressly state that a request by the entity to treat a document as a tax invoice should be in writing. However, the Commissioner would need to have sufficient evidence to be able to conclude that the entity made a creditable acquisition. It would only be in rare circumstances that a request made orally would be able to satisfy this requirement. Accordingly, an entity should make such a request in writing.

Further examples

Example 4

61. *Bigger Buildings Pty Ltd*, a property development company, *entered into a contract for the sale of an office block in which the parties agreed that the margin scheme would apply. The sale was completed in March 2006. However, in preparing its activity statement, Bigger Buildings made an error and returned GST on the full sale price rather than the margin.*

62. *Bigger Buildings Pty Ltd subsequently realises that it made a number of errors in its activity statements between January 2005 and June 2008 because of a shortage of appropriately trained staff.*

63. *It undertakes a process to comprehensively review its GST affairs during that period. In November 2008, it provides the Tax Office with a letter which states:*

> *Please be advised that:*
>
> *On 21 January 2006 Bigger Buildings Pty Ltd (BB) entered into a contract of sale for an office block at 1001 High Street, New Town. The contract of sale included an election by the parties to apply the margin scheme. The sale was completed on 21 March 2006. In its Activity Statement for the quarter ending 31 March 2006, BB returned GST on the sale of the apartment block based on the full sale price of $4.5 million, rather than the margin. Accordingly, BB has overpaid GST and is entitled to a refund.*
>
> *BB owned the office block since 1996. BB obtained a valuation of the office block as at 1 July 2000, but cannot presently locate the valuation. BB is seeking to obtain a copy of that valuation from the valuer and when it has the relevant information will formalise a claim for a refund.*
>
> *BB has also identified a number of other errors in its BAS between 2005 and 2008 and is continuing to review its affairs. BB considers that it may have overpaid GST and/or underclaimed input tax credits in respect of several property dealings within this period. BB will seek to quantify these claims as soon as possible.*

64. To the extent that the letter relates to the sale of the office block in New Town it is considered to be a valid section 105-55 notification. The letter identifies the relevant transaction and the relevant tax period. Whilst the notification is valid in relation to the New Town sale, the Commissioner will still need to consider whether BB is actually entitled to the refund under the relevant taxation laws.

65. On the other hand, the letter is not a valid notification for the purposes of any other overstatements of GST or underclaiming of input tax credits between 2005 and 2008. It is considered that the letter does not meet the requirements for section 105-55 purposes because:

- the reference to GST overpaid and/or input tax credits underclaimed does not clearly identify the tax periods involved. It could not be said that any particular refund, other payment or credit is covered by the notification; and
- it does not positively assert that there is an entitlement, rather it indicates that there may be a refund or credit entitlement.

66. To make a claim for these other overstatements of GST or under claiming of input tax credits, BB would need to lodge revised activity statements, or provide further correspondence which meets the requirements for a section 105-55 notification before the expiry of the four-year time limit.

67. [Omitted.]

68. [Omitted.]

69. [Omitted.]

Detailed contents list

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Commissioner of Taxation
29 April 2009

Previous draft:
MT 2008/D4

Related Rulings/Determinations:
GSTR 1999/1; TR 2006/10; WETR 2002/2; MT 2008/1; MT 2010/1

Subject references:
- business activity statements
- fuel tax credits
- GST input tax credits & creditable acquisitions
- GST refunds
- GST returns, payments & refunds
- WET credit

Legislative references:
- TAA 1953
- TAA 1953 35
- TAA 1953 36
- TAA 1953 Sch 1 Subdiv 105-A
- TAA 1953 Sch 1 105-50
- TAA 1953 Sch 1 105-50(3)(b)
- TAA 1953 Sch 1 105-55
- TAA 1953 Sch 1 105-55(1)
- TAA 1953 Sch 1 105-55(1)(a)
- TAA 1953 Sch 1 105-55(1)(b)
- TAA 1953 Sch 1 105-55(1)(c)
- TAA 1953 Sch 1 105-55(2)
- TAA 1953 Sch 1 105-55(2)(a)
- TAA 1953 Sch 1 105-55(2A)
- TAA 1953 Sch 1 105-55(3)
- TAA 1953 Sch 1 105-55(3)(a)
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- TAA 1953 Sch 1 105-55(6)
- TAA 1953 Sch 1 105-60
- TAA 1953 Sch 1 105-65
- TAA 1953 Sch 1 Subdiv 155-B
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- ANTS(GST)A 1999 29-10(1)
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- ANTS(GST)A 1999 93-5
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- FTA 2006 47-5
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- Tax Laws Amendment (2008 Measures No. 3) Act 2008 Sch 2 16(2)
- Tax Laws Amendment (2009 GST Administration Measures) Act 2010 Sch 1 19

Case references:

- Beard v. South Australia (1991) 57 SASR 65; (1991) 74 LGRA 224
- Central Equity Limited v. Commissioner of Taxation [2011] FCA 908; 2011 ATC 20-274; (2011) 82 ATR 550
- Deputy Commissioner of Taxation v. Woodhams (2000) 199 CLR 370; [2000] HCA 10; 2000 ATC 4141; (2000) 43 ATR 757
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- MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd v. Commissioner of Taxation [2011] AATA 769; 2012 ATC 20-323
- National Jet Systems Pty Ltd v. Commissioner of Taxation [2011] AATA 766; 2011 ATC 10-212; (2011) 82 ATR 740
- North Sydney Developments Pty Ltd v Federal Commissioner of Taxation [2014] AATA 363; 2014 ATC 10-365; [2014] ALMD 5048; (2014) 92 ATR 740
- Secretary, Department of Family and Community Services v. Rogers (2000) 104 FCR 272; [2000] FCA 1447
- White v. Herefordshire Council [2008] 2 All ER 852

Other references:

- Decision Impact Statement for MTAA Superannuation Fund (R G Casey Building) Property Pty Ltd v. Commission of Taxation
- Decision Impact Statement for National Jet Systems Pty Ltd v. Commissioner of Taxation
- Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1999
- Notification of entitlement to GST refund form (NAT 11719)
- Time Limit on GST refunds fact sheet (NAT 11645)

ATO references

NO:	2008/15400
ISSN:	1443-5160
ATOlaw topic:	Goods and Services Tax ~~ General rules and concepts ~~ other

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