MT 2010/1 - Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953

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Miscellaneous Taxation Ruling

Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the *Taxation Administration Act 1953*

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Preamble

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

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.

What this Ruling is about

1. This Ruling sets out the Commissioner's views on section 105-65 of Schedule 1 to the *Taxation Administration Act 1953* (TAA), which provides for a restriction on goods and services tax (GST) refunds that arise from the overpayment of GST.

2. Specifically, this Ruling explains:

- whether section 105-65 of Schedule 1 to the TAA applies to overpayments of luxury car tax (LCT), wine equalisation tax (WET) and to taxable importations;
- the meaning of 'overpaid';
- the meaning of 'treated' as a taxable supply;
- the meaning of 'to any extent';
- the operation of section 105-65 where the wrong entity remits the GST;
- the meaning of the Commissioner need not 'give' a 'refund of an amount';
- the circumstances in which the Commissioner may exercise the discretion to refund where section 105-65 of Schedule 1 to the TAA applies;
- the amount of any refund that is given;

- the ability of the Commissioner to recover amounts refunded without regard to section 105-65 of Schedule 1 to the TAA; and
- whether the operation of section 105-65 of Schedule 1 to the TAA must be taken into account in working out an entity's net amount.

3. This Ruling also provides examples on how the Commissioner's discretion in section 105-65 of Schedule 1 to the TAA may be exercised. In providing these examples, there is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion in any particular case. Nor does this Ruling represent a general exercise of the Commissioner's discretion. Rather, the examples are provided to assist in determining when the discretion may be exercised.

4. Any entitlement to a refund may also be affected by section 105-55 of Schedule 1 to the TAA, which provides for a four-year time limit for entitlements to refunds, other payments or credits in relation to GST. This Ruling does not consider the operation of that section.

5. This Ruling does not consider adjustment events and the operation of Division 19 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).[1]

6. All subsequent legislative references in this Ruling are to Schedule 1 to the TAA, except where otherwise indicated.

Background

Legislative framework

7. A refund or credit may arise as a result of a taxpayer miscalculating their net amount and either the taxpayer or the Commissioner amends or revises that net amount by:

- including additional input tax credits;
- reducing the GST payable; or
- including a decreasing adjustment.

8. The result of the amendment or revision may be that :

- the net amount the entity paid is reduced;
- the entity becomes entitled to a refund under section 35-5 of the GST Act; or
- the amount of the refund under section 35-5 of the GST Act is increased.

[1] Adjustment events are explained in GSTR 2000/19 Goods and services tax: making adjustments under Division 19 for adjustment events.

9. The Commissioner is required to give a refund or apply that amount in accordance with the running balance account (RBA) rules.[2]

10. However, where the refund or credit arises from an overpayment of the amount of GST payable in the calculation of the net amount, subsection 105-65(1) modifies this requirement so that the Commissioner need not give a refund (or apply that amount) where the entity overpaid its net amount or an amount of GST and the other requirements of the section are established.[3]

11. Appendix 2 of this Ruling provides an illustrative overview of the operation of section 105-65. For the purpose of this Ruling unless otherwise stated a reference to an 'overpaid amount' is a reference to a credit or refund arising from the overpayment of the GST payable in the calculation of the net amount.

12. Prior to tax periods starting on or after 1 July 2008 section 105-65 did not apply to a GST refund where the overpaid amount was for a transaction that did not give rise to a 'supply' as defined in section 9-10 of the GST Act. This was decided by the Federal Court in *Kap Motors Pty Ltd v. Commissioner of Taxation* [2008] FCA 159; 2008 ATC 20-007; (2008) 68 ATR 927 *(Kap Motors)*.

13. Section 105-65 was amended to overcome this identified deficiency in the law and to cover overpaid amounts involving an arrangement that was treated as giving rise to a taxable supply but which does not give rise to a supply.[4] These amendments apply in respect of refunds relating to tax periods starting on or after 1 July 2008.

Legislative context

14. Section 105-65 states:

> (1) The Commissioner need not give you a refund of an amount to which this section applies, or apply (under Division 3 or 3A of Part IIB) an amount to which this section applies, if:
>
> (a) you overpaid the amount, or the amount was not refunded to you, because a *supply was treated as a *taxable supply, or an *arrangement was treated as giving rise to a taxable supply, to any extent; and
>
> (b) the supply is not a taxable supply, or the arrangement does not give rise to a taxable supply, to that extent (for example, because it is *GST-free); and

[2] See section 35-5 of the GST Act and Division 3 and Division 3A of Part IIB of the TAA.
[3] See paragraph 14 of this Ruling.
[4] See the *Tax Laws Amendment (2008 Measures No. 3) Act 2008.*

(c) one of the following applies:

(i) the Commissioner is not satisfied that you have reimbursed a corresponding amount to the recipient of the supply or (in the case of an arrangement treated as giving rise to a taxable supply) to an entity treated as the recipient;

(ii) the recipient of the supply, or (in the case of an arrangement treated as giving rise to a taxable supply) the entity treated as the recipient, is *registered or *required to be registered.

(2) This section applies to the following amounts:

(a) in the case of a *supply:

(i) so much of any *net amount or amount of *GST as you have overpaid (as mentioned in paragraph (1)(a)); or

(ii) so much of any net amount that is payable to you under section 35-5 of the *GST Act as the Commissioner has not refunded to you (as mentioned in paragraph (1)(a)), either by paying it to you or by applying it under Division 3 of Part IIB of this Act;

(b) in the case of an *arrangement:

(i) so much of any net amount or amount of GST to which subparagraph (a)(i) would apply if the arrangement were a supply; or

(ii) so much of any net amount to which subparagraph (a)(ii) would apply if the arrangement were a supply.

Frequently used terms for the purposes of this Ruling

15. The terms ‘supply’ or ‘taxable supply’ also encompass the concept of an arrangement being treated as giving rise to a supply or a taxable supply (where it is appropriate).

16. The term ‘refund’ also encompasses applying a refund or credit in accordance with the running balance account rules (where the context so requires).

17. The term ‘remitted’ means that an amount has been reported and paid to the Commissioner.

18. The term ‘reimburse’ encompasses not only an actual monetary payment but also crediting of the recipient’s account such that it reduces the debt owed or offsetting the credit against liabilities.

Ruling

Whether section 105-65 applies to overpayments of LCT and WET and to taxable importations

19. Section 105-65 only applies to a miscalculation of a net amount that arises as a result of the amount of GST payable being overstated and does not apply to a miscalculation of the net amount that arises where LCT or WET is overpaid or to taxable importations.

Meaning of 'overpaid'

20. In the context of section 105-65, 'overpaid' means the amount that has been remitted must be in excess of what was legally payable on the particular supply in the relevant tax period[5] prior to taking into account or applying section 105-65.

Meaning of 'treated' as a taxable supply

21. In the context of section 105-65 a supply would be treated as a taxable supply where the supplier has mischaracterised a supply as taxable because they believed the supply to be a taxable supply, has dealt with the recipient of the supply as if the supply was a taxable supply and has remitted an amount as GST to the Commissioner on that supply in the calculation of their net amount. A supply would also be treated as a taxable supply where a supplier correctly characterises a supply as GST-free or input taxed but mistakenly includes GST for that supply in the calculation of their net amount. A supply would also be treated as a taxable supply where a supplier correctly characterises a supply as taxable but miscalculates the GST for that supply in the calculation of their net amount.

22. In most cases it will be the supplier who erroneously treats the supply as taxable (as the supplier is the entity who has the liability for remitting the GST as a component part of the net amount).[6] However, in some situations it may be the Commissioner (or another entity, such as a member of the same GST group) who treats the supply as taxable. In these circumstances section 105-65 can apply.[7]

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[5] *Chippendale Printing Co Pty Ltd v. FC of T & Anor* 96 ATC 4175; (1996) 32 ATR 128, *Luxottica Retail Australia v. FC of T* 2010 ATC 10-119 at paragraph 55.

[6] There are circumstances, such as with the grouping provisions, where the person who makes the supply is not necessarily the entity who has the liability to remit the GST. For example, see Example 12 at paragraphs 173-176 of this Ruling and Example 15 at paragraphs 183 to 185 of this Ruling. Section 105-65 can still apply in these cases.

[7] In such circumstances it may be appropriate for the Commissioner to exercise his discretion to pay the refund. See paragraphs 113 to 132 of this Ruling.

Meaning of 'to any extent'

23. The Commissioner considers that paragraphs 105-65(1)(a) and 105-65(1)(b) cover all overpaid amounts arising from the supplier treating a supply as a taxable supply to any extent whether the overpayment occurs from a miscalculation or a mischaracterisation.[8]

24. This means that section 105-65 will apply, for example, to the circumstances of a transaction in real property in which the GST liability was calculated using the margin scheme or to a mixed supply (that is a supply that is partly taxable and partly input-taxed or GST-free) or to the calculation of a global GST amount payable in relation to a gambling supply. These matters concern the GST payable on a supply that was treated as a taxable supply to some extent and the 'extent' of that treatment as a taxable supply is different to the correct extent of the treatment under the GST Act.

Effect where the wrong entity remits the GST

25. Section 105-65 applies where an entity has remitted an amount as GST for supplies that are subsequently determined to have been made by another entity.

Meaning of the Commissioner need not 'give' a 'refund of an amount'

26. Section 105-65 is not limited to situations where an actual refund is payable. The section can also apply in cases where a supplier revises a relevant activity statement and, after netting off all underpayments and overpayments, has a nil net amount or still has a liability to pay for the particular tax period.[9] Section 105-65 can apply to any component of the revision that represents an overpayment arising from the incorrect treatment of a supply as taxable to any extent.

Circumstances in which the Commissioner may exercise the discretion to refund where section 105-65 applies

27. The operation of section 105-65 to deny the requirement to pay refunds that would otherwise be payable is not discretionary. Where the conditions in section 105-65 apply, the Commissioner has no obligation to pay a refund that would otherwise be payable under section 8AAZLF of the TAA. Where the section applies the Commissioner need not give you a refund of the amount or apply the amount under the relevant RBA provisions. However, the words 'need not' indicate the Commissioner may choose to pay a refund in appropriate circumstances, even though the conditions in

[8] *Luxottica Retail Australia v. FC of T* 2010 ATC 10-119 at paragraph 56.
[9] The same outcome applies where the net effect of the transactions is that a refund previously paid under Division 35 of the GST Act is reduced.

paragraphs 105-65(1)(a), 105-65(1)(b) and 105-65(1)(c) are satisfied. It is to that limited extent that the Commissioner has a discretion.

28. The guiding principles the Commissioner will take into account in exercising the discretion are explained at paragraphs 113 to 132 of this Ruling.

What is the amount of any refund given

29. The words 'so much if any' indicate that subsection 105-65(1) can apply to an amount that is less than the whole amount that has been overpaid (or not refunded).

30. Accordingly, if a supplier reimburses (in a later tax period) a lesser amount to an entity that is not registered (or required to be registered), section 105-65 does not apply to restrict the payment of a refund of that reimbursed amount.

31. However, section 105-65 is concerned with the GST payable on **the** supply and because of this any input tax credits claimed by the supplier in respect of acquisitions that relate to the making of that supply are not taken into account in calculating the amount of the refund.

Recovery of amounts refunded without regard to section 105-65

32. Section 8AAZN of the TAA may be used to recover a refund where the Australian Taxation Office's (ATO's) automated system processes that refund without regard to section 105-65. The Commissioner considers that the payment of such a refund constitutes a mistake and is therefore an 'administrative overpayment' for purposes of section 8AAZN of the TAA.

33. Where the refund is paid as a result of the actions of a taxpayer that amount to the making of a false or misleading statement under Subdivision 2B of Part III of the TAA and the Criminal Code, the Commissioner depending on the particular facts may initiate prosecution action and also seek an order from the Court under section 21 B of the *Crimes Act 1914* for an amount equal to the amount refunded.

Section 105-65 is taken into account in determining net amount

34. The effect of section 105-65 must be taken into consideration in determining an entity's net amount.

Date of effect

35. This Ruling applies to years of income commencing both before and after its date of issue. However, this Ruling will not apply to

taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling.

Commissioner of Taxation
15 December 2010

Appendix 1 - Explanation

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

36. In interpreting any provision of an Act it is important to consider the context in which it appears, the evident purpose of the provision and, where appropriate, the legislative history of similar provisions in the same Act or other Acts.

37. With this in mind there are two important policy reasons behind the operation of section 105-65:

- GST charged on a taxable supply is intended to be borne by the unregistered end consumer,[10] and
- there should not be a refund of overpaid GST to a supplier where it may result in a windfall gain to the supplier.[11]

38. The scheme of the GST Act,[12] on which the section 105-65 policy is based, is premised on the following principles:

- it is the supplier that determines if the supply it makes is taxable in the first instance. By determining that its supply is a taxable supply, an amount for GST is included in the price.
- double taxation is avoided by the registered recipient being entitled to claim an input tax credit for that taxable supply where it is acquired for a creditable purpose and the supplier, in the relevant circumstances, provided a tax invoice. In this way the Act envisages symmetry between the GST payable and the input tax credit which may be claimed.
- it is the unregistered end consumer that bears the cost of the GST.

39. The GST regime, like the former sales tax regime, is an indirect tax regime with a central characteristic being that the entity liable to remit the tax is not intended to be the entity that actually bears the cost of the tax.

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[10] See Chapter 1 of the Explanatory Memorandum of the A New Tax System (Goods and Services Tax) Bill 1998 – in particular: 'GST is effectively borne by consumers when they acquire anything to consume.' See also Edmonds J in *Federal Commissioner of Taxation v. DB Rreef Funds Management Limited* 2006 ATC 4282 at 4285; (2006) 62 ATR 699 at 702.

[11] 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.

[12] See paragraphs 3.15, 3.24 and 5.4 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

40. The High Court in *Avon Products Pty Ltd v. Commissioner of Taxation* [2006] HCA 29 (*Avon*) 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.' In this regard the GST and sales tax regimes are very similar though the manner in which double taxation is avoided differs between the two regimes. GST avoids double taxation through symmetry by generally allowing an equal and offsetting input tax credit for the GST payable on business to business transactions, whilst the sales tax system relied on a system of quoting.

41. The *Sales Tax Assessment Act 1992* (STAA 92) and its predecessor Acts contained a similar provision to section 105-65, which restricted the payment of a refund for overpaid sales tax.[13] In *Avon* the High Court stated, in regard to subsection 51(1) of STAA 92 'In this way, the Act evinces a stance against automatic recovery of sales tax merely upon proof that it has been overpaid'. The reason behind the stance of not automatically paying refunds in an indirect tax system is the underlying premise that the 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.

42. Section 105-65 is based on provisions such as subsection 26(1) of the *Sales Tax Assessment Act (No.1) 1930* and subsection 51(1) of the STAA 92. Although section 105-65 makes no specific mention of 'passing on', it proceeds on the basis that the whole structure of the GST Act is based on the principle that the tax is passed on when a supply is treated as a taxable supply.

43. The Explanatory Memorandum that accompanied the Bill[14] that introduced the GST Act summarised this approach in the following manner:

> GST is effectively borne by consumers when they acquire anything to consume.
>
> *and remitted by suppliers.*
>
> 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.

[13] Table 3 in section 51 of the STAA 92.
[14] See Executive Summary of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

44. Within this framework the reasoning in *Avon*, albeit in a sales tax context, equally applies in the GST context. In that case the High Court stated, at paragraphs 9 and 14:

> 9. That sales tax is expected to be passed on depends upon the circumstance that sales of goods occur within an economy geared to making profit…In a profit-making structure, businesses will set prices so as to ensure at least that all foreseeable costs are recovered…it forms part of the cost structure of doing business…There is nothing extraordinary in the proposition that in the usual course of things sales tax will be passed on…..
>
> 14. Additionally, once it is appreciated that it is in the nature of sales tax to be passed on, there is nothing remarkable in the consequences that proof to the contrary will occur comparatively seldom.

45. Accordingly, section 105-65 evinces a stance that ordinarily overpaid GST need not be refunded.

Whether section 105-65 applies to overpayments of LCT and WET and to taxable importations

46. Subsection 105-65(2) refers to 'net amount', which is relevantly defined in section 195-1 of the GST Act.[15] That definition refers to sections 17-5, 126-5 and 162-105 of the GST Act. It is clear that GST is included in the meaning of 'net amount'.

47. It is also clear from the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act)[16] and the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act)[17] that both LCT and WET are included in the net amount.

48. Although both LCT and WET are included in the net amount as used in subsection 105-65(2), this does not necessarily mean that section 105-65 applies to overpayments of LCT or WET.

49. LCT applies to a 'taxable supply of a luxury car' (as defined in section 5-10 of the LCT Act) rather than a 'taxable supply' as relevantly defined[18] in section 195-1 of the GST Act (as having the meaning given by sections 9-5, 78-50, 84-5 and 105-5 of the GST Act). Therefore, an overpayment of LCT is not covered by section 105-65.[19]

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[15] Under subsection 3AA(2) of the TAA an expression has the same meaning in Schedule 1 to the TAA as in the *Income Tax Assessment Act 1997* (ITAA 1997). Under subsection 995-1(1) of the ITAA 1997 'net amount' has the same meaning as in section 195-1 of the GST Act.

[16] See subsection 2-10(1), and sections 2-25 and 13-5 of the LCT Act.

[17] See sections 2-20, 2-25, 21-1 and 21-5 of the WET Act.

[18] Under subsection 3AA(2) of the TAA an expression has the same meaning in Schedule 1 to the TAA as in the ITAA 1997. Under subsection 995-1 of the ITAA 1997 'taxable supply' has the same meaning as in section 195-1 of the GST.

[19] Overpayments of LCT are specifically covered by section 17-5 of the LCT Act.

50. WET applies to 'assessable dealings'[20] rather than taxable supplies. Therefore, an overpayment of WET also is not covered by section 105-65.[21]

51. An importation is not a supply and therefore is not subject to the restrictions in section 105-65.[22]

52. Accordingly, section 105-65 only applies to overpayments of GST on taxable supplies and cannot be applied where LCT or WET is overpaid or to overpayments of GST on taxable importations.

53. The *Tax Laws Amendment (2008 Measures No. 3) Act 2008* amended paragraph 105-65(2)(a) to recognise this by removing a reference to 'an amount of indirect tax' and inserting a reference to 'amount of GST'.

Meaning of 'overpaid'

54. For section 105-65 to apply there has to be an overpayment of GST, that is, the amount remitted as GST for a supply in a relevant tax period must exceed the amount which was required to be remitted.

55. The word 'overpaid' as used in paragraph 105-65(1)(a) is not a defined term so it takes its normal meaning. The Macquarie Dictionary[23] relevantly defines 'overpay' as: '1. to pay more than (an amount due).'

56. In *Chippendale Printing Co Pty Ltd v. FC of T & Anor* 96 ATC 4175; (1996) 32 ATR 128 (*Chippendale*), the Full Federal Court made some observations on the meaning of 'overpaid' in the context of the sales tax regime. Lehane J considered that the concept of overpayment includes both a payment exceeding an amount of tax actually due and a payment, as tax, where no amount of tax was actually due.

57. Tamberlin J compared the previous sales tax legislation with the then relevant current sales tax legislation. Neither legislation defined the term 'overpaid' but a schedule to the new legislation referred to 'overpaid' as an amount paid as sales tax that was not legally payable. Tamberlin J thought this expression would also cover the concept of 'overpaid' in the previous legislation and, furthermore, held that this meaning accords with 'the ordinary meaning of the expression which is '…a sum of money paid in excess of what is due.'[24]

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[20] See sections 5-1 and 5-5 of the WET Act.
[21] Overpayments of WET are specifically covered by CR1 in the Wine Credit Table in section 17-5 of the WET Act.
[22] See section 7-1 of the GST Act where it states that GST is payable on 'taxable supplies' and 'taxable importations'. Taxable importations are not supplies and are dealt with under Part 2-3 of the GST Act.
[23] The *Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[24] 96 ATC 4175 at 4179; (1996) 32 ATR 128 at 131.

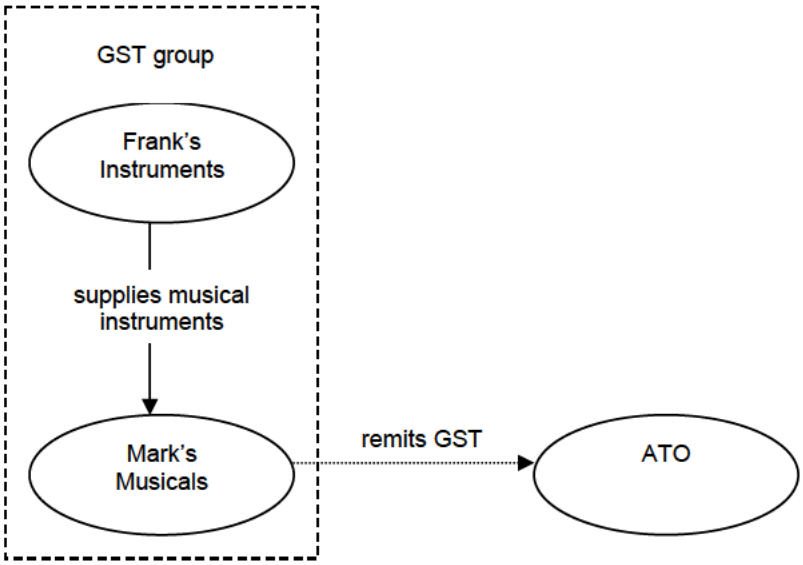
58. Applying the reasoning in *Chippendale* in the context of section 105-65, the amount of GST that has been remitted as part of the net amount must be in excess of what was legally payable on the particular supply in the relevant tax period prior to section 105-65 being applied. The view that overpaid means 'in excess of what is legally payable' is further supported by the reasoning in *Luxottica Retail Australia v. FC of T* 2010 ATC 10-119 (*Luxottica*) at paragraph 55. In discussing what was meant by 'overpaid', it was stated:

> The words must be taken to encompass any payment in excess of the true net amount …

Example 1- overpaid GST

59. *Frank's Instruments Pty Ltd and Mark's Musicals Pty Ltd are part of the same GST group that sells musical instruments. Frank's Instruments supplies Mark's Musicals with a number of trumpets. Frank's Instruments issues Mark's Musicals with tax invoices however no consideration is provided by Mark's Musicals and no input tax credits are claimed in respect of the supply. Mark's Musicals (the group representative member) lodges the activity statement for the group and mistakenly accounts for the GST on the intra-group supply of the trumpets from Frank's Instruments.*

60. *Some months later Mark's Musicals realises that it has remitted GST on the intra-group supply of trumpets and requests a refund from the Commissioner.*



61. In this example, there has been an overpayment because a payment, as tax, occurred 'where no amount of tax was actually due'. The payment occurred because the supply was initially treated as taxable by Frank's Instruments[25] but subsequently it is ascertained that the supply was not taxable (because it is treated as if it were not a taxable supply under paragraph 48-40(2)(a) of the GST Act). The transaction is covered by section 105-65.[26]

Meaning of 'treated' as a taxable supply

62. For section 105-65 to apply, the relevant supply must be 'treated' as a taxable supply. In the context of section 105-65 a supply would be treated as a taxable supply where the supplier mischaracterised a supply as taxable because they believed the supply to be a taxable supply, has dealt with the recipient of the supply as if the supply was a taxable supply and has remitted GST to the Commissioner on that supply in the calculation of their net amount. A supply would also be treated as a taxable supply where a supplier correctly characterises a supply as GST-free or input taxed but mistakenly includes GST for that supply in the calculation of their net amount. A supply would also be treated as a taxable supply where a supplier correctly characterises a supply as taxable but miscalculates the GST for that supply in the calculation of their net amount.

63. In most cases it will be the supplier who incorrectly treats the supply as taxable (as the supplier is the entity that has the liability for remitting the GST).[27] However, in some situations it may be the Commissioner who incorrectly treats the supply as taxable. In these circumstances section 105-65 is not precluded from applying.[28]

64. Nothing in section 105-65 limits its application to circumstances where it was the supplier who treated the supply as taxable. If the legislative intention had been to restrict the provision only to the supplier's misclassification of the supply it may have been expected that more restrictive words would have been used. Furthermore there is nothing in the relevant Explanatory Memoranda or other extrinsic material which would support restricting section 105-65 to situations where the supplier treated the supply as a taxable supply.

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[25] See paragraphs 59 and 60 of this Ruling – paragraph 105-65(1)(a) does not require that the supply is treated as taxable by a particular entity (in this case it does not matter that the supply was treated as taxable by Frank's Instruments but that, due to the particular grouping provisions, the GST was remitted by Mark's Musicals).

[26] In such circumstances the Commissioner may exercise the discretion to pay the refund. See paragraphs 113 to 132 of this Ruling.

[27] There are circumstances, such as with the grouping provisions, where the person who makes the supply is not necessarily the entity who has the liability to remit the GST. For example, see Example 12 at paragraphs 173-176 of this Ruling. Section 105-65 can still apply in these cases.

[28] In such circumstances it may be appropriate for the Commissioner to exercise the discretion to pay the refund. See paragraphs 113 to 132 of this Ruling.

Example 2 – Commissioner treats a supply

65. *Rehka treats a particular supply as GST-free. Subsequently she is audited by the ATO, which determines that she should have remitted GST on that supply. An assessment is raised and Rehka remits the outstanding GST.*

66. *Rehka subsequently objects to the assessment on the basis that the supply was not taxable. The Commissioner reverses the audit decision and gives a favourable objection decision. Rehka seeks a refund of the overpaid GST.*

67. In this case paragraphs105-65(1)(a) and 105-65(1)(b) are satisfied, that is, Rehka overpaid GST and a supply was treated as taxable but was subsequently determined not to be taxable. The fact that the Commissioner initially treated the supply as taxable, when in fact it was not, does not preclude the operation of the section.[29]

Meaning of 'to any extent'

68. Paragraph 105-65(1)(a) uses the expression 'a supply was treated as a taxable supply, or an arrangement was treated as giving rise to a taxable supply, **to any extent**' and paragraph 105-65(1)(b) uses the expression 'the supply is not a taxable supply, or the arrangement does not give rise to a taxable supply, '**to that extent**' (emphasis added).

69. Section 105-65 is concerned with supplies that have been treated as taxable supplies (or arrangements giving rise to taxable supplies). Therefore, the section is not concerned with input tax credits or tax on importations. Nor is the section concerned with a GST-free supply that was incorrectly treated as input taxed. None of these matters concerns the GST payable on a taxable supply.

70. In interpreting any provisions of an Act it is important to consider the context in which it appears, the evident purpose of the provision and, where appropriate, the legislative history of similar provisions in the same Act or other Acts.

71. In this regard the extent to which a supply was treated as taxable should be construed in the context in which it appears, that is to say, in a provision concerned with *the amount* paid as GST.

72. Having regard to that context, section 105-65 should be construed as applying where a supply was treated as a taxable supply to the extent that a certain amount of GST was considered to be payable, but the supply is not a taxable supply to that extent because a lesser amount is in fact payable.

[29] In this case it may be appropriate for the Commissioner to exercise the discretion to pay the refund. See Example 15 at paragraphs 183 to 185 of this Ruling.

73. That construction, being reasonably open, should be preferred as it gives effect to the evident policy of the provision, whereas a narrower construction would not.[30]

74. The phrase 'to any extent' is an expression of wide import[31] and the Commissioner considers that the provision is intended to apply to all amounts of overpaid GST. This interpretation is consistent with the broad purpose of the provision to prevent windfall gains where GST has been incorrectly imposed, as indicated in the Explanatory Memorandum that accompanied the Bill that introduced the original provisions.[32] This is further supported by paragraph 56 of the decision in *Luxottica*.

75. In *Luxottica* the applicant had argued that, because the supply was taxable to the extent of the frames and was always treated as taxable to that extent, section 105-65 did not apply. The Administrative Appeals Tribunal (Tribunal) rejected this argument, and found in favour of the Commissioner's view that the amount of GST was miscalculated and therefore the supply was treated as a taxable supply to an extent and was not taxable to the extent that the amount was miscalculated.

76. Further, in the comparison table after paragraph 2.10 in the Explanatory Memorandum[33] it is stated that the section 105-65 applies where:

- 'input taxed or GST-free supplies are incorrectly treated as taxable supplies and GST has been remitted', **or**
- 'an amount of GST on a taxable supply has been remitted that exceeds the amount of GST correctly payable on that taxable supply'. (emphasis added)

77. The use of the term 'or' indicates that the section can apply to cases where there has been a mischaracterisation as to the nature of the supply as well as to incorrect payments that occur due to other types of circumstances involving a supply incorrectly treated as a taxable supply to the extent that the amount paid as GST is greater than the amount actually payable.

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[30] It has, for instance, been argued that section 105-65 only applies to those types of overpayments that result from the treatment of the character of a supply altering – for example to overpayments arising because a supply was mischaracterised as taxable when in fact it was GST-free.

[31] See *Commissioner of Taxation v. Hornibrook* (2006) 156 FCR 313; 2006 ATC 4761; (2006) 65 ATR 1 where Young J held at paragraph 85 that the words 'to any extent' (as used in the context of subsection 14ZR(2) of the TAA) are 'words of extension'.

[32] See paragraphs 3.40 and 3.41 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1998.

[33] To the Tax Laws Amendment (2008 Measures No.3) Bill 2008.

78. In *Kap Motors*, Emmet J stated at paragraph 33:

> Section 105-65 should not be given an expansive construction. While its object may be commendable, in seeking to avoid windfall gains for taxpayers, it is, in a sense, a paternalistic interference with the rights of taxpayers. It proceeds on the basis that GST that should not have been paid has been paid by a taxpayer. Its operation is to ensure that the Commissioner receives a windfall rather than a taxpayer.

79. It has been suggested that this statement supports a view that section 105-65 should be interpreted in a strict and narrow fashion. The Commissioner does not agree that the statement compels such a general conclusion. The statement needs to be considered in its context. The statement was made in reaction to an argument advanced by the Commissioner that section 105-65 should be read as though the word 'supply' included a purported supply or a putative supply such that it in effect referred to **any transaction** that was incorrectly treated as a taxable supply. His Honour's reference to an 'expansive construction' should be understood accordingly. That particular construction is not in issue in this Ruling.

80. After the decision in *KAP Motors*, Parliament *specifically* amended section 105-65 with the effect of reversing the decision in that case.[34] Further, his Honour was concerned with whether an overpayment relating to an arrangement that was not a supply was covered by the then provision, not with when a supply or arrangement is treated as a taxable supply 'to any extent'.

81. The Commissioner's view is that the words must be interpreted in the context in which they appear and with the mischief of denying a windfall gain to the supplier in mind.[35]

82. As the phrase 'to any extent' has a broad meaning, section 105-65 will apply to the circumstances of a transaction in real property in which the GST liability was calculated using the margin scheme, and to a supply that was determined to be a mixed supply or to the calculation of a global GST amount payable in relation to a gambling supply. These matters concern the GST payable on a supply that was treated as a taxable supply to some extent and the 'extent' of that treatment is greater than the correct treatment under the GST Act.

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[34] See paragraph 2.8 of Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008

[35] See section 15AA of the *Acts Interpretation Act 1901* and *Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation* (1981) 147 CLR 297; 81 ATC 4292; (1981) 11 ATR 949.

Margin scheme cases

83. Under Division 75 of the GST Act the amount of GST payable on taxable supplies of real property may be calculated (using the margin scheme) on the margin for the supply. There may be circumstances where the margin for a supply is less than the amount reflected in the activity statement lodged by the taxpayer. For example, a more favourable valuation method may apply.

84. The margin scheme simply represents another method by which the GST that forms part of a foreseeable cost of a supply is calculated. Where the margin for a supply of real property is overstated, it follows that the GST payable on the taxable supply is overstated. In these circumstances, as an amount of GST payable on the taxable supply has been remitted that exceeds the amount of GST legally payable on that taxable supply, section 105-65 applies.

85. The case of *Luxottica* provides support for this approach. In that case the applicant had argued that, because the supply was taxable to the extent of the frames and was always treated as taxable to that extent, section 105-65 did not apply. However the Tribunal preferred the Commissioner's argument that, since the applicant had originally calculated a higher taxable proportion than was correct, the supply had been treated as taxable to a greater extent than it should have been.[36]

Mixed supply cases

86. A mixed supply is a supply that is partly taxable and partly GST-free or input taxed.[37]

87. In some situations a supplier may incorrectly apportion a mixed supply and overpay its GST liability (that is the supplier pays more at this point than was legally due on the supply). In these circumstances the extent to which a supply is treated as taxable is greater than the correct treatment. Accordingly, there has been an overpayment to which section 105-65 applies.

88. This view is also supported in *Luxottica* where it was determined that section 105-65 did apply to mixed supplies.

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[36] *Luxottica* at paragraph 56.

[37] The Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008 expressly considers that these types of situations would be covered by section 105-65. For example, paragraph 2.14 states that an 'overpayment of GST may occur, for example, if a transaction is treated as a taxable supply when it is a mixed supply that is partly a taxable supply and partly a GST-free supply'. Furthermore, example 2.2 expressly covers a mixed supply scenario. See also *Luxottica Retail Australia v. FC of T* 2010 ATC 10-119 where it was determined that section 105-65 did apply to mixed supplies.

Example 3 – application to mixed supplies

89. *Amie supplies grocery items to end consumers. As part of a promotional activity, Amie packaged some GST-free food items with taxable items (such as promotional calculators and watches) and sold them as a single package (that is, the promotional items could only be acquired in packages with the food products).*

90. *Amie initially calculated the taxable component as forming 70% of the value of the supply. However, after an internal review by the company accountant, it was determined that the taxable component of the supply was only 50% of the total value.*

91. In this case there has been an overpayment of GST because the supply was treated as a taxable supply to the extent of 70% but was only taxable to the extent of 50%. Accordingly section 105-65 will apply to these circumstances.[38]

Gambling supplies

92. Under Division 126 of the GST Act a gambling operator's net amount is the sum of the global GST amount and other GST less input tax credits (that relate to amounts other than prize money). The global GST amount for a tax period is one-eleventh of the total amount wagered less the total monetary prizes (the gambling operator's margin). The total amount wagered is the sum of the consideration for all of the gambling supplies made by the gambling operator that are attributable to that tax period. The total monetary prizes are:

- the prize money that the gambling operator is liable to pay in that tax period on the outcome of gambling events, disregarding monetary prizes that relate to supplies that are GST-free (the gambling event or the gambling supplies do not have to take place during that tax period); and
- any refunds of losses, whole or in part, that the gambling operator is required to make in that tax period (the refunds do not have to relate to gambling supplies in that tax period).

[38] See paragraphs 113 to 132 of this Ruling regarding the Commissioner's discretion to give a refund where a corresponding amount has not been reimbursed to the recipient and the recipient is not registered nor required to be registered.

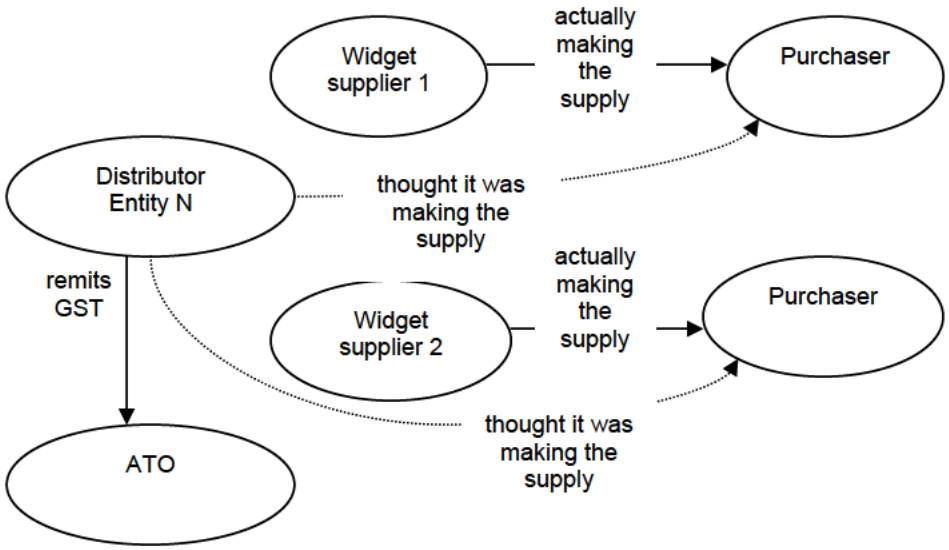
93. The global accounting system represents another method by which the GST that forms part of the cost of a supply, in this case a gambling supply, is calculated. Where the gambling operator's margin on a gambling supply is less than the amount treated as the margin, it follows that the global GST amount, that is, the GST payable on the gambling supplies, is overstated. The net amount for the tax period to which the GST on the gambling supply is attributable will also be overstated. In these circumstances, as an amount of GST payable on the taxable gambling supply has been remitted that exceeds the amount of GST legally payable on that taxable supply, section 105-65 applies.

Effect where the wrong entity remits the GST

94. In some instances an entity may in error remit GST on a supply that was not made by that entity.

Example 4 – wrong entity remits GST

95. *Entity N is acting as a distributor for a collective of individual registered entities that make and supply widgets. The individual widget suppliers are making the supplies but Entity N thought it was the supplier and hence remitted the GST on its own behalf. Entity N subsequently ascertains that it was not the supplier and seeks a refund.*



96. A question arises as to whether section 105-65 operates to preclude an entity from obtaining a refund of GST paid by that entity for supplies that are subsequently determined to have been made by another registered entity. The Commissioner considers that section 105-65 applies in these circumstances.

97. In Example 4 at paragraph 95 of this Ruling Entity N has 'overpaid' GST because, as it was not the supplier, it had no legal obligation to remit GST. Furthermore, Entity N made the overpayment because it erroneously treated an arrangement as giving rise to a taxable supply to the extent of 100%.[39] In this sense paragraph 105-65(1)(a) is satisfied.

98. Paragraph 105-65(1)(b), however, must also be satisfied in order for the restriction on refunds to apply to this type of situation. It is the Commissioner's view that paragraph 105-65(1)(b) is satisfied since the arrangement did not give rise to a taxable supply by Entity N. That is, from Entity N's perspective, the arrangement is taxable to the extent of 0%.

Meaning of the Commissioner need not 'give' a 'refund of an amount'

99. It is possible for a supplier to have understated or overstated its net amount for a prior tax period while also incorrectly treating some non-taxable supplies as taxable. In such cases a supplier may revise the relevant activity statement to account for these errors.

100. When the supplier revises the relevant activity statement for a tax period, it will effectively net off all their underpayments and overpayments to the net amount for that period. After such a revision the supplier may have a nil net amount or may still have an obligation to pay more for the particular tax period, that is, the overall revision may reflect a liability and not a refund. In this situation the net amount may contain within it a component that represents an overpayment arising from the incorrect treatment of a supply as taxable.

101. For the reasons set out below, the Commissioner considers that section 105-65 affects the amount of the overpayment in these circumstances.[40]

102. Subsection 105-65(1) provides that the Commissioner need not 'give' a 'refund of an amount' to which the section relates. The word 'give', in the context in which it is used here, does not mean that an actual refund in respect of the overpaid amount need arise. The concept of 'give' a refund can also cover situations where the supplier would obtain the benefit of a set off in respect of an overpaid amount by being able to use it in determining its net amount to be less than the amount it would otherwise be.

[39] See paragraphs 63 to 67 of this Ruling in which the view is taken that it need not be the supplier who 'treats' a supply as taxable.
[40] The same outcome applies where the net effect of the transactions is that a refund previously paid under Division 35 of the GST Act is reduced.

103. In *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 it was held that where a literal construction of a statutory provision causes an inconvenient or improbable result, it may be legitimate to prefer a construction that is reasonably open and more closely conforms to the legislative intent.[41] In view of this, in the context of section 105-65, if a literal interpretation of 'give' a refund was accepted then the policy purpose (to ensure suppliers do not get a windfall gain) would not be achieved in cases where the supplier obtains the benefit of taking into account the overpaid amount without reimbursing the recipient.

104. Accordingly the Commissioner is of the view that section 105-65 is not limited to situations where an actual refund is payable or would be applied to the entity's running balance account.

105. It is also implicit in the language of section 105-65, by the use of the phrase 'a supply was treated as a taxable supply' that the section is intended to apply at the level of each individual supply rather than only at the total revised net amount.

106. Additionally, subsection 105-65(2) refers to 'so much of any net amount', which indicates that the Commissioner can look at each individual supply to determine if it is an amount to which section 105-65 should apply. These factors indicate that section 105-65 is predicated on an examination of individual transactions rather than on overall net amounts for a particular period.

107. The relevant Explanatory Memorandum[42] also supports the view that the section applies to individual components of GST that may make up the net amount. For example, paragraph 2.2 states that 'if a business overpays GST **on a sale** to customer then **the GST** may be refunded to the business only if the business has first refunded **the** overpaid amount' (emphasis added). Paragraph 2.8 reiterates that the restriction on providing refunds 'applies to situations in which *transactions* have been treated incorrectly as taxable supplies' (emphasis added).

108. Accordingly the Commissioner is not prevented from examining each individual supply or transaction that has occurred to determine if it could give rise to a refund to the supplier.

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[41] The Court also made reference to the importance of 'context' in statutory interpretation, stating that 'the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which…one may discern that the statute was intended to remedy'.

[42] Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008.

Example 5 – single transaction where GST incorrectly charged

109. *Andrew Enterprises is registered for GST and makes supplies only to unregistered end consumers. For Quarter 1 it had a net amount of $2,400 which it paid. In Quarter 4 it realises that it had incorrectly charged GST of $400 on a supply that should have been GST-free. Andrew Enterprises has not reimbursed its unregistered end consumers.*

110. Section 105-65 applies to the overpayment of $400. Therefore the Commissioner is not required to give a refund of the $400 to Andrew Enterprises. The net amount for Quarter 1 is still $2,400.

Example 6 – multiple transactions: GST incorrectly charged and increase in GST payable

111. *Assuming the same facts in Example 5 at paragraph 109 of this Ruling but in addition Andrew Enterprises also discovers in Quarter 4 that it had made a further mistake (in respect of a separate transaction involving a separate customer) in the calculation of its net amount for Quarter 1. The additional mistake results in an increase in GST payable of $500. The net result of these two corrections would be an increased liability of $100 for Quarter 1 ($500 of GST less $400 of overpaid GST).*

112. However, section 105-65 still applies to the overpayment of $400. As the Commissioner is not required to give a refund of the $400, Andrew Enterprises is liable to pay GST of $500. The net amount for the Quarter 1 tax period is therefore $2,900.

Circumstances in which the Commissioner may exercise the discretion to refund where section 105-65 applies

113. The GST Act and the TAA specify when a taxpayer has an obligation to pay and when they have an entitlement to a refund. The payment of refunds or credits arising from the operation of the GST Act and the TAA are authorised by Divisions 3 and 3A of Part IIB of the TAA, in particular section 8AAZLF. That section provides that the Commissioner must, where the relevant conditions are present, pay any amount of any RBA surplus remaining after the allocation of primary tax debts and any credits where there are no other tax debts to which the surplus may be applied.[43]

[43] Refer Explanatory Memorandum accompanying the introduction of A New Tax System (Pay As You Go) Bill 1999 paragraphs 3.27 – 3.29

114. Upon the introduction of section 8AAZLF of the TAA it was not necessary to have a specific provision to permit a refund of overpaid GST. Accordingly, former section 39 of the TAA (the predecessor to section 105-65) was enacted on a basis that it placed a restriction on a refund of overpaid GST.[44] The obligation imposed on the Commissioner by section 8AAZLF to refund a RBA surplus is qualified by the operation of section 105-65. In this regard section 105-65 places a restriction on the payment of a refund of overpaid GST.

115. However if the supplier satisfies the Commissioner that it has reimbursed the recipient of the supply and the recipient of the supply is not registered or required to be registered the Commissioner has a prima facie obligation to pay the refund of overpaid GST under section 8AAZLF provided the supplier satisfies any other legislative conditions (for instance, the time limits contained in section 105-55). In all other cases section 105-65 provides that the Commissioner 'need not' give a refund.

116. The operation of section 105-65 to deny the requirement to pay refunds that would otherwise be payable is not discretionary. Where the conditions in section 105-65 apply, the Commissioner has no obligation to pay a refund that would otherwise be payable. The words of the provision say that where the section applies the Commissioner need not give you a refund of the amount or apply the amount under the relevant RBA provisions. However, the words 'need not' indicate the Commissioner may choose to pay a refund in appropriate circumstances, even though the conditions in paragraphs 105-65(1)(a), 105-65(1)(b) and 105-65(1)(c) are satisfied. It is to that limited extent that the Commissioner has a discretion

117. The Commissioner considers that the words 'need not', in the context of section 105-65, do not prohibit the giving of a refund and accordingly the Commissioner has a discretion to pay a refund in appropriate circumstances. It is noted that this view is supported by the decision in *Luxottica*.[45]

[44] Refer to Explanatory Memorandum accompanying the introduction of A New Tax System (Tax Administration) Bill 1999 paragraphs 7.49 – 7.56. We note on this point that section 39 was originally drafted on the basis to permit a credit for a refund of overpaid GST. The enactment of section 8AAZLF obviated the need for a specific provision entitling a supplier to a refund.

[45] See paragraph 57 where the Tribunal refers to the 'residual discretion'.

118. Given the scheme of the GST Act[46] and the context in which section 105-65 appears, the starting point[47] is that the Commissioner is under no obligation to pay a refund. It may be noted that subparagraph 105-65(c)(i) is expressed in the terms of a state of satisfaction by the Commissioner. The provision will apply unless the Commissioner is satisfied that the taxpayer has reimbursed the recipient of the supply. Therefore, the supplier needs to demonstrate that its circumstances make it appropriate for the Commissioner to give a refund.

119. The relevant principles for making administrative decisions were set out by Mason J in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24, where his Honour said at 39-40:

> What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion… **where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard** …By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act. [Emphasis added.]

120. It is therefore important to consider the subject matter, scope and purpose of section 105-65.

121. The Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1998 (which introduced section 39 of the TAA, the predecessor to section 105-65) states:

> 3.40 However, if GST is overpaid in a situation where supplies were incorrectly treated as taxable supplies in a GST return or assessment, a refund will have to be paid only if the Commissioner is satisfied that the recipients of the supplies on which the GST was overpaid have been reimbursed. The recipients of the supplies must not be registered or required to be registered for GST purposes. [New subsection 39(3)]
>
> 3.41 Because GST is payable by suppliers but is ultimately borne by the consumers of goods and services, a refund of overpaid GST would ordinarily result in a windfall gain to the supplier. A supplier will need to satisfy the Commissioner that an amount corresponding to the refund will be passed on to the persons who ultimately bore the cost of the overpaid GST.

[46] Where a supplier treats a supply as taxable, the price of that supply includes GST. See for example paragraph 3.15 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, which states that 'The price paid for a taxable supply always includes the GST.'

[47] When the conditions in paragraphs 105-65(1)(a), 105-65(1)(b) and 105-65(1)(c) have been met.

122. The Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008 (which introduced the current version of section 105-65) at paragraph 2.2 states:

> Without the restriction on refund requirement, there is a potential for a windfall gain to arise to businesses that receive the refund of GST but have not borne the incidence of the tax.

123. The GST Act presumes GST is ultimately borne by end consumers. A key design feature of the GST system to ensure this occurs and to avoid double taxation is to generally allow a corresponding input tax credit to a recipient of a supply in business to business transactions. The GST Act envisages a degree of symmetry between the GST payable and the input tax credit which may be claimed in business to business transactions.

124. Further, where a business cannot fully claim an input tax credit this cost will ultimately be covered as a foreseeable cost of business and borne by the end consumer in the price paid for the good or service. The Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 states at paragraph 5.4

> You do not charge GST on supplies that are input taxed. However, you are not entitled to input tax credits on acquisitions relating to the supplies. The effect is that you have borne GST on those acquisitions and will pass on that cost in the price of the supply.

125. It is these factors that underlie the position that the Commissioner need not, that is, is under no obligation to, pay a refund where the condition in subparagraph 105-65(c)(ii) is satisfied. That condition is satisfied when the recipient of the supply is registered or required to be registered or, in other words, broadly, in business to business transactions.

126. The discretion contained in section 105-65 must be exercised within a framework that the GST Act is structured on a basis that GST is passed on when a supply is treated as a taxable supply. As such, factors outlined in *Avon* at paragraphs 9 to 12, albeit in a sales tax context, would equally apply in a GST context:

- in an economy geared to making a profit GST is expected to be passed on;
- businesses set prices to cover foreseeable costs;
- GST is a foreseeable cost that forms part of the cost recovery and pricing structure of doing business;
- GST will be passed on in the usual course of doing business;
- as it is inherent in an indirect system that GST will be passed on, proof to the contrary will seldom occur;
- the fact that GST is presumed to be passed on forms the basis for permitting the corresponding input tax credit in business to business transactions.

127. It is clear from the scope and purpose of section 105-65 that the provision is designed to prevent windfall gains to suppliers and to require the supplier to ensure that any refund ultimately compensates the person or entity who ultimately bore the cost. In relation to a refund of overpaid GST, the potential or otherwise for a windfall gain, the requirement to ensure the refund compensates the person or entity that ultimately bore the cost and the potential to disturb the symmetry envisaged by the GST system, are factors that must be taken into account in relation to the exercise of the discretion.

Guiding principles to consider in exercising the discretion

128. Section 105-65 does not specify what factors are relevant to the exercise of this discretion. In exercising the discretion, the Commissioner will have regard to the following guiding principles:[48]

(a) The Commissioner must consider each case based on all the relevant facts and circumstances.

(b) The Commissioner needs to follow administrative law principles such as not fettering the discretion or taking into account irrelevant considerations.

(c) The Commissioner must have regard to the subject matter, scope and purpose of section 105-65. As explained in paragraph 127 of this Ruling, it clear from the scope and purpose that section 105-65 is designed to prevent windfall gains to suppliers and to maintain the inherent symmetry in the GST system and is based on the underlying design feature and presumption of the GST system that the cost of the GST is ultimately borne by the non registered end consumer.

(d) The discretion should be exercised where it is fair and reasonable to do so and must not be exercised arbitrarily. The circumstances in which the Commissioner considers it may be fair and reasonable to exercise the discretion include, but are not limited to, the following:

    (i) The overpayment of GST occurs as a result of an arithmetic or recording error made by the supplier.

[48] In providing these guiding principles there is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion. A decision to exercise the discretion will be made by having regard to the particular facts and circumstances of each case. Taxpayers cannot self-assess the discretion, and cannot assume that the Commissioner will always exercise the discretion in the circumstances described in these guiding principles. For this reason taxpayers should seek clarification from the Commissioner, for example by requesting a private ruling.

For instance, an entity correctly treated its supply as GST-free when making the supply to the customer. However, when filling out its activity statement the entity incorrectly included the supply as a taxable supply in the calculation of the net amount returned on the activity statement. In such circumstances it would not be necessary for the supplier to refund the recipient of the supply whether the recipient is registered or unregistered.

(ii) The overpayment of GST arises as a direct result of the actions of the Commissioner and the taxpayer has not had the opportunity to factor in the cost of the GST or otherwise pass on the GST, for instance through a gross up clause.

For instance, an entity had treated its supply as GST-free, the Commissioner subsequently treats the supply as taxable, the entity pays an amount for GST on the supply, but the Commissioner later reverses that decision. In such circumstances it would not be necessary for the supplier to refund the recipient of the supply whether the recipient is registered or unregistered.

(iii) The supplier is able to satisfy the Commissioner that an amount corresponding to the refund will be, or has been, passed on to the party that ultimately bore the cost of the overpaid GST.

In a business to business transaction it is generally not enough simply to show that the supplier refunded the immediate business recipient. A supplier must be able to prove that an unregistered end consumer is the one ultimately compensated.

Where the registered recipient is unable to claim input tax credits or is only allowed to partially claim input tax credits, then, before the Commissioner would pay a refund to the supplier, the supplier would have to refund the registered recipient and the registered recipient would have to show it either did not pass the foreseeable cost (that is denied input tax credits) to the next recipient or that they have also refunded that amount to the next recipient and the entity that ultimately has borne the cost is compensated.

(e) The discretion would generally not be exercised where it produces an unreasonable result, for example an asymmetrical revenue outcome. This could occur where, for example, a supplier reimburses a registered recipient for the overpaid GST but the Commissioner is unable to reclaim the overclaimed input tax credit from the recipient.[49]

129. Generally, the Commissioner will not exercise the discretion in cases where the supplier has not reimbursed the unregistered recipients a corresponding amount of the overpaid GST, unless there are other countervailing reasons for doing so.

130. It is noted that in *Luxottica* the Tribunal thought it appropriate to exercise the discretion to refund the supplier although unregistered recipients had not been reimbursed. The Tribunal stated that, if reimbursement occurred, the customer would 'walk away from the transaction having paid, in net terms, less than he or she contracted to pay'.[50] The Tribunal further reasoned that any reimbursement would mean that the amount reimbursed would then need to be allocated to the separate components of the supply and this, in turn, would lead to a need for a further reimbursement. The Tribunal opined that such a process of reiterating prices, values and GST did not accord with GST as a practical business tax.

131. In reviewing the Tribunal's decision, the Commissioner accepted that on the evidence before the Tribunal the overpaid amount was not borne by customers. However, the Commissioner does not consider that a reimbursement to an unregistered recipient would ordinarily result in ongoing downward adjustments to the consideration. It is only the GST component of the supply that is reduced by a reimbursement and the GST exclusive value of the supply remains unchanged.

132. Appendix 3 of this Ruling provides examples of circumstances illustrating the exercise of the Commissioner's discretion.

What is the amount of any refund given

133. A refund given by the Commissioner is usually equivalent to the amount of GST that has been overpaid (or not refunded). Subsection 105-65(1) provides that the Commissioner need not refund an amount to which the section applies if the supplier overpaid the amount (or the amount was not refunded to the supplier).

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[49] The Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008 provides further support for the proposition that reimbursement on its own does not necessary lead to a refund. At paragraph 2.4 it states that 'A discretion exists so that, for example, in business-to-business transactions, the Commissioner *may* refund overpaid amounts if the supplier can demonstrate that they have first reimbursed the registered recipient…*and the Commissioner considers it reasonable in the circumstances*'. (emphasis added)

[50] At paragraph 58.

134. However, subsection 105-65(2) provides that the section applies to 'so much of any net amount or amount of GST' as the entity has overpaid (or 'so much of any net amount' that has not been refunded to the entity). The Commissioner considers that the use of words 'so much of any' indicates that subsection 105-65(1) can apply to an amount that is less than the whole amount that has been overpaid (or not refunded).

135. Accordingly, if a supplier reimburses (in a later tax period) a lesser amount to an entity that is not registered (or required to be registered), then section 105-65 does not apply to that reimbursed amount because neither of the conditions in paragraph 105-65(1)(c) are satisfied.[51]

136. The lesser amount will be refunded under the RBA rules and the restrictions on refunds in section 105-65 will not apply to this amount. However, the restriction on refunds will still apply to the amount not reimbursed.

Example 7 – reimbursement to recipient of supply

137. *Laurren treats a supply made to Hoa (who is not registered or required to be registered) as a taxable supply for $1,100. After Laurren lodges her activity statement, she realises that the supply should have been treated as GST-free. Laurren and Hoa agree that only $70 of the total $100 overpaid GST should be reimbursed. Laurren reimburses $70 to Hoa.*

138. As Laurren has reimbursed Hoa $70, this amount can be refunded to Laurren (see paragraph 105-65(1)(c)). However, section 105-65 applies to restrict the refund of the remaining $30.

No adjustment for other transactions

139. The use of the words 'so much of any' in subsection 105-65(2) does not allow the amount refunded to be adjusted to reflect the effect of some other transaction, such as the offsetting of input tax credits that may be claimed by the supplier.

[51] Subparagraph 105-65(1)(c)(i) does not apply to the amount reimbursed because the Commissioner is satisfied that a reimbursement of that amount has occurred and subparagraph 105-65(1)(c)(ii) does not apply because the entity is not registered.

140. The Commissioner considers that the restriction on refunds in section 105-65 is transaction based and operates at a transaction level, not at a higher global level. The transaction or transactions related to the claiming of input tax credits are unrelated to the transaction which is the focus of section 105-65.[52] In other words, section 105-65 is concerned with GST payable on the supply and because of this any input tax credits for related acquisitions are excluded from the calculation of the amount that is subject to the refund restriction.

Example 8 – determining the amount of the refund

141. *Entity FS provides services to Belinda (who is not registered or required to be registered for GST) for $5,500. Entity FS believes the supply of services to be taxable and accordingly remits GST of $500 to the ATO. Entity FS also claims $150 in input tax credits for acquisitions it used to make the supply to Belinda. It is later ascertained the supply of services to Belinda was in fact an input taxed supply. Entity FS reimburses $500 to Belinda and seeks a refund of the overpaid GST.*

142. The Commissioner must refund the entire $500 to Entity FS (that is, the refunded amount under section 105-65 cannot be reduced by the $150 input tax credit that was claimed in respect of the supply).[53] However, the Commissioner would disallow the input tax credit claim of $150 if he was within the time permitted by section 105-50. The input tax credit relates to the making of a supply that is input taxed.

Recovery of amounts refunded without regard to section 105-65

143. There are cases where the Commissioner may inadvertently refund amounts without regard to the operation of section 105-65. For example, an entity revises an earlier activity statement that results in a refund of overpaid GST. The refund is processed and paid automatically by ATO systems without regard being had to section 105-65. Later the Commissioner discovers that the refund of GST was one to which section 105-65 applied.

144. In this situation section 8AAZN of the TAA may be used to recover a refund that was paid without regard to section 105-65.

[52] Also input tax credits are allowed where, among other things, an entity acquires a thing in carrying on the entity's enterprise – see sections 11-5 and 11-15 of the GST Act. Therefore, the claiming of input tax credits is not necessarily linked to the making of a particular supply.

[53] In other words the amount of the refund as determined by section 105-65, is $500 and not $350.

145. Section 8AAZN of the TAA relevantly states:

> **8AAZN(1) [Overpayments are court recoverable as debts due]**
>
> An administrative overpayment (the overpaid amount):
>
> (a) is a debt due to the Commonwealth by the person to whom the overpayment was made (the recipient); and
>
> (b) is payable to the Commissioner; and
>
> (c) may be recovered in a court of competent jurisdiction by the Commissioner, or by a Deputy Commissioner, suing in his or her official name.
>
> …
>
> **8AAZN(3) [Administrative overpayment]**
>
> In this section:
>
> *administrative overpayment* means an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled.

146. If section 105-65 applies so that the Commissioner need not pay a refund, and the ATO processes a refund without regard to that section, the Commissioner considers that the payment of that refund constitutes a mistake and therefore an 'administrative overpayment' for purposes of section 8AAZN of the TAA.

147. GST is referred to as a self actuating system and, due to the sheer volume of activity statements that are required to be processed, relies necessarily on a degree of automation in the processing of these activity statements. To attempt to check all revisions pre-issue would be counter productive and inconsistent with a self actuating system. It would lead to unnecessary delays in the processing of other refund requests where section 105-65 has no application.

148. Section 8AAZN must be read in the context of such a system. A refund that is effected without any consideration of the facts and without knowledge that the recipient of the supply has been reimbursed (or that the recipient was registered) can, if section 105-65 applies, be seen as an amount to which the person is not entitled.

149. Where the refund is paid as result of the actions of a taxpayer that amounts to the making a false or misleading statement under Subdivision 2B of Part III of the TAA and the Criminal Code, the Commissioner depending on the particular facts may initiate prosecution action and also seek an order from the Court under section 21 B of the *Crimes Act 1914* for an amount equal to the amount refunded

Section 105-65 is taken into account in determining net amount

150. Subdivision 105-C of Part 3-10 of Schedule 1 to the TAA is entitled 'Limits on credits, refunds and recovering amounts' and contains section 105-50, 105-55, 105-60[54] and 105-65. It has been argued that as these provisions are not referred to in Division 17 of the GST Act that they are mere recovery provisions and should not be taken into account in determining the net amount. However, section 7-15 of the GST Act clearly indicates that the amount a taxpayer is legally required to pay or is entitled to as a refund is the net amount. In determining the net amount the Commissioner considers that all sections of all relevant Acts that may bear on that legal obligation or legal entitlement must be taken into consideration.

151. GST is defined in section 195-1 of the GST Act as including 'tax that is payable under the GST law'. GST law is defined in section 195-1 of the GST Act in paragraph (d) as including *the Taxation Administration Act 1953, so far as it relates to any Act covered by paragraphs (a) to (c)*', which includes the GST Act, any Act that imposes GST and the GST Transition Act.[55] Section 2-30 of the GST Act also indicates that the provisions of the TAA contain provisions dealing with administration, collection and recovery of amounts of GST. This evidences that these Acts are to be read together.

152. In *Deputy Commissioner of Taxation v. Moorebank Proprietary Limited* (1988) HCA 29; 165 CLR 55; 88 ATC 4443 at 4446 Mason CJ, Brennan, Deane, Dawson and Gaudron JJ, stated,

> In that regard, it is relevant to note that it has long been recognised that to speak of even traditional limitation provisions as merely 'procedural' or as 'barring the remedy and not the right' is misleading in that such provisions will, at least in some circumstances, entail consequences which are substantive in that, by barring the remedy, they will effectively extinguish both rights and liabilities. (see, example *In re Hepburn: Ex parte Smith* (1884) 14 Q.B.D.394, at PP.399-400

153. Section 105-50 provides a time limit after which unpaid net amounts and amounts of indirect tax cease to be payable, whilst section 105-55 provides a time limit that extinguishes a taxpayer's entitlement to refunds, credits and other payments. Similarly section 105-65 operates to remove the obligation imposed on the Commissioner by section 8AAZLF of the TAA to pay a refund whenever the section applies.

154. In *Australian Leisure Marine Pty Ltd v. Commissioner of Taxation* [2010] AATA 620 at paragraphs 16 and 17 the Tribunal, referring to the High Court decisions in *Deputy Commissioner of Taxation v. Moorebank Proprietary Limited* (1988), 165 CLR 55 and *McAndrew v. Federal Commissioner of Taxation* (1956) 98 CLR 263, held that section 105-55 had a substantive not procedural effect because '…the provision certainly denies the entitlement of an entity to an input tax credit'.

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[54] Note: section 105-60 was repealed with effect from 1 July 2010.
[55] *A New Tax System (Goods and Services Tax Transition) Act 1999*.

155. Furthermore, it is implicit in two other Tribunal cases that the application of sections 105-50 and 105-65 is taken into account in determining the net amount. *Luxottica Retail Australia v. FC of T* 2010 ATC 10-119 considered the application of section 105-65 whilst *Cyonara Snowfox Pty Ltd v. Commissioner of Taxation* [2010] AATA 137; 2010 ATC 10-125 considered the application of section 105-50. In both cases the Tribunal proceeded on the basis that the net amount was affected by the application of the TAA provisions and treated the applicable TAA provisions as subject to its jurisdiction under Part IVC.

156. Paragraph 105-65(2)(a) provides that the section applies to so much of any 'net amount' as has been overpaid. As noted at paragraph 150 of this Ruling the net amount is intended to reflect the amount that an entity is legally obligated to pay or the amount that is legally refundable.

157. Section 105-65 restricts the entity's right to a refund in the sense that when the section applies the entity is, to that extent, not legally entitled to a refund of the GST it was not required to pay. As such the assessment of the net amount should be made taking into consideration all relevant legislation, including the TAA provisions which may impinge upon the amount the taxpayer is legally obligated to pay or entitled to be paid in the form of a refund.

158. Determining the correct net amount is a two step process. The first step is to determine whether the entity is entitled to a refund because they overpaid GST as a result of incorrectly treating a supply as a taxable supply to some extent. If an overpayment did occur, then generally the net amount is reduced by the amount of the overpayment. However, before determining the correct net amount (that is the actual entitlement to a refund or obligation to pay) a second step is required. That step is to consider all the provisions that go to or may affect the entitlement to pay that refund. Section 105-65 operates to restrict that entitlement and if it operates to deny the refund then the entity has no entitlement to the refund and the net amount must reflect this application of the law.

159. The view that the relevant TAA provisions impact upon the net amount, and hence also on assessments, means that taxpayers are provided with the ability to challenge decisions under Part IVC of the TAA and also may be able to obtain merits review in the Tribunal . In particular, on this view, taxpayers are able to obtain, as part of the review of an objection decision relating to an assessment of the taxpayer's net amount for a tax period, merits review of a decision made by the Commissioner not to exercise the section 105-65 discretion to pay a refund where its provisions otherwise apply.

Example 9 – effect of section 105-65 being more than a mere recovery provision on review rights

160. *Sheree remits GST of $2,000 in Quarter 1. Sheree has not claimed input tax credits and her net amount is $2,000. In Quarter 3 Sheree realises that some of the transactions in Quarter 1 were actually GST-free and that consequently the correct amount of GST payable was $1,700. Sheree does not refund any amounts to her end consumers. She requests the Commissioner to make an assessment of her net amount for Quarter 1.*

161. In this situation, the Commissioner will make an assessment of Sheree's net amount for $2,000 as this reflects the proper amount due and payable after the operative effect of section 105-65 is taken into account. This is because Sheree has not reimbursed a corresponding amount to the recipients of the supplies and as such is not entitled to a refund of the overpaid GST. However, Sheree has legal rights to challenge the assessment, including the decision not to exercise the discretion to pay the refund, under Part IVC of the TAA. If Sheree was entitled to a refund of the overpaid GST, the Commissioner would reflect this by making assessment of her net amount for $1,700.

Appendix 2 – Overview of the GST refund rules

This Appendix sets out an illustrative diagram. It does not form part of the binding public ruling.

162. The following diagram provides a simplified illustration of the GST refund rules in the context of section 105-65.

The general rule…	***However…***	***Unless…***
The Commissioner must refund (or apply an amount) in accordance with the running balance account rules (Division 3A of Part II of the TAA).	The Commissioner need not give a refund (or apply that amount) if the conditions in section 105-65 apply.	The Commissioner exercises the discretion under section 105-65 to give the refund (or apply that amount).

Appendix 3 – Examples: exercise of the discretion

This Appendix sets out examples. It does not form part of the binding public ruling.

163. The operation of the discretion in section 105-65 depends on the facts and circumstances of each case. The following examples are not intended to fetter the exercise of the Commissioner's discretion, but are for illustrative purposes only.

Example 10

164. *Kasey carries on an enterprise and made a series of supplies to Anita between July 2000 and July 2002. Both parties were registered for GST from July 2000. Kasey charged GST on the supplies and Anita claimed input tax credits. After the case of Federal Commissioner of Taxation v. DB Rreef Funds Management Limited* 2006 ATC 4282; (2006) 62 ATR 699 *(DB Rreef), it was established that the supplies to Anita should have been treated as GST-free under section 13 of the A New Tax System (Goods and Services Tax Transition) Act 1999* (*Transition Act). The contractual terms contained in Kasey's contract had the practical effect that the price could not have been increased for the first six months.*

165. *The evidence in relation to 2001 and 2002 is ambiguous. However, Kasey contends that she sought informal advice from the ATO in August 2000 and was told that her supplies would not be GST-free under section 13 of the Transition Act.*

166. *Kasey is a sole trader who prepared her own activity statement and did not keep up to date on tax developments. She did not become aware of the DB Rreef case until hearing about refund opportunities in relation to section 13 of the Transition Act in June 2008. She put in a section 105-55 notification for a refund at that time for the supplies that occurred in 2000 to 2002.*

167. This may be an appropriate case for the exercise of the Commissioner's discretion in relation to the first six month period when Kasey can establish that she bore the cost of the GST. In this transitional period, Kasey was contractually unable to increase her price to take GST into account in setting her prices. The exercise of the discretion also takes into account the ATO's informal advice that encouraged Kasey to remit the GST and there is a reasonable explanation for the lengthy delay in claiming the refund.

168. A factor weighing against the exercise of the discretion is that there is a loss to the revenue in respect of a transaction that is intended by the GST system to be revenue neutral. Nevertheless, on balance this may be an appropriate case to exercise the Commissioner's discretion.

Example 11

169. This example illustrates a situation where the Commissioner is unlikely to exercise the discretion.

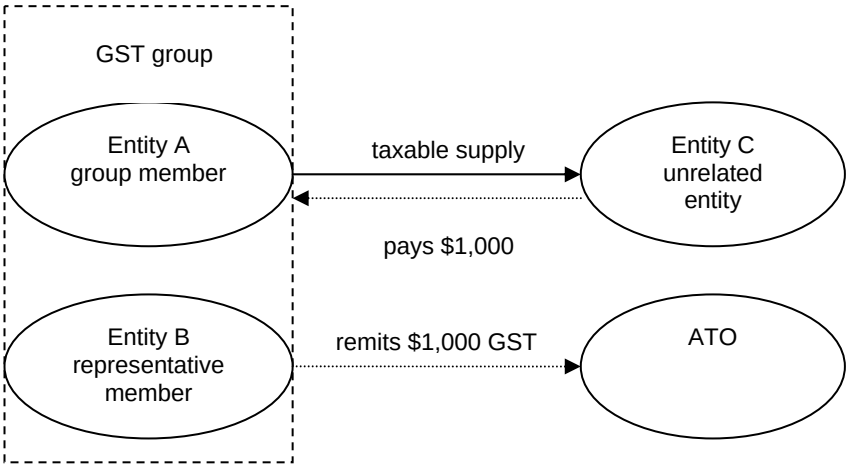
170. *A management company (MC) supplies consulting services to a financial supply provider (FS). Both parties are registered for GST. The supplies were treated as taxable and MC remitted GST equivalent to the full amount charged while FS claimed a reduced input tax credit of 75% of the GST included in the price.*

171. *It is subsequently ascertained that the supply of services should have been GST-free (under the transitional rules). MC requests a refund of 25% of the overpaid GST on the basis that it will refund this amount to FS since FS was not able to obtain an input tax credit in respect of this component.*

172. On balance, the Commissioner is unlikely to exercise the discretion to refund an amount equivalent to the 25% unclaimed input tax credit amount. The transaction occurred between registered entities and paragraph 105-65(1)(c) expressly contemplates that refunds need not be given in these circumstances. The fact that FS only claimed a reduced input tax credit is not exceptional, particularly since many entities in this position will pass on the unclaimed cost of GST to their customers.[56]

Example 12

173. *Entity A is a member of a GST group and the representative member is Entity B. Entity A makes a supply to an unrelated party, Entity C, who is not registered for GST. GST of $1,000 is charged on the supply. Entity B, as the representative member, remits the $1,000 of GST to the ATO.*



[56] GST is effectively borne by consumers when they acquire anything to consume. See paragraphs 37 and 38 of this Ruling which outline the policy behind section 105-65.

174. *It is subsequently determined that the supply by Entity A to Entity C was in fact GST-free. Section 105-65 applies to the overpaid GST of $1,000 because Entity B overpaid the amount on a supply that was treated as taxable (by Entity A) but was not in fact taxable. Entity B, as the representative member who remitted the GST, seeks a refund from the Commissioner of the overpaid amount.*

175. *Paragraph 105-65(1)(c) requires that Entity B provide a reimbursement to Entity C before a refund can be given. However, since in this case Entity A had the contract with Entity C, Entity A is the entity that makes the reimbursement to Entity C.*

176. This may be an appropriate case for the exercise of the Commissioner's discretion in relation to the overpayment of $1,000. Although Entity B did not make the reimbursement, a reimbursement was in fact made and for this reason no windfall gain occurs to either Entity A or B. The recipient of the supply, who bore the cost of GST on a supply that was not subject to GST, has been effectively compensated. In this type of case it may be fair and reasonable for the Commissioner to exercise his discretion to refund the amount.

Example 13

177. *At 1 July 2000 Heavy Industries Ltd was considering whether the supply of certain goods would be taxable or GST-free. It decided that its supplies were all taxable. After taking all factors into consideration Heavy Industries Ltd decided that a uniform 7% increase in prices was sufficient to cover the cost of implementing the new GST.*

178. *In June 2007 Heavy Industries Ltd's accountants advise that they believe that certain supplies made by the company should be treated as GST-free. Heavy Industries Ltd lodges a section 105-55 notice seeking to notify the Commissioner of its entitlement to a refund in relation the relevant GST-free supplies incorrectly treated as taxable supplies. All of Heavy Industries Ltd customers are registered taxpayers. Heavy Industries Ltd seeks to argue that it bore the cost of the GST.*

179. In this case the factors weighing against the refund are that Heavy Industries Ltd has taken the GST into account in determining the price that it considered necessary to cover the cost of the GST under the new regime. This cost has been embedded in the price. Another factor weighing against exercising the discretion is that the recipients are registered for GST.

180. On balance this is a case where it is not appropriate to refund the overpaid GST.

Example 14

181. *Tom charged Charles, a non-registered recipient, the correct amount of GST of $200 on a particular supply. The tax invoice issued to Charles also showed the correct GST amount of $200. When lodging his Business Activity Statement Tom inadvertently remits GST of $2,000 in respect of that particular supply. Tom realises his mistake in the next tax period and seeks a refund of $1,800, which is the overpaid GST amount.*

182. The incorrect payment satisfies paragraphs 105-65(1)(a) and 105-65(1)(b) because the supply was treated as taxable to a higher extent than it actually was. However, since Tom has charged the correct amount of GST to Charles, Tom will not obtain a windfall gain by being refunded the overpaid GST. In this case, it is fair and reasonable for the Commissioner to exercise the discretion to refund the overpaid GST without requiring Tom to reimburse Charles.

Example 15

183. *Rehka treats a particular supply as GST-free. Subsequently she is audited by the ATO, which determines that she should have remitted GST on that supply. An assessment is raised and Rehka remits the outstanding amount assessed as GST. Contractually Rehka cannot seek to recover the GST from the recipient of the supply*

184. *Rehka subsequently objects to the assessment on the basis that the supply was not taxable. The Commissioner reverses the audit decision and gives a favourable objection decision. Rehka seeks a refund of the overpaid GST.*

185. In this case, Rehka overpaid the amount as GST because the Commissioner incorrectly treated the supply as taxable. It is fair and reasonable for the Commissioner to exercise the discretion to refund the overpaid GST.

Example 16

186. *Developer BW built new residential premises. In deciding the pricing structure for the supply, BW determined that the GST payable where the margin scheme was applied would be $13,000.*

187. *The property was sold to Adam (an unregistered individual who acquired the property solely for private purposes) under the margin scheme. The selling price in the contract was stated to be '$400,000 inclusive of GST (if any)'.*

188. *After the sale, BW included the $13,000 GST in the net amount it reported and paid.*

189. *Two years later BW recalculated the margin on the sale of the new residential premises and determined that, based on the recalculation, the GST payable on the sale was $10,000. BW sought a refund from the Commissioner for the $3,000 of overpaid GST.*

190. In this case, the Commissioner considers that it would not be appropriate to exercise the discretion. BW knew it had a GST liability before the sale which it took into account in determining its cost recovery and pricing structure. In addition the GST component was paid by Adam. A refund of the GST in these circumstances would result in a windfall gain to Developer BW.

Example 17

191. *Developer TN built new residential apartments. In deciding the pricing structure for the supply of certain apartments where the margin scheme would be applied, TN determined the GST component would be $11,000.*

192. *TN sells the apartments to Jamie (an unregistered individual who acquired the property solely for private purposes) under the margin scheme. The selling price in the contract stated to be '$400,000 inclusive of GST (if any)'.*

193. *After the sale, there is a mix up with the calculations and TN mistakenly includes $13,000 GST in the net amount it reported and paid.*

194. *Two years later, TN's accountant is undertaking an audit of the company's books and realised that TN had in fact modelled the pricing structure for the supply of the residential premises on a margin which amounted to a GST component of $11,000. The amount of $13,000 which had been remitted was incorrect and did not accord with the company's modelling system. TN sought a refund from the Commissioner of $2,000 overpaid GST.*

In this case, it may be appropriate to exercise the discretion to refund the overpaid GST. This is because Developer TN had factored $11,000 GST into its cost recovery and pricing structure and had been paid the GST component by the purchaser. However, due to an arithmetic error, TN had remitted an amount that did not accord with the amount of GST that had been factored into the pricing structure.

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