M3K Services Pty Ltd and Commissioner of Taxation -

Decision impact statement

M3K Services Pty Ltd and Commissioner of Taxation

Court citation(s):	[2021] AATA 4416
Venue:	Administrative Appeals Tribunal
Venue reference no:	2021/0940
AAT member name:	Olding R, Senior Member
Judgment date:	26 November 2021
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice

This decision has no impact on any related advice or guidance.

Précis

This Decision impact statement outlines the ATO's response to this case which concerns whether the taxpayer passed on excess goods and services tax (GST) to its customers and, if it had, whether the excess GST was refundable to the taxpayer under section 142-15 of the *A New Tax System (Goods and Services Tax) Act 1999*.

All legislative references in this Decision impact statement are to the *A New Tax System (Goods and Services Tax) Act 1999*.

Brief summary of facts

The taxpayer supplied and administered cosmetic treatments and injectables.

GST treatment

The taxpayer's point of sale system could only account for sales being fully taxable or GST-free supplies. The taxpayer incorrectly assumed its cosmetic injectable supplies were fully taxable and accounted for GST on this basis until a later point. The Commissioner issued notices of assessment for the earlier tax periods on the footing that the excess amounts were to be treated as payable in accordance with section 142-10.

Documentation surrounding the transactions

During the relevant period, the taxpayer's receipts, terms and conditions of sale, and other documents provided to customers did not mention GST. On the rare occasion when a customer requested a tax invoice, the invoice would display GST.

Price-setting policy

The taxpayer priced its supplies according to what the market would bear, having regard to the pricing of its major competitors, and not by applying a margin to costs. Regular price reviews were conducted to maximise prices to the extent they did not exceed the pricing of competitors. GST was not explicitly considered in the price reviews.

Issues decided by the Tribunal

The two issues before the Tribunal were whether:

- the taxpayer passed on excess GST to customers under section 142-10, and
- if any such excess GST was refundable under section 142-15.

Issue 1 – was excess GST passed on?

The taxpayer contended that the High Court decision in *Avon Products Pty Limited v Commissioner of Taxation* [2006] HCA 29 (*Avon Products*) made its pricing policy the starting point in determining if excess GST was passed on. The Tribunal agreed, though noted that *Avon Products* did not confine the inquiry to a question of pricing policy alone.[1] The taxpayer argued that the excess GST was not passed on because its pricing policy did not seek to recover costs. However, the Tribunal found that the taxpayer '… did not set out to prove, and did not prove, that its prices did not recover costs in particular tax periods.'[2] Consequently, the evidence failed to establish that this case was unlike the usual position of a profitable business recovering all its costs, including GST and amounts mistakenly paid as GST, in the prices charged to customers. The tax invoices were consistent with the mistaken treatment of the supplies as fully taxable.[3] The Tribunal considered that it was not determinative that the taxpayer's prices remained unchanged after it started paying the correct amount of GST.[4] The Tribunal therefore decided that excess GST was passed on.[5]

Issue 2 – application of section 142-15

Having found that the taxpayer passed on the excess GST, the question for the Tribunal became whether section 142-15 applied to provide the taxpayer a refund of the excess GST.

The taxpayer argued that section 142-15 was not to be narrowly construed and that refunding the excess GST would not result in a windfall gain; rather, it would remove a commercial detriment it suffered relative to its competitors in the market.

The Tribunal held that section 142-15 '… does not confer a broad discretionary power of the type that is unconfined other than in its terms and by reference to its scope, purpose and subject matter.'[6] Rather, the operation of section 142-15 rests on whether the Commissioner (or the Tribunal standing in the Commissioner's shoes on review) is satisfied that applying section 142-10 would be inconsistent with the prevention of a windfall gain.[7]

When interpreting the meaning of a 'windfall gain' in section 142-15, the Tribunal considered dictionary definitions, noting that the word 'windfall' embodied the concept of a gain that was not only unexpected but also unearned, in the sense that it did not arise out of the recipient's activities.[8]

The Tribunal accepted that by charging excess GST[9], the taxpayer financially disadvantaged itself compared to some of its major competitors, inferring that the

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[1] *M3K Services Pty Ltd and Commissioner of Taxation* [2021] AATA 4416 *(M3K Services)* at [32].
[2] *M3K Services* at [23].
[3] *M3K Services* at [41].
[4] *M3K Services* at [40].
[5] *M3K Services* at [42].
[6] *M3K Services* at [54].
[7] *M3K Services* at [55].
[8] *M3K Services* at [75] and [76].
[9] *M3K Services* at [71].

market generally would have treated the injectable component of the supplies as GST-free, despite acknowledging there was no direct evidence of this.

However, the question of whether the taxpayer would be at a commercial disadvantage was not the question asked by section 142-15. The correct question was whether it followed from this commercial disadvantage that refunding the excess GST would not give the taxpayer a windfall gain.[10] The Tribunal concluded that it could not be said that the taxpayer would not obtain a windfall gain if the excess GST was refunded.[11]

While the Tribunal acknowledged that such a result may be argued as harsh or unfair, it observed that the correct construction of section 142-15 did not confer a broad-based discretion involving 'fairness' or 'harshness of the result' as relevant considerations.[12]

ATO view of decision

The decision on both issues is favourable to the Commissioner and is in line with the Commissioner's published material on the interpretation of Division 142.

Issue 1: Passing on excess GST

The Tribunal's decision highlights that the onus on the taxpayer is to demonstrate sufficient circumstances to conclude that it had not passed on excess GST. The Commissioner agrees with the Tribunal's observation that it will be a rare case in which GST is not passed on to a customer, in accordance with the High Court's comments on 'passing on' in the context of sales tax, as expressed in *Avon Products*.

The Tribunal addressed all four factors outlined in paragraph 28 of Goods and Services Tax Ruling GSTR 2015/1 *Goods and services tax: the meaning of the terms 'passed on' and 'reimburse' for the purposes of Division 142 of the A New Tax System (Goods and Services Tax) Act 1999* that the Commissioner regards as relevant in determining whether excess GST has been passed on. These factors are:

- the manner in which the excess GST arose
- the supplier's pricing policy and practice
- the documentary evidence surrounding the transaction, and
- any other relevant circumstances.

Issue 2: Application of section 142-15

The decision is in accordance with the Commissioner's approach to section 142-15, which is that it applies only in exceptional circumstances. The provision is interpreted as a confined power exercised according to its terms, rather than a broad-based discretion importing concepts of fairness, reasonableness or harshness of outcome.

Implications for impacted advice or guidance

The decision is in line with the Commissioner's public advice in GSTR 2015/1. It also provides clarity that the Tribunal's earlier decision on Division 142 in *WYPF and Commissioner of Taxation*[13] turned on the particular facts and circumstances of that case.

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[10] *M3K Services* at [73].
[11] *M3K Services* at [79].
[12] *M3K Services* at [83].
[13] [2021] AATA 3050.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	24 March 2022
Due date:	22 April 2022
Contact officer:	Contact officer details have been removed as the comments period has expired

Related Ruling/Determination

GSTR 2015/1

Legislative references

ANTS(GST)A 1999
Div 142
142-10
142-15

Case references

Avon Products Pty Limited v Commissioner of Taxation [2006] HCA 29; 230 CLR 356; 80 ALJR 1161
WYPF and Commissioner of Taxation [2021] AATA 3050; 2021 ATC 10-587

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