


# ***MT 2018/D1 - Miscellaneous tax: time limits for claiming an input tax or fuel tax credit***

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# Draft Miscellaneous Taxation Ruling

## Miscellaneous tax: time limits for claiming an input tax or fuel tax credit

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## Summary – what this draft Ruling is about

- This draft Ruling sets out the Commissioner’s view on time limits applying to the entitlement to claim an input tax or fuel tax credit set out in:
  - subsection 93-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), and
  - subsection 47-5(1) of the *Fuel Tax Act 2006* (FTA).

### Glossary

- In this draft Ruling, we use the following terms:

| Term                                      | Refers to   |
|---|---|
| Assessment <sup>1</sup>                   | An assessment of a: <ul style="list-style-type: none"> <li>net amount, or</li> <li>net fuel amount.</li> </ul>  |
| Four year entitlement period <sup>2</sup> | The period set out in: <ul style="list-style-type: none"> <li>subsection 93-5(1) of the GST Act, and</li> <li>subsection 47-5(1) of the FTA.</li> </ul> |

<sup>1</sup> See paragraph 52 of this draft Ruling.

<sup>2</sup> See paragraphs 47 and 48 of this draft Ruling.

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| <b>Term</b>                   | <b>Refers to</b>   |
|-------------------------------|--|
| Limiting provisions           | Subsection 93-5(1) of the GST Act and subsection 47-5(1) of the FTA.   |
| Period of review <sup>3</sup> | The periods set out in Subdivision 155-B of Schedule 1 to the <i>Taxation Administration Act 1953</i> (TAA). |
| Return <sup>4</sup>           | GST return or a fuel tax return.   |
| Tax credit <sup>5</sup>       | Input tax credit or a fuel tax credit.   |

**Ruling**

3. Your entitlement to a tax credit ceases under the limiting provisions<sup>6</sup> (unless an exception applies<sup>7</sup>) to the extent that the tax credit:

- has not been taken into account in an assessment
- within the four year entitlement period.

**Tax credit taken into account in an assessment**

4. A tax credit is ‘taken into account’ in an assessment to the extent the credit is included in the calculation of the assessment of a net amount or net fuel amount.<sup>8</sup>

5. Tax credits will have been taken into account for the purposes of the limiting provisions if they are included in an assessment, but a subsequent amended assessment adjusts the credits previously allowed.

***Within the four year entitlement period***

6. Your tax credits will be taken into account in an assessment in the four year entitlement period if they are included in an assessment made within that period. The assessment must be completed and a notice of assessment given or deemed to be given.<sup>9</sup>

<sup>3</sup> See paragraph 57 of this draft Ruling.

<sup>4</sup> See section 31 of the GST Act and section 61 of the FTA.

<sup>5</sup> See section 195-1 of the GST Act and Division 41 of the FTA.

<sup>6</sup> See paragraphs 47 and 48 of this draft Ruling.

<sup>7</sup> See paragraphs 60 to 62 of this draft Ruling.

<sup>8</sup> An assessment includes an amended assessment, see section 155-80 of Schedule 1 to the TAA.

<sup>9</sup> Section 155-10 of Schedule 1 to the TAA requires the Commissioner to give a notice of assessment. Where there is a self-assessment, section 155-15 of Schedule 1 to the TAA provides for your GST return or fuel tax return for the tax period to be treated as a notice of assessment.

***To the extent that the tax credits are not taken into account***

7. Under the limiting provisions, tax credits cease ‘to the extent’ that the tax credits are not taken into account within the time limit.

8. If only part of a tax credit has been included in an assessment of the net amount or net fuel amount, then only that amount is taken into account for the purposes of the limiting provisions. If the remaining part is not included in any assessment in the four year entitlement period, the entitlement to that remaining part of the tax credit ceases.

***Objections, amendment requests and applications for private rulings***

9. You do not include a tax credit in an assessment by lodging an objection, requesting an amendment, or applying for a private ruling.

10. This is the case even if:

- the objection, amendment request or private ruling application is made within the four year entitlement period
- the period of review for the assessment of the relevant tax period has not expired<sup>10</sup>, and
- you provide all necessary information, including the amount of tax credits you would like to claim.

11. The limiting provisions set a clear time limit for entitlements to tax credits. The Commissioner is required to apply this time limit when making a decision on an objection or amendment request, or providing a private ruling.

12. At the time of making a decision or providing a private ruling, if the tax credits you are seeking have not been taken into account in an assessment and the four year entitlement period has expired, the decision or ruling must be that you are not entitled to the tax credits sought. This is the case even though the Commissioner may have the power to otherwise amend an assessment at any time to give effect to decisions on objections, amendment requests or private ruling applications.

***Examples******Example 1 – tax credits taken into account in an assessment***

13. *Tristan purchases computer software for \$330 that he uses in his enterprise.*

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<sup>10</sup> Subsection 155-35(2) of Schedule 1 to the TAA sets out the four year period in which an assessment may be reviewed.

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14. *Tristan includes a claim for the \$30 input tax credit for his software purchase in his GST return for the tax period in which he purchased the software. The Commissioner is treated as making an assessment, and issuing a notice of assessment, of Tristan's net amount on the day the GST return is lodged.<sup>11</sup>*

15. *The Commissioner reviews Tristan's affairs and decides that he is only entitled to an input tax credit of \$20 due to some private use of the software. The Commissioner amends Tristan's assessment reducing the input tax credits to \$20.*

16. *The full input tax credit of \$30 has been taken into account in an assessment as the credits were included in the original assessment for the tax period.*

17. *If Tristan lodges an objection to the amended assessment his entitlement to the additional \$10 of input tax credits will not cease (due to the limiting provisions) during the subsequent review and potential appeal process.*

*Example 2 – to the extent that tax credits are not taken into account*

18. *Claire purchases a computer for \$2,200 that she uses solely in her enterprise.*

19. *Claire makes a mistake when she completes her GST return and only includes \$20 as the input tax credit for her acquisition rather than the full \$200.*

20. *The Commissioner is treated as making an assessment, and issuing a notice assessment, of Claire's net amount on the day the GST return is lodged.<sup>12</sup>*

21. *Only \$20 of input tax credits would have been taken into account in the assessment. The remaining \$180 has not been taken into account.*

22. *If Claire only lodges an objection to her assessment, her entitlement to the additional \$180 of input tax credits could potentially cease during the subsequent review process due to the operation of the limiting provisions (see Example 3 of this draft Ruling).*

*Example 3 – no assessment of tax credits at the time an objection is lodged*

23. *Violet purchases a mobile phone in November 2013 that she uses in her enterprise.*

<sup>11</sup> See section 155-15 of Schedule 1 to the TAA.

<sup>12</sup> See section 155-15 of Schedule 1 to the TAA.

24. Violet is required to lodge quarterly. The due date for her GST return for the December 2013 quarterly tax period is 28 February 2014. She lodges her GST return late on 7 March 2014 and her net amount is assessed. Violet does not claim any input tax credits for the mobile phone.

25. The four year entitlement period ends on 28 February 2018.<sup>13</sup> The period of review ends on 8 March 2018.<sup>14</sup>

26. Violet later discovers that she could have claimed input tax credits for the mobile phone. On 26 February 2018 Violet lodges an objection seeking input tax credits in respect of her mobile phone acquisition.

27. The Commissioner does not make a decision on Violet's objection until 10 March 2018, after the four year entitlement period has expired.

28. Violet's entitlement to input tax credits has ceased, as the credits were not included in an assessment within the four year entitlement period. The Commissioner advises Violet that she is not entitled to the input tax credits and disallows her objection. Her assessment cannot be amended to include the input tax credits.

*Example 4 – claiming credits within the four year entitlement period*

29. An alternative scenario for Violet's mobile phone (Example 3 of this draft Ruling): instead of lodging an objection, Violet includes the input tax credit in her return for the December 2017 tax period.<sup>15</sup>

30. Violet lodged the December 2017 GST return on 26 February 2018 and her net amount is assessed.<sup>16</sup>

31. Violet's entitlement to input tax credits has not ceased as the credits are taken into account in an assessment made within the four year entitlement period.

*Example 5 – credits claimed in an assessment even though disallowed subsequently in an amended assessment*

32. Logistics Company acquires 500 litres of taxable fuel in December 2012 to use in carrying on its enterprise. Logistics Company lodges quarterly. The due date to lodge the return for the December 2012 quarterly tax period is 28 February 2013. Logistics Company lodges the return for this period on 21 February 2013 and a deemed assessment of the net fuel amount for the tax period is made on the same day.<sup>17</sup>

<sup>13</sup> Subsection 93-5(1) of the GST Act.

<sup>14</sup> Subsection 155-35(2) of Schedule 1 to the TAA.

<sup>15</sup> Subsection 29-10(4) of the GST Act.

<sup>16</sup> Section 155-15 of Schedule 1 to the TAA.

<sup>17</sup> Section 155-15 of Schedule 1 to the TAA.

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33. *The four year entitlement period ends on 28 February 2017.<sup>18</sup> The period of review for the assessment ends on 22 February 2017.<sup>19</sup>*
34. *Logistics Company discovers in 2016 that it may be entitled to a further amount of fuel tax credits to that already claimed in respect of the 500 litres of taxable fuel made in the December 2012 quarterly tax period. Logistics Company relies on Fuel Tax: Correcting Fuel Tax Errors Determination 2013<sup>20</sup> and includes the additional fuel tax credits in the return for the September 2016 quarterly tax period, which they lodge on 31 October 2016.*
35. *The Commissioner is treated as making an assessment, and issuing a notice of assessment, of Logistics Company's net fuel amount on the day the return is lodged.<sup>21</sup>*
36. *The Commissioner subsequently reviews the assessment, disallows the claim for the additional fuel tax credits and issues an amended assessment on 31 May 2017. Logistics Company decides to lodge an objection against the disallowance of the additional fuel tax credits. The objection is lodged on 15 June 2017.*
37. *The Commissioner allows the objection on 29 August 2017 following receipt of additional information from Logistics Company. Logistics Company's entitlement to the fuel tax credits, that have been disallowed did not cease, as the fuel tax credits were included in an assessment within the period specified in subsection 47-5(1) of the FTA. The Commissioner can give effect to the objection decision by amending the assessment for the September 2016 quarter.*

## *Example 6 – private ruling application does not take tax credits into account*

38. *Environment Research Centre (ERC) is registered for goods and services tax and lodges their returns monthly. ERC has not previously claimed fuel tax credits.*
39. *ERC apply for a private ruling on 20 October 2018, asking whether they had entitlement to a \$2,000 fuel tax credit for fuel that they acquired in September 2014 and for fuel they intended to purchase in 2019.*
40. *Any fuel tax credit entitlement for the September 2014 tax period ends on 21 October 2018.<sup>22</sup> ERC lodged the return for the September 2014 tax period on 29 October 2014 and therefore the period of review for the assessment for the tax period ends on 30 October 2018.<sup>23</sup>*

<sup>18</sup> Subsection 47-5(1) of the FTA.

<sup>19</sup> Subsection 155-35(2) of Schedule 1 to the TAA.

<sup>20</sup> *Fuel Tax: Correcting Fuel Tax Errors Determination 2013* and within the period of review for the December 2012 tax period as required by clause 5(b) of the Determination.

<sup>21</sup> See section 155-15 of Schedule 1 to the TAA.

<sup>22</sup> See subsection 47-5(1) and section 61 of the FTA, and section 31 of the GST Act.

<sup>23</sup> Subsection 155-35(2) of Schedule 1 to the TAA.

41. *ERC's application for the private ruling is made on 20 October 2018 and the Commissioner issues the private ruling on 25 October 2018. The Commissioner rules that ERC will have entitlement to a fuel tax credit for the purchase of taxable fuel in 2019. However, any entitlement to fuel tax credits for the September 2014 tax period have ceased. While the period of review for the assessment of the September 2014 tax period had not ended (and therefore the Commissioner may otherwise amend the assessment), the fuel tax credits for the September 2014 tax period had not been taken into account in an assessment by 21 October 2018. It does not matter that ERC quantified the amount of fuel tax credits in their private ruling application.*

*Example 7 – entitlement to tax credits ceases during appeals process*

42. *An alternative scenario for ERC (Example 6 of this draft Ruling): ERC lodges their application for a private ruling in July 2017.*

43. *The Commissioner issues an unfavourable ruling in September 2017 to which ERC objects in October 2017.<sup>24</sup> ERC receives an unfavourable objection decision in December 2017.*

44. *In January 2018 ERC seeks a review of the objection decision in the Federal Court. The Commissioner puts Division 47 in issue before the Court.*

45. *The Federal Court does not list the matter for hearing until November 2018 by which time ERC's entitlement to fuel tax credits for the September 2014 tax period has ceased. The Federal Court finds in 2019 that ERC does have an in-principle entitlement to fuel tax credits in respect of fuel purchased in September 2014 and subsequently in 2019. The Commissioner cannot give effect to the Court's favourable decision in respect of the September 2014 tax period because ERC's entitlement to the fuel tax credits ceased on 21 October 2018.*

## **Date of effect**

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

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**Commissioner of Taxation**

23 November 2018

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<sup>24</sup> ERC may object to the private ruling as there is no assessment (of fuel tax) to which the ruling relates, see section 359-60 of Schedule 1 of the TAA.



## Appendix 1 – Explanation

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

### The limiting provisions

47. Subsection 93-5(1) of the GST Act states:

You cease to be entitled to an input tax credit for a creditable acquisition to the extent that the input tax credit has not been taken into account, in an assessment of a net amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a GST return for the tax period to which the input tax credit would be attributable under subsection 29-10(1) or (2).

48. Subsection 47-5(1) of the FTA states:

You cease to be entitled to a fuel tax credit to the extent that it has not been taken into account, in an assessment of a net fuel amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a return for the tax period or fuel tax return period to which the fuel tax credit would be attributable under subsection 65-5(1), (2) or (3).

### Claiming entitlements to tax credits

49. There are rules which explain when you can attribute a tax credit to a tax period.<sup>25</sup> If you don’t claim a tax credit in the first tax period to which it is attributable then you can attribute it to a later tax period.<sup>26</sup>

50. The limiting provisions limit the time in which you can claim a tax credit. Without such a limit, a credit which is not attributed to a tax period could exist indefinitely. To ensure finality, the limiting provisions provide that you will lose your entitlement to a tax credit if it is not included in an assessment within four years from the day that you were required to lodge your return for the first tax period to which the credits would have been attributable. Once the entitlement to a tax credit ceases, the amount cannot be attributed to any tax period.

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<sup>25</sup> Division 29 of the GST Act and Division 65 of the FTA.

<sup>26</sup> In respect of GST, the attribution rules are considered in further detail in Goods and Services Tax Ruling GSTR 2000/29 *Goods and services tax: attributing GST payable, input tax credits and adjustments and particular attribution rules made under section 29-25*.

51. This view is supported by comments in Decision Impact Statement on *Trustee for SBM Trust v. Federal Commissioner of Taxation*<sup>27</sup> (*SBM Trust*) and *Re SE Sedgwick & Anor v. Federal Commissioner of Taxation*<sup>28</sup> (*Sedgwick*).<sup>29</sup> In both of these matters, taxpayers had not included input tax credits in a GST return within the four year entitlement period. In *Sedgwick DP Deutsch*, referring to *SBM Trust*, stated at paragraph 15:

The operation of Division 93 of the GST Act in circumstances such as these is clear and unambiguous and leaves no room for the operation of a discretion.

### **Assessments**

52. For there to be an ‘assessment’, the ‘assessable amount’ must have been ascertained.<sup>30</sup> This in turn requires an ascertainment of the ‘net amount’ or the ‘net fuel amount’ for the tax period.<sup>31</sup> The ascertainment of these net amounts refers to the completed process of assessment, culminating in a notice of assessment.<sup>32</sup> The assessment of a net amount or net fuel amount requires that there be an ‘assessed’ net amount or net fuel amount<sup>33</sup> which results in:

- the determination of a liability to pay the Commissioner<sup>34</sup>
- an entitlement to a refund<sup>35</sup>, or
- nothing being due or refundable.

53. Objections, amendment requests and private ruling applications are not assessments.

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<sup>27</sup> [2015] AATA 174.

<sup>28</sup> [2015] AATA 690.

<sup>29</sup> *SBM Trust* and *Sedgwick* considered the application of Division 93 of the GST Act before the amendments to the section for self-assessment, however it is considered that the comments apply equally to the amended legislation.

<sup>30</sup> See the definition of ‘assessment’ in subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

<sup>31</sup> An ‘assessable amount’ includes a ‘net amount’ and a ‘net fuel amount’, see subsection 155-5(2) of Schedule 1 to the TAA. Section 17-5 of the GST Act explains ‘net amount’. Section 60-5 of the FTA explains ‘net fuel amount’.

<sup>32</sup> See *Batagol v. Federal Commissioner of Taxation* (1963) 109 CLR 243, (1963) 13 ATD 202. Section 155-10 of Schedule 1 to the TAA requires that a notice of assessment be given. Subsection 155-15(4) of Schedule 1 to the TAA provides for a notice of assessment where there is self-assessment.

<sup>33</sup> See the definition of ‘assessed net amount’ in section 195-1 of the GST Act and ‘assessed net fuel amount’ in section 110-5 of the FTA.

<sup>34</sup> Section 33-5 of the GST Act and section 61-10 of the FTA.

<sup>35</sup> Subsection 35-5(1) of the GST Act and section 61-5 of the FTA.

## ***Taken into account***

54. Guidance on ‘taking into account’ can be found in *Professional Admin Service Centres Pty Ltd v. Federal Commissioner of Taxation*<sup>36</sup> which considered the application of subsection 29-10(4) of the GST Act (which is mirrored by subsection 65-5(4) of the FTA).

Subsection 29-10(4) and subsection 65-5(4) provide that if a tax credit is not ‘taken into account’ in a return for a tax period, it is no longer attributable to that tax period and is attributable to the first tax period in which the taxpayer does claim the credit. The taxpayer argued that it was entitled to more input tax credits for other acquisitions which had not been claimed in the GST returns lodged. Edmonds J stated:

...in respect of the first two relevant periods, a taxpayer will not succeed in demonstrating that an assessment of GST net amount for a period is excessive by showing that it made acquisitions which were not taken into account in preparing its BAS for that period. That is because those acquisitions (assuming them otherwise to be creditable acquisitions) are not attributable to that period: s 29-10(4) of the GST Act.

55. Following the reasoning in this case, to take a tax credit ‘into account’ in an assessment means that the tax credit must be included in the assessed net amount and included in the notice of the assessment.

56. As the Commissioner is treated as having made an assessment of a net amount or net fuel amount for a tax period when a return is lodged<sup>37</sup>, any amount of tax credits included in the lodged return will be taken into account in an assessment.

## ***Subdivision 155-B of Schedule 1 to the TAA – amendments to assessments***

57. The Commissioner may amend an assessment within the period of review for the assessment.<sup>38</sup> The period of review is the period starting on the day on which the Commissioner first gives a notice of assessment to you, and ending on the last day of the period of four years starting the day after that day, unless the period of review is extended.<sup>39</sup>

58. The Commissioner may amend an assessment at any time to give effect to:

- a decision on an amendment request made in the approved form within the period of review<sup>40</sup>
- the advice given in a private ruling where the private ruling was applied for within the period of review<sup>41</sup>, or
- an objection decision or a decision on review or appeal.<sup>42</sup>

<sup>36</sup> [2013] FCA 1123.

<sup>37</sup> Section 155-15 of Schedule 1 to the TAA.

<sup>38</sup> Subsection 155-35(1) of Schedule 1 to the TAA.

<sup>39</sup> Subsection 155-35(2) of Schedule 1 to the TAA.

<sup>40</sup> Section 155-45 of Schedule 1 to the TAA.

<sup>41</sup> Section 155-50 of Schedule 1 to the TAA.

59. The Commissioner is bound to apply the law and can only assess a taxpayer in accordance with the law. The Commissioner cannot amend a taxpayer's assessment to include a tax credit if and because of the limiting provisions, the taxpayer no longer has any legal entitlement to the credit. This is the case regardless of whether the Commissioner may still be able to make other amendments to the assessment as the period of review has not expired.

***Exceptions to the limiting provisions***

60. There are two exceptions to the time limit in the limiting provisions.

61. The first only relates to GST. You remain entitled to an input tax credit where the input tax credit is for a creditable acquisition that relates to making a supply which is incorrectly treated as input taxed in an assessment, and after the end of the four year entitlement period the assessment is amended to treat the supply as taxable or GST-free.<sup>43</sup>

62. The second exception<sup>44</sup> ensures that you remain entitled to a tax credit where:

- you have requested the Commissioner to treat a document as a tax invoice
- the request was made before the end of the four year entitlement period, and
- the Commissioner agrees to your request after the end of the four year entitlement period.

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<sup>42</sup> Section 155-60 of Schedule 1 to the TAA.

<sup>43</sup> Subsection 93-10(4) of the GST Act.

<sup>44</sup> Subsection 93-10(5) of the GST Act and section 47-10 of the FTA.

## Appendix 2 – Alternative view

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

63. The alternative view is that the limiting provisions and Subdivision 155-B of Schedule 1 to the TAA should be read together and need to operate in an integrated way so that the taxpayer's entitlement to a tax credit does not cease if within the four year entitlement period and the period of review a taxpayer:

- lodges a valid objection against an assessment
- makes a complete request for an amendment of an assessment, or
- applies for a private ruling regarding their entitlement to tax credits.

64. This approach means that entitlements to credits will not cease for matters that are in progress before the four year entitlement period expires. That is, while an amount of tax credits has not been included in an assessment made within the four year entitlement period, the Commissioner may still decide that the taxpayer is entitled to the tax credits and amend an assessment to give effect to that decision at any time.

65. This view relies on there being competing provisions which need to be interpreted by adopting the purposive approach to statutory interpretation and the harmonious goals principle as explained in *Project Blue Sky Inc v. Australian Broadcasting Authority*.<sup>45</sup>

66. The Commissioner does not accept the alternative view for the reasons already provided. Further it is considered that the entitlement, attribution and amendment provisions do work in harmony and are not in conflict. Additionally, the alternative view is inconsistent with the clear wording of the limiting provisions that tax credits must be taken into account in an assessment within the four year entitlement period.

67. Lastly, there are specific exceptions to the time limit on entitlement to tax credits in section 93-10 of the GST Act and section 47-10 of the FTA which indicates that any further exception to the limiting provisions cannot be implied. Subdivision 155-B of Schedule 1 to the TAA does not override the operation of the limiting provisions.

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<sup>45</sup> [1998] HCA 28; 194 CLR 355 at paragraphs 69 and 70. This approach was subsequently referred to in a taxation context by the Full Federal Court in *Channel Pastoral Holdings Pty Ltd v. Federal Commissioner of Taxation* [2015] FCAFC 57; 2015 ATC 20-503.

## **Appendix 3 – Your comments**

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

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

- provide responses to persons providing comments, and
- be published on the ATO website at [ato.gov.au](http://ato.gov.au)

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

|                         |   |
|-------------------------|---|
| <b>Due date:</b>        | <b>25 January 2019</b>  |
| <b>Contact officer:</b> | <b>Brett O’Neill</b>  |
| <b>Email address:</b>   | <a href="mailto:taxcredits@ato.gov.au">taxcredits@ato.gov.au</a>        |
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**Appendix 4 – Detailed contents list**

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

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## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

GSTR 2000/29; TR 2006/10

### *Legislative references:*

- ANTS(GST)A 1999
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- ANTS(GST)A 1999 Div 29
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