


MT 2010/1A2 - Addendum - Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953

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Addendum

Miscellaneous Taxation Ruling

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

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953* (TAA). It amends Miscellaneous Taxation Ruling MT 2010/1 to reflect:

- the Administrative Appeals Tribunal decision in *Naidoo v. Commissioner of Taxation* [2013] AATA 443, and
- amendments made by the *Indirect Tax Laws Amendment (Assessment) Act 2012*, which came into effect on 1 July 2012 and introduced a self-assessment regime for indirect taxes.

This Addendum also makes further minor amendments to MT 2010/1 and updates the references section.

Miscellaneous Taxation Ruling MT 2010/1 is amended as follows:

1. Paragraph 2

(a) Omit the third dot point, substitute:

- 'circumstances under which section 105-65 applies'

(b) Omit the seventh dot point.

(c) Omit the last dot point, substitute:

- whether the operation of section 105-65 of Schedule 1 to the TAA is taken into account in working out an entity's assessed net amount.

2. Paragraph 7

Omit the paragraph, substitute:

7. A refund or credit may arise where a taxpayer's assessed net amount^{1A} is amended^{1B} to:

^{1A} For tax periods that start before 1 July 2012, section 105-65 applies to a 'net amount'. For these tax periods, a reference to 'assessed net amount' in this Ruling is to be read as 'net amount'.

^{1B} For tax periods starting on or after 1 July 2012, the Commissioner is taken to have made an assessment of the net amount on the day the taxpayer lodges its GST return for a tax period. Generally, the Commissioner may amend the assessment 4

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- include additional input tax credits;
- reduce the GST payable; or
- include a decreasing adjustment.

3. Paragraph 8

- Omit 'or revision'.
- In the first dot point insert 'assessed' before the words 'net amount'.

4. Paragraph 10

Omit the paragraph, substitute:

10. However, subsection 105-65(1) modifies this requirement so that the Commissioner need not give a refund (or apply that amount) where the requirements of the section are met.³

5. Paragraph 11

Insert 'assessed' before the words 'net amount'.

6. Paragraph 14

- Insert the footnote after, 'Section 105-65:'.

^{4A} Prior to 1 July 2012, paragraphs 105-65(2)(a)(i), (a)(ii), (b)(i) and (b)(ii) refer to 'net amount'.

- Insert 'assessed' before the words 'net amount' at paragraphs (2)(a)(i), (2)(a)(ii), (2)(b)(i) and (2)(b)(ii).

7. Paragraph 19

- Omit 'a net amount', substitute 'an assessed net amount'.
- Omit 'net amount', substitute 'assessed net amount'.

8. Paragraph 20

Omit the paragraph including the heading and footnote, substitute:

Circumstances under which section 105-65 applies

20. For section 105-65 to apply, there must firstly be an amount of GST taken into account in an entity's assessed net

years from the day after the day the notice of assessment was given. For tax periods starting before 1 July 2012, the Commissioner is not treated as having made an assessment on lodgment of the GST return. For these tax periods, a reference to 'amend' in this Ruling is to be read as meaning a 'revision' to a taxpayer's GST return.

amount which is in excess of what was legally payable on the particular supply in the relevant tax period ('incorrect GST').⁵

20A. Section 105-65 applies to the extent that an entity's assessed net amount for a tax period takes into account an amount of incorrect GST and this resulted in:

- an overpaid amount – because the assessed net amount the entity paid was more than its amended assessed net amount for the tax period, or
- an amount not refunded – because the assessed net amount paid to the entity was less than the amended assessed net amount payable to it.

20B. However section 105-65 does not apply to the extent that there is incorrect GST but the assessed net amount itself is not overpaid. That is, the entity's assessed net amount is less than its amended assessed net amount because, for example, the incorrect GST is offset by over claimed input tax credits or other errors.

20C. Where an entity is found not to be carrying on an enterprise (so that its amended assessed net amount for a tax period is zero), section 105-65 will apply, but only to the extent that the entity's assessed net amount for the tax period was greater than zero.^{5A}

9. Paragraph 26

Omit the heading, paragraph and footnote.

10. Paragraph 31

Omit the paragraph.

11. Paragraph 34

Omit the heading and paragraph, substitute:

Section 105-65 is not taken into account in determining assessed net amount

34. Section 105-65 is not taken into account in determining an entity's net amount for a tax period. It operates **after** the net amount for a tax period is worked out under the GST Act.^{9A}

⁵ The incorrect GST must also arise from a supply or arrangement being wrongly treated as a taxable supply to any extent, and it is not taxable to that extent. Refer to the discussion at paragraphs 21 to 25D of this Ruling.

^{5A} See *Naidoo & Anor v. FC of T* [2013] AATA 443 at paragraphs 79 and 80.

^{9A} [2013] AATA 433 at paragraph 95.

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12. Paragraph 35A

After the paragraph, insert:

35B. The Addendum to this Ruling that issued on 5 February 2014 applies both before and after its date of issue. To the extent that it relates to the introduction of self assessment for indirect tax, the Ruling applies to tax periods commencing on or after 1 July 2012.

13. Paragraph 46

Omit the paragraph, substitute:

46. Subsection 105-65(2) refers to 'assessed net amount', which is relevantly defined in section 195-1 of the GST Act and means, for a tax period, the net amount assessed for that period.¹⁵ 'Net amount' is also defined in section 195-1 and refers to sections 17-5, 123-15, 126-5 and 162-105 of the GST Act. It is clear that GST is included in the meaning of 'net amount'.

14. Paragraph 47

Omit the paragraph including the footnotes, substitute:

47. Subsection 17-5(2) of the GST Act provides that the net amount may be increased or decreased under Subdivision 13-A of the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act)¹⁶ and under Subdivision 21-A of the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act).¹⁷

15. Paragraph 48

Omit the paragraph, substitute:

48. However, this does not mean that section 105-65 applies to overpayments of LCT or WET.

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 The definition of 'net amount' in section 17-5 of the GST Act was amended, effective 1 July 2012, to clarify that 'net amount' includes an amount of luxury car tax (LCT) refundable or payable. However, before this amendment, amounts of LCT payable or LCT adjustments are included in the net amount pursuant to subsection 2-10(1), section 2-25 and section 13-5 of the LCT Act.

¹⁷ The definition of 'net amount' in section 17-5 of the GST Act was amended, effective 1 July 2012, to clarify that 'net amount' includes an amount of wine equalisation tax (WET) refundable or payable. However, before this amendment, amounts of WET payable or refunded are included in the net amount pursuant to sections 2-20, 2-25, 21-1 and 21-5 of the WET Act.

16. Paragraph 54

Omit the heading and paragraph, substitute:

Circumstances under which section 105-65 applies

54. For section 105-65 to apply, there must firstly be an amount of incorrect GST (arising from a supply or arrangement being wrongly treated as a taxable supply to any extent). The incorrect GST must result in:

- an overpaid amount – because the assessed net amount the entity paid was more than its amended assessed net amount for the tax period, or
- an amount not refunded – because the assessed net amount paid to the entity was less than the amended assessed net amount payable to it.

17. Paragraph 58

Omit the paragraph, substitute:

58. Applying the reasoning in *Chippendale* in the context of section 105-65, the incorrect GST must either result in the assessed net amount that the entity paid being more than its amended assessed net amount for the tax period or the assessed net amount that was paid to the entity being less than the amended assessed net amount payable to it.

18. Paragraph 61

After the paragraph, insert the following:

Example 1A - assessed net amount payable to the entity not refunded

61A. *Greg Sports Pty Ltd carries on an enterprise of selling sports equipment. Its assessed net amount for the tax period ending 30 June 2013 was a refund of \$3,000 consisting of GST payable on taxable supplies of \$5,000 and input tax credits of \$8,000. Greg Sports was refunded the \$3,000.*

61B. *Later Greg Sports realises that it incorrectly treated a GST-free supply as taxable, resulting in GST of \$500 being incorrectly included in the assessed net amount in that tax period. His amended assessed net amount is therefore a refund of \$3,500.*

61C. *Section 105-65 will apply to potentially restrict the additional refund of \$500, because it is so much of the assessed net amount payable to Greg Sports that was not refunded.*

61D. *Section 105-65 does not apply to the extent that the incorrect GST is taken into account in the entity's assessed*

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net amount but the assessed net amount itself is not overpaid because, for example, the incorrect GST is offset by over claimed input tax credits or other errors.

Example 1B - incorrect GST offset by over claimed input tax credits – amount to which section 105-65 applies

61E. *Tony Enterprises Pty Ltd's assessed net amount for the tax period ending 31 March 2013 was a refund of \$5,000 consisting of GST payable on taxable supplies of \$45,000 and input tax credits of \$50,000. Tony Enterprises was refunded this amount.*

61F. *Tony Enterprises incorrectly treated a supply that is input taxed as taxable, resulting in GST of \$3,000 being incorrectly included in the assessed net amount for the tax period. In addition, Tony Enterprises also over claimed its input tax credits by \$2,000. Tony Enterprises amended assessed net amount is therefore a refund payable to it of \$6,000.*

61G. *Section 105-65 will apply to potentially restrict the further refund of \$1,000, because it is so much of the assessed net amount payable to Tony Enterprises that was not refunded to it.*

Example 1C - incorrect GST entirely offset by over claimed input tax credits – no amount to which section 105-65 applies

61H. *Jeannette Shoes assessed net amount for the tax period ending 30 September 2013 is \$1,000 payable, consisting of GST payable on taxable supplies of \$3,000 and input tax credits of \$2,000. It pays the \$1,000 to the Commissioner.*

61I. *Jeannette Shoes incorrectly treated a supply that is GST-free as taxable, resulting in an amount of incorrect GST of \$300. In addition, Jeannette Shoes over claimed its input tax credits by \$500.*

61J. *These two errors mean Jeannette Shoes' amended assessed net amount for the September 2013 tax period is \$1,200 payable. Since it only paid \$1,000 to the Commissioner, it is liable to pay an additional \$200 to the Commissioner.*

61K. *In this example, section 105-65 does not apply because Jeannette Shoes has not overpaid an amount. That is, although its assessed net amount included incorrect GST of \$300, it was offset by the over claimed input tax credits, resulting in Jeannette Shoes having an amount payable.*

Entity not carrying on an enterprise

61L. Where an entity is found not to be carrying on an enterprise, section 105-65 will apply to potentially restrict a refund of the incorrect GST, but only to the extent that the entity's assessed net amount for the tax period was greater than zero.^{26A}

Example 1D - taxpayer not carrying on an enterprise and section 105-65 applies

61M. Matthew is registered for GST. He lodged an activity statement for the tax period ending 31 March 2013 reporting a net amount of \$1,000 consisting of GST payable of \$1,500 and input tax credits of \$500. Matthew pays the assessed net amount of \$1,000 to the Commissioner.

61N. The Commissioner later determines that Matthew is not carrying on an enterprise. Therefore, his amended assessed net amount for the March 2013 tax period is nil. As Matthew has paid \$1,000 for this tax period, section 105-65 will apply to potentially restrict any refund of that amount. This is because it is so much of his assessed net amount that he overpaid.

61O. Where an entity's assessed net amount resulted in a refund to which it is no longer entitled to following an amendment to its assessed net amount, section 105-65 does not apply. However, the overpaid refund is payable to the Commissioner under subsection 35-5(2) of the GST Act.

Example 1E - Application of subsection 35-5(2) of the GST Act

61P. Tess is registered for GST. She lodged an activity statement for the tax period ending 30 June 2013, resulting in a refund of her assessed net amount of \$300 being paid to her consisting of GST payable of \$1,500 and input tax credits of \$1,800.

61Q. The Commissioner later determines that Tess is not carrying on an enterprise. Therefore, her amended assessed net amount for the June 2013 tax period is nil.

61R. Section 105-65 does not apply to Tess because the refund of \$300 paid to her is greater than the amended assessed net amount payable to her (ie nil). That is, although her assessed net amount included an amount of incorrect GST of \$1,500, it is offset by the over claimed input tax credits of \$1,800. The overpaid refund of \$300 is payable to the Commissioner under subsection 35-5(2) of the GST Act.

^{26A} [2013] AATA 433 at paragraphs 79 and 80.

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19. Paragraph 62

Omit the second sentence in the paragraph, substitute: 'In the context of section 105-65, a supply would be treated as a taxable supply where the supplier mischaracterised a supply as taxable (to any extent) because they believed the supply to be a taxable supply (to that extent), and an amount of GST is taken into account in their assessed net amount.'

20. Paragraphs 99 to 112

Omit the headings, paragraphs and footnotes.

21. Paragraph 115A

Omit the third and fourth dot points, substitute:

- the reimbursement is in money, or if made through a journal entry, to the extent that the journal entry offsets the recipient's pre-existing liability to the taxpayer; and
- the reimbursement or journal entry has actually been made, and is not merely planned to be made.

22. Paragraph 122

Omit '(which introduced the current version of section 105-65)', substitute '(which amended section 105-65 in 2008)'.

23. Paragraph 134

Omit the first sentence, substitute: 'However, subsection 105-65(2) provides that the section applies to 'so much of any assessed net amount or amount of GST' as the entity has overpaid (or 'so much of any assessed net amount' that has not been refunded to the entity).'

24. Paragraphs 139 to 142

Omit the headings, paragraphs and footnotes.

25. Paragraph 143

Omit the paragraph, substitute:

143. There are cases where the Commissioner may inadvertently refund amounts without regard to the operation of section 105-65. For example an entity applies for an amendment to its assessment using a revised activity statement, which results in a refund of an amount to which section 105-65 applies. The revised activity statement is processed and paid automatically by ATO systems without regard being had to section 105-65. Later the Commissioner

discovers that the refund was one to which section 105-65 applied.

26. Paragraph 147

Omit the paragraph, substitute;

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

27. Paragraph 150

Omit the heading, paragraph and footnote; substitute:

Section 105-65 is not taken into account in determining assessed net amount

150. The Commissioner previously took the view that section 105-65 is taken into account in determining the net amount for a tax period. The Commissioner considered that, in determining the net amount that a taxpayer is legally required to pay or is entitled to as a refund, all sections of all relevant Acts that may bear on that legal obligation or legal entitlement must be taken into consideration.

28. Paragraph 151 and 152

Omit the paragraph including the footnote, substitute:

151. Contrary to the Commissioner's previous view, the Administrative Appeals Tribunal in *Naidoo v Commissioner of Taxation* [2013] AATA 443 determined that section 105-65 is not a provision that allows the Commissioner to alter the net amount worked out under subsection 17-5(1) of the GST Act. The Tribunal found that section 105-65 operates after the net amount for a tax period is worked out under the GST Act.⁵⁵

152. The Tribunal therefore found that it did not have jurisdiction to review the Commissioner's decision under section 105-65 to not give a refund of the overpaid GST. It noted that the taxpayer's review rights are limited to judicial review in proceedings brought in the Federal Court under

⁵⁵ [2013] AATA 433 at paragraph 95.

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section 39B of the Judiciary Act 1903 or under the Administrative Decisions (Judicial Review) Act 1977.^{55A}

29. Paragraphs 153 to 159

Omit the paragraphs.

30. Paragraph 160 and 161

Omit the heading and paragraphs, substitute:

Example 9 – section 105-65 not taken into account in determining assessed net amount

160. *Sheree's assessed net amount for the tax period ending 31 March 2014 is \$2,000 payable to the Commissioner. In September 2014, Sheree realises that some of the transactions in the tax period ending 31 March 2014 were actually GST-free instead of taxable. Consequently her assessed net amount should have been \$1,700 payable to the Commissioner. Sheree does not refund any amounts to her customers. She requests the Commissioner to amend the assessment of her net amount for the tax period ending 31 March 2014.*

161. *In this situation, the Commissioner will amend Sheree's assessed net amount to \$1,700 as section 105-65 is not taken into account in determining her assessed net amount for that tax period. However, the Commissioner need not refund the overpaid amount of \$300 because Sheree has not reimbursed a corresponding amount to the recipients of the supplies. As section 105-65 is not taken into account in determining her assessed net amount, Sheree cannot object to the Commissioner's decision to not pay the GST refund, under Part IVC of the TAA.*

31. Paragraph 171

- (a) After the first sentence, insert: 'Therefore, MC has overpaid its net amount.'
- (b) In the second sentence, omit 'overpaid GST'; substitute 'incorrect GST'.

32. Paragraph 174

Omit the second sentence, substitute: 'Section 105-65 applies to the incorrect 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 and this resulted in Entity B's net amount being overpaid.'

^{55A} [2013] AATA 433 at paragraph 103.

33. Paragraph 178

Omit the second sentence, substitute: '*Heavy Industries Ltd lodges a section 105-55 notice seeking to notify the Commissioner of its entitlement to a refund in relation to the relevant GST-free supplies incorrectly treated as taxable supplies, which resulted in its net amount being overpaid.*'

34. Paragraph 180

Omit 'overpaid GST', substitute 'overpaid amount'.

35. Paragraph 182

Omit the last sentence, substitute: '*Rehka has overpaid an amount because Rehka's assessed net amount was more than the amended assessed net amount. Rehka seeks a refund of the overpaid amount.*'

36. Paragraph 183

In the last sentence, omit 'overpaid GST', substitute 'overpaid amount'.

37. Paragraph 185

Omit the last sentence, substitute: '*George has overpaid an amount because his assessed net amount was more than his amended assessed net amount. George seeks a refund of the overpaid amount.*'

38. Paragraph 186

In the last sentence, omit 'overpaid GST', substitute 'overpaid amount'.

39. Paragraph 195

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40. Legislative references

Insert:

- TAA 1953 Sch 1 155-5
- TAA 1953 Sch 1 155-15
- TAA 1953 Sch 1 155-35

41. Case references

Insert:

- Naidoo v Commissioner of Taxation [2013] AATA 443; 2013 ATC 10-323

This Addendum applies on and from 5 February 2014.

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Commissioner of Taxation

5 February 2014

ATO references

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