

GSTD 2014/1 - Goods and services tax: can you object to a private ruling that the Commissioner makes on the way in which section 105-65 of Schedule 1 to the Taxation Administration Act 1953 applies or would apply to you?

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Goods and Services Tax Determination

Goods and services tax: can you object to a private ruling that the Commissioner makes on the way in which section 105-65 of Schedule 1 to the *Taxation Administration Act 1953* applies or would apply to you?

! This publication provides you with the following level of protection:

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.

Ruling

1. Yes, you can object to a private ruling that the Commissioner makes on the way in which section 105-65 of Schedule 1 to the *Taxation Administration Act 1953* applies or would apply to you, but **only if** the Commissioner has **not** made an assessment of your net amount for the tax period in which you took into account an amount of incorrect GST.¹

Examples

Example 1 – Pre 1 July 2012 tax periods and no assessment

2. After lodging his GST returns for the quarterly tax periods 1 July 2010 to 30 June 2011, in which he treated certain supplies as taxable, Arya learns those supplies are, in fact, not supplies for consideration. Arya asks the Commissioner to make a private ruling on whether section 105-65 applies to restrict his GST refund in relation to those tax periods. The Commissioner issues an unfavourable private ruling to Arya. If the Commissioner has not made assessments of Arya's net amount for any of those tax periods to which the private ruling relates, Arya may object to his private ruling.

¹ For tax periods starting on or after 1 July 2012, the Commissioner is treated as having made an assessment of your net amount when you lodge your GST return for the tax period.

Example 2 – Pre 1 July 2012 tax periods and assessment

3. Lots of Chocolates Pty Ltd (Lots of Chocolates) treats certain supplies as taxable supplies in its quarterly tax period ending 30 September 2010 and lodges its GST return for that tax period on that basis. In 2011, Lots of Chocolates is audited and the Commissioner makes an assessment reducing its input tax credit claim for that same quarterly tax period.
4. In September 2013, a Court rules that supplies, which are the same as the supplies Lots of Chocolates made, are GST-free. After hearing about the Court decision, Lots of Chocolates asks the Commissioner to make a private ruling on whether section 105-65 applies to restrict its GST refund in its quarterly tax period ending 30 September 2010. The Commissioner issues an unfavourable private ruling to Lots of Chocolates.
5. As the Commissioner has made an assessment of Lots of Chocolates' net amount for the quarterly tax period ending 30 September 2010, Lots of Chocolates cannot object to its private ruling. Lots of Chocolates also cannot object to its assessments in relation to the Commissioner's decision to not give it a refund of its overpaid net amount under section 105-65.²

Example 3 – Post 1 July 2012 tax period

6. Good For You Shoes Pty Ltd (Good For You Shoes) lodges its monthly GST returns from 1 July 2012 to 30 June 2013, during which it treats certain supplies as taxable. Later Good For You Shoes becomes aware that these supplies should have been GST-free. Good For You Shoes asks the Commissioner to make a private ruling on whether the Commissioner would apply section 105-65 to restrict its GST refund in relation to its monthly tax periods 1 July 2012 to 30 June 2013. The Commissioner issues an unfavourable private ruling to Good For You Shoes.
7. As the Commissioner is treated as having made assessments of Good For You Shoes' net amount when it lodged its GST returns, Good For You Shoes cannot object to its private ruling in relation to those tax periods. Good For You Shoes also cannot object to its assessments in relation to the Commissioner's decision to not give it a refund of its overpaid assessed net amount under section 105-65.³

Date of effect

8. This Determination applies both before and after its date of issue. However, this Determination 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 Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

² This results from the Tribunal's finding in *Naidoo* that a decision under section 105-65 does not affect a taxpayer's net amount. This means that there is no provision in the TAA which provides the taxpayer with a specific objection right. A taxpayer's formal review rights are limited to judicial review proceedings under section 39B of the *Judiciary Act 1903* or the *Administrative Decisions (Judicial Review) Act 1977*.

³ *Ibid.*

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Page status: **legally binding**

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Commissioner of Taxation
22 January 2014

Appendix 1 – Explanation

❶ 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.

9. All legislative references are to Schedule 1 to the *Taxation Administration Act 1953* (TAA) unless otherwise specified.

Background

10. Section 105-65 is a provision which restricts GST refunds. The Commissioner’s views on this provision are set out in MT 2010/1.⁴

Section 105-65 does not alter your net amount

11. In *Naidoo*,⁵ the Administrative Appeals Tribunal concluded that section 105-65 is not a provision that allows the Commissioner to alter the net amount calculated under subsection 17-5(1) of the GST Act.⁶ The Tribunal found that section 105-65 operates after the net amount for a tax period is calculated under the GST Act.

12. Having concluded that section 105-65 does not alter the determination of a taxpayer’s net amount under the GST Act, and noting that section 105-65 does not contain any express provision allowing a taxpayer to object to a decision under that provision, the Tribunal found that it did not have jurisdiction to review the Commissioner’s decision under section 105-65 to not give a GST refund.

13. The Tribunal noted that the taxpayer’s review rights are limited to judicial review in proceedings brought in the Federal Court under section 39B of the *Judiciary Act 1903* or under the *Administrative Decisions (Judicial Review) Act 1977*.

The Commissioner can make a ruling on section 105-65

14. The Commissioner may, on application, make a private ruling on the way in which he considers a relevant provision applies or would apply to you in relation to a specified scheme.⁷ A relevant provision includes a provision that is about indirect tax or the administration or the collection of an indirect tax.⁸

15. Section 105-65 is a relevant provision because it is about the administration or collection of GST, which is an indirect tax.⁹ This means that the Commissioner may make a private ruling on the way in which section 105-65 applies or would apply to you. Such a private ruling can be about any aspect of the operation of section 105-65, including the discretion.¹⁰

⁴ Miscellaneous Taxation Ruling MT 2010/1 *Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953*.

⁵ *Naidoo v. Commissioner of Taxation* [2013] AATA 443; (2013) 2013 ATC 10-323.

⁶ *A New Tax System (Goods and Services Tax Act) 1999*.

⁷ Section 359-5.

⁸ Paragraphs 357-55(fb) and 357-55(g).

⁹ Subsection 995-1 of the *Income Tax Assessment Act 1997*.

¹⁰ The Commissioner may make a private ruling on how the discretion would apply (see paragraph 16 of Taxation Ruling TR 2006/11). However the Commissioner may also decline to make a private ruling if the appropriate course of action for him is to simply decide, for example, to exercise the discretion under section 105-65 (see section 359-35 and paragraph 39 of TR 2006/11).

You can object against a private ruling about section 105-65 if there is no assessment for the period to which the ruling relates

16. You may object to a private ruling that applies to you in the manner set out in Part IVC of the TAA if you are dissatisfied with it.¹¹ However, you **cannot object** against a private ruling if there is an assessment for you for the accounting period to which the ruling relates [see paragraph 359-60(3)(a)].

17. This means that if you are dissatisfied with a private ruling on the way in which section 105-65 applies or would apply to you, you may object to it. However, you can only do this if the Commissioner has not made an assessment of your net amount for the tax period to which the ruling relates – being the tax period in which you have accounted for the incorrect GST.

18. The decision of the Tribunal in *Naidoo*, confirms that section 105-65 cannot be taken into account in the assessment of the taxpayer's net amount for a tax period. The provision operates after the net amount for the tax period has been calculated. However, the restriction on objections in paragraph 359-60(3)(a) continues to apply. The words of the provision do not specify any connection between the subject matter of the assessment and the subject matter of the private ruling in order for the restriction in paragraph 359-60(3)(a) to apply.

19. For tax periods starting on or after 1 July 2012, the Commissioner is treated as having made an assessment of your net amount when you give your GST return to the Commissioner.¹² The assessment is treated as having been made on that date.¹³ This means that you cannot object against your private ruling about section 105-65 if it relates to a tax period for which you have lodged your GST return. This is because there is an assessment of your net amount for that tax period to which the ruling relates and takes into account the incorrect GST.

20. You may object to a private ruling about section 105-65 if it concerns a future tax period for which you have not given your GST return. However, given that section 105-65 is about GST refunds, this is unlikely to frequently occur in practice.

21. For tax periods starting before 1 July 2012, the Commissioner did not usually make an assessment of your net amount when you gave your GST return to him. However, the Commissioner could make an assessment of your net amount at any time, generally if you requested the Commissioner to do so, or if he did not agree with the net amount in your GST return.¹⁴ Again, if the Commissioner has made an assessment of your net amount (or any part of your net amount) for a tax period, then you cannot object against a private ruling relating to that tax period.¹⁵

¹¹ Subsection 359-60(1).

¹² Subsection 155-15(1).

¹³ Subsection 155-15(2).

¹⁴ Paragraphs 105-5(1)(a) and 105-10(1)(a). Note that under subsection 105-10(2), the Commissioner is obliged to comply with a taxpayer's request to make an assessment only if the request is made within four years after the end of the relevant tax period.

¹⁵ However, this does not prevent you from requesting the Commissioner to undertake an informal review of the private ruling.

References*Previous draft:*

GSTD 2013/D4

Related Rulings/Determinations:

TR 2006/10; TR 2006/11; MT 2010/1

Subject references:

- GST returns, payments & refunds
- GST objections
- GST private rulings

Legislative references:

- ANTS(GST)A 1999 7-5
- ANTS(GST)A 1999 17-5(1)
- ANTS(GST)A 1999 35-5
- ANTS(GST)A 1999 195-1
- ITAA 1997 995-1
- TAA 1953 8AAZLF(1)
- TAA 1953 8AAZLF(3)

- TAA 1953 Sch 1 105-5(1)(a)
- TAA 1953 Sch 1 105-10(1)(a)
- TAA 1953 Sch 1 105-10(2)
- TAA 1953 Sch 1 105-65
- TAA 1953 Sch 1 155-15(1)
- TAA 1953 Sch 1 155-15(2)
- TAA 1953 Sch 1 357-55(fb)
- TAA 1953 Sch 1 357-55(g)
- TAA 1953 Sch 1 359-5
- TAA 1953 Sch 1 359-35
- TAA 1953 Sch 1 359-60(1)
- TAA 1953 Sch 1 359-60(3)(a)
- ADJRA 1977
- Judiciary Act 1903 39B

Case references:

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

ATO references

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