MT 2011/1 - Miscellaneous taxes: application of penalties and interest charges to the Commonwealth, States, Northern Territory and Australian Capital Territory

There is a Compendium for this document: **MT 2011/1EC** .

Miscellaneous Taxation Ruling

Miscellaneous taxes: application of penalties and interest charges to the Commonwealth, States, Northern Territory and Australian Capital Territory

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Preamble

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.

What this Ruling is about

1. This Ruling sets out the Commissioner's view on the application of the uniform penalty regime[1] and interest charges[2] to liabilities of a Commonwealth, State or Territory body[3]; including where section 114 of the *Commonwealth of Australia Constitution Act 1901* (the Constitution) is relevant.

2. This Ruling does not apply to Territories other than the Australian Capital Territory (ACT) and the Northern Territory (NT).[4]

[1] See paragraphs 23 to 27 of this Ruling for a description of the uniform penalty regime.
[2] See paragraphs 10, 11, 17 and 28 to 31 of this Ruling for a description of the interest charges considered in this Ruling.
[3] The meaning of Commonwealth body, State body and Territory body, as those terms are used in this Ruling, is explained at paragraphs 7, 18 and 21 of this Ruling respectively.
[4] Other Territories to which the Ruling does not apply include the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, Jervis Bay Territory, the Coral Sea Islands Territory, the Territory of Ashmore and Cartier Islands, Norfolk Island.

3. This Ruling does not consider statements of a kind referred to in items 3A, 3B and 3C of the table in subsection 284-90(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[5]. These items were inserted into the table by *Tax Laws Amendment (2010 Measures No. 1) Act 2010*, and relate to circumstances where a statement is false or misleading but does not result in the relevant entity having a shortfall amount.

4. This Ruling does not consider how the ATO will administer the view expressed in this Ruling. Reference must be made to Law Administration Practice Statement PS LA 2011/26 Administration of penalties and interest charges in relation to the notional liabilities of the States.

5. This Ruling does not consider the following:

- the guidelines for the exercise of the Commissioner's discretion under section 298-20 of Schedule 1 to the TAA to remit penalty otherwise attracted;[6]
- the guidelines for the exercise of the Commissioner's discretion under section 8AAG of the TAA to remit general interest charge (GIC) otherwise attracted or under section 280-160 of Schedule 1 to the TAA to remit the shortfall interest charge (SIC) otherwise attracted;[7] and
- the specific conditions that create a liability to the various administrative penalties in the uniform penalty regime.

Definitions

6. This section outlines the definition of various terms used in this Ruling.

Commonwealth body

7. The term 'Commonwealth body' refers to the Crown in right of the Commonwealth or any emanation or instrumentality, including a statutory corporation. This term also refers to an untaxable Commonwealth entity, an authority of the Commonwealth or a Commonwealth authority.

[5] All subsequent legislative references in this Ruling are to Schedule 1 to the TAA unless otherwise indicated.
[6] See Law Administration Practice Statement PSLA 2006/2 Administration of shortfall penalty for false or misleading statement.
[7] See Law Administration Practice Statement PSLA 2006/8 Remission of shortfall interest charge and general interest charge for shortfall periods.

Crown

8. The term 'Crown' refers to the executive governments in the Australian federal system which includes the central executive government (referred to as the Commonwealth) and executive governments of the States and Territories. The executive governments in the Australian federal system are headed by the Queen through her representatives.

Entity

9. The term 'entity' has the same meaning as in the uniform penalty regime provisions. The term 'entity' is defined in section 960-100 of the *Income Tax Assessment Act 1997* (ITAA 1997) to include an individual, a body corporate, a body politic, a partnership, any other incorporated association or body of persons, a trust, a superannuation fund or an approved deposit fund. The term entity includes a Commonwealth body, a State body or a Territory body.

General interest charge

10. The term 'general interest charge' refers to the GIC calculated under Part IIA of the TAA.

Interest charges

11. The term 'interest charges' is used to refer collectively to the GIC and the SIC.

Indirect tax

12. 'Indirect tax' is defined in section 995-1 of the ITAA 1997 to mean the GST[8], wine tax[9] or luxury car tax.[10]

Legal liability

13. In this Ruling, the term 'legal liability' refers to a liability that is assessed under a 'taxation law' and is imposed under the relevant imposition Act.

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[8] 'GST' is defined in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*.
[9] 'Wine tax' is defined in section 33-1 of *A New Tax System (Wine Equalisation Tax) Act 1999*.
[10] 'Luxury car tax' is defined in section 27-1 of *A New Tax System (Luxury Car Tax) Act 1999*.

Notional liability

14. The term 'notional liability'[11] refers to any amounts that are the notional equivalent of tax that would have been assessed under a taxation law and imposed under the relevant imposition Act. For a State body, notional liabilities arise because:

(a) section 114 of the Constitution prohibits the imposition of the tax in respect of the property of a State; and

(b) the body has an obligation arising under a State law or from Ministerial directions, to pay to the Commissioner the notional equivalent of what would have been payable under a taxation law if section 114 of the Constitution did not apply.

15. For a Commonwealth body, notional liabilities arise because various taxation laws include provisions that reflect Parliament's intention that, although the relevant law does not apply to the Commonwealth, Commonwealth bodies be notionally liable to pay an equivalent amount of tax.[12]

Shortfall amount

16. The term 'shortfall amount' refers to shortfall amounts calculated under section 284-80. Broadly, this amount is the amount by which a relevant liability is less than it would otherwise have been, or a payment or credit is more than it would otherwise have been, as a result of a statement that is false or misleading, or a statement that treats an income tax law as applying in a way that is not reasonably arguable.

Shortfall interest charge

17. The term 'shortfall interest charge' refers to the SIC assessed under Division 280.

State body

18. The term 'State body' is used to refer to the Crown in right of the States or any emanation or instrumentality, including a statutory corporation, of a State.

Taxation law

19. 'Taxation law' has the meaning given by section 995-1 of the ITAA 1997. That is:

[11] The concept of 'notional liability', as used in this Ruling, has no application or relevance to the operation of the National Tax Equivalent Regime (NTER), which is outside the scope of this Ruling.
[12] Paragraph 37 of this Ruling lists these provisions.

a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or

b) Regulations under such an Act (including such a part of an Act); or

c) the *Tax Agent Services Act 2009* or regulations made under that Act.

Tax-related liability

20. 'Tax-related liability' is defined in section 255-1 as 'a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable)'.

Territory body

21. In this Ruling, the term 'Territory body' is used to refer to the Crown in right of the ACT or NT or any emanation or instrumentality, including a statutory corporation, of the ACT or the NT.

Uniform penalty regime

22. In this Ruling, the term 'uniform penalty regime' refers to the scheme of uniform administrative penalties in Part 4-25.

Legislative Context

Uniform penalty regime

23. The uniform penalty regime imposes uniform administrative penalties on taxpayers for failing to satisfy certain obligations under different taxation laws for which the Commissioner has general administration.

24. The administrative penalties imposed under the uniform penalty regime can be broadly categorised as follows:

- penalties relating to statements and schemes; [13]
- penalties for failing to lodge documents on time; [14] and
- miscellaneous administrative penalties. [15]

Penalties relating to statements and schemes

25. Division 284 provides for a category of penalties, within the uniform penalty regime, relating to statements and schemes. In particular, Division 284 enables administrative penalties to apply to entities that fail to meet their obligations under taxation laws in relation to:

- making false or misleading statements – subsection 284-75(1) and 284-75(4);
- taking a position that is not reasonably arguable – subsection 284-75(2);
- entering into schemes – Subdivision 284-C; and
- failing to provide documents to the Commissioner – subsection 284-75(3).

Penalties for failing to lodge documents on time

26. Division 286 provides for a category of penalties, within the uniform penalty regime, which enable administrative penalties to apply for failure under taxation laws to give returns, notices, statements or other documents on time.

Miscellaneous administrative penalties

27. Division 288 includes various miscellaneous administrative penalties for failing to comply with obligations under taxation laws.

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[13] See Miscellaneous Taxation Rulings MT 2008/1, MT 2008/2 and MT2008/3 and Law Administration Practice Statements PS LA 2006/2 and PS LA 2008/18 Interaction between Subdivisions 284-B and 284-C of Schedule 1 to the TAA.

[14] See Law Administration Practice Statement PS LA 2011/19 Administration of penalties for failing to lodge documents on time.

[15] See Law Administration Practice Statements PS LA 2007/3 Remission of penalty for failure to comply with obligations in relation to tax invoices, adjustment notes or third party adjustment notes and PS LA 2007/4 Remission of penalty for failure to comply with GST registration obligations.

Interest charges

General interest charge

28. Subsection 8AAB(2) of the TAA provides that an entity will be liable to pay the GIC if a provision in the TAA or in other Acts specifies that the person is liable to pay the charge. Subsections 8AAB(4) and 8AAB(5) of the TAA list the provisions in various Acts that make an entity liable for the charge.

29. Subsection 8AAB(3) of the TAA provides that the GIC does not apply to the Commonwealth or an authority of the Commonwealth.

Shortfall interest charge

30. Division 280 imposes a liability to the SIC on shortfalls of income tax, petroleum resource rent tax or excess contributions tax that are revealed when the Commissioner amends an assessment relating to those taxes.

31. Subsection 280-103(2) provides that neither the Commonwealth nor an authority of the Commonwealth is liable to pay the SIC.

Application of taxes to Crown in right of the States, the ACT and the NT

32. The taxation laws listed below apply to a State or Territory body. Some taxation laws include a clear statement that the Act binds the Crown in right of each of the States, the ACT and the NT. The relevant provisions are listed next to the Act:

- *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) – section 1-4;
- *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act) – section 1-4;
- *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act) – section 1-3;
- *Fuel Tax Act 2006* (FTA) – section 1-15;
- *Fringe Benefits Tax Assessment Act 1986* (FBTAA) – subsection 163(3);[16]
- *Fringe Benefits Tax Act 1986* (FBT Act) – section 4;[17]
- *Energy Grants (Credits) Scheme Act 2003* (EGCSA) – section 2A*;* and

[16] Subsection 163(3) of the FBTAA does not bind the ACT however section 135S of the FBTAA which deals with nomination of eligible State or Territory bodies provides for bodies to be nominated from the ACT.

[17] Section 4 of the *Fringe Benefits Tax Act 1986* does not bind the ACT.

- *Product Grants and Benefits Administration Act 2000 (*Product Grants Act) – section 4.

33. In relation to income tax, the *Income Tax Assessment Act 1936* (ITAA 1936) and the ITAA 1997 do not include provisions that specifically bind the States, the ACT and NT. However, Division 1AB of Part III of the ITAA 1936 and section 50-25 of the ITAA 1997 exempt income of certain government entities that are in the nature of government from the application of those Acts.[18] The National Tax Equivalent Regime (NTER), which is outside the scope of this Ruling, notionally applies federal income tax laws to listed entities; notional tax, notional penalties and notional interest may be payable under that regime.[19]

34. There is no specific provision in the *Excise Act 1901* (Excise Act) applying that Act to State or Territory bodies. However, it is considered that the Excise Act discloses an intention to regulate the manufacture and importation of particular goods irrespective of the identity of the proposed importer, and would be rendered less effective if it did not do so. The better view is considered to be that the Excise Act binds State and Territory bodies.

Application of section 114 of the Constitution to liabilities of a State or Territory

35. The imposition of the taxes is subject to section 114 of the Constitution which prohibits the Commonwealth and the States from imposing a tax on property belonging to a State or the Commonwealth respectively. Various imposition Acts[20] provide that the imposition Act does not impose a tax on any property belonging to a State.

36. Section 114 of the Constitution does not apply to the Territories.

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[18] State/Territory bodies (STB) that meet the definition of 'excluded STB' in section 24AT of the ITAA 1936 are not exempt from income tax.

[19] See the NTER Manual.

[20] Some examples include section 5 of the: *A New Tax System (Goods and Services Tax Imposition – General) Act 1999; A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999; A New Tax System (Goods and Services Tax – Customs) Act 1999; A New Tax System (Luxury Car Tax Imposition – General) Act 1999; A New Tax System (Luxury Car Tax Imposition – Excise) Act 1999; A New Tax System (Luxury Car Tax Imposition – Customs) Act 1999; A New Tax System (Wine Equalisation Tax Imposition – General) Act 1999; A New Tax System (Wine Equalisation Tax Imposition – Excise) Act 1999*; *A New Tax System (Wine Equalisation Tax Imposition – Customs) Act 1999*; and section 7 of the *Fringe Benefits Tax Act 1986.*

Immunity of the crown in right of the Commonwealth from taxation laws

37. Commonwealth bodies are not liable to pay taxes under certain taxation laws. However, specific provisions in those taxation laws reflect Parliament's intention that the Commonwealth body be notionally liable to pay an equivalent amount of tax and have a notional entitlement to any credits or adjustments that would arise. The relevant provisions in various Acts are listed below:

- section 177-1 of the GST Act;
- section 27-20 of the WET Act;
- section 21-1 of the LCT Act;
- section 95-10 of the FTA; and
- section 2A of the *Fringe Benefits Tax (Application to the Commonwealth*) *Act 1986.*

Ruling

The Commonwealth

38. Relevant taxation laws referred to in paragraph 37 of this Ruling do not bind a Commonwealth body. A Commonwealth body is not legally liable to tax under these laws. Instead, liabilities arising under the taxation laws are notional liabilities.

39. A Commonwealth body is not liable to a penalty under the uniform penalty regime in relation to its notional liabilities.

40. A Commonwealth body is not liable to interest charges. A Commonwealth body is exempt from the GIC under subsection 8AAB(3) of the TAA and from the SIC under subsection 280-103(2) of Schedule 1 to the TAA.

The States

41. The uniform penalty regime applies in relation to the legal taxation liabilities of a State body. It does not apply in relation to a State's notional taxation liabilities. This is because a notional liability does not form part of a tax-related liability or amount of tax imposed under a taxation law.[21]

42. The GIC and SIC apply to a State body in relation to its legal liabilities. They do not apply in relation to its notional liabilities.

[21] See paragraphs 84 to 88 of this Ruling.

43. A liability that arises under a State law is a notional liability to Commonwealth tax and not a legal taxation liability. The taxation liability is notional because, although prohibited by section 114 of the Constitution, it is paid pursuant to State legislation consistent with the Intergovernmental Agreement on Federal Financial Relations.[22] State laws may also provide for notional penalties and notional interest charges with respect to notional liabilities to Commonwealth tax. However, this Ruling does not consider notional penalties or notional interest which may be paid pursuant to State laws.

The Territories

44. The uniform penalty regime applies in relation to all taxation liabilities of the Territories. This is because the terms of section 114 of the Constitution do not extend to the Territories, and so the tax-related liabilities of the Territories are always legal liabilities.

45. Similarly, the GIC and SIC apply to a Territory body in relation to all of its taxation liabilities.

46. The following table summarises the penalty and interest obligations of Commonwealth, State and Territory bodies:

	Legal taxation liability	**Notional taxation liability**	**Uniform penalty regime**	**Interest (SIC/GIC)**
Commonwealth	None	All	No	No
State	Some	Some	Yes – but only for legal taxation liabilities	Yes – but only for legal taxation liabilities
Territory	All	None	Yes	Yes

Date of effect

47. This Ruling applies to tax periods 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 settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

[22] Or its predecessor, the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations.

Transitional administrative treatment

48. In accordance with the moratorium the Commissioner had previously placed on the assessment of penalties and the application of interest charges in relation to net amounts of State and Territory entities that share the immunities of the Crown [23], the Commissioner will not seek to disturb previous decisions relating to application of the uniform penalty regime and interest charges to liabilities of State and Territory bodies. Similarly, the Commissioner will not assess penalties and apply interest charges, in accordance with the views in this Ruling, in relation to liabilities of State and Territory bodies in relation to tax periods commencing prior to 1 July 2011.

Related Ruling

49. Goods and Services Tax Ruling GSTR 2006/5 Goods and services tax: meaning of 'Commonwealth, a State or a Territory' discusses the meaning of those terms for the purposes of certain provisions in the GST Act.

Commissioner of Taxation
29 June 2011

[23] See paragraph 2 of PS LA 2011/26.

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.

Relevance of the concept of crown immunity – presumption that legislation does not bind the Crown

50. There is a general presumption that when Parliament legislates it does not intend to bind the Crown, assuming the legislation does not expressly indicate what the intention is. This concept is referred to as 'crown immunity'. The concept of 'crown immunity' was developed by English courts, forms part of Australian law and needs to be considered to determine whether the uniform penalty regime, GIC and SIC legislation applies to the Commonwealth, States and Territories. This is because the TAA, unlike many more recent Acts, does not have an express provision indicating the extent to which the Crown is bound by that Act.[24]

51. Until the decision in *Bropho v. Western Australia* (1990) 171 CLR 1; [1990] HCA 24 (*Bropho*), the presumption that the Crown is not bound by legislation could only be overcome by a clear statement or by necessary implication. However, the High Court in *Bropho* stated that this approach to the Crown's presumptive immunity tended 'to discount the significance of its character as an aid to statutory construction and treated it as an inflexible principle'.[25] The relevance of this strict approach has diminished. As stated by Mason CJ, Dean, Dawson, Toohey, Gaudron and McHugh JJ at page 19:

> …the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise.[26]

52. Therefore, the High Court in *Bropho* held that in many cases it will be possible to rebut the presumption notwithstanding the absence of express words or necessary implication indicating Parliament's intent to bind the Crown. As stated by Mason CJ, Dean, Dawson, Toohey, Gaudron and McHugh JJ at pages 21-22:

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[24] For discussion of whether crown immunity applies in the context of other taxation laws refer to paragraphs 32 to 37 of this ruling.
[25] *Bropho* 171 CLR 1 at 16 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24 at paragraph 12.
[26] *Bropho* 171 CLR 1 at 19 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24 at paragraph 15.

> …once it is accepted that a legislative intention to bind the Crown may be disclosed notwithstanding that it could not be said that that intention was 'manifest from the very terms' of the statute or that the purpose of the statute would otherwise be 'wholly frustrated', fundamental principle precludes confinement of the general words which the legislature has used in a way which will defeat that intention. Such a legislative intent must, of course, be found in the provisions of the statute — including its subject matter and disclosed purpose and policy — when construed in a context which includes permissible extrinsic aids.[27]

53. When considering whether the presumption against the legislation applying to the Crown has been rebutted in accordance with the principle in *Bropho*, it is also necessary to consider the principles from *Cain v. Doyle*; (1946) 72 CLR 409; [1946] HCA 38 (*Cain v Doyle*).

54. In *Cain v. Doyle*, the High Court considered whether the Commonwealth can be made liable to a penalty under subsection 18(1) of the *Re-establishment and Employment Act 1945* which provided that an employer who had reinstated a former employee shall not terminate the employment of that employee without reasonable cause. At the foot of the subsection was a penalty of one hundred pounds. Section 41 of the *Acts Interpretations Act 1901-1937* provided that a penalty set out at the foot of any section of an Act indicates that any contravention of the section is an offence against that Act punishable upon conviction by a penalty not exceeding the penalty mentioned. The High Court stated: 'There is … the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature'.[28]

55. The High Court concluded that the Crown in right of the Commonwealth cannot be convicted of offences or have a fine imposed. The following factors were relevant for the decision:

- any proceedings against the Commonwealth would result in the Commonwealth prosecuting the Commonwealth;
- any fine imposed upon the Commonwealth will be a debt of record to the Commonwealth resulting in the Commonwealth paying a fine to itself; and
- the Crown had the power to remit any penalty imposed for a breach of Federal law.

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[27] *Bropho* 171 CLR 1 at 21-22 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24 at paragraph 17.

[28] Per Dixon J in *Cain v. Doyle* (1946) 72 CLR 409 at 424; [1946] HCA 38.

56. In *State Authorities Superannuation Board v. Commissioner of State Taxation for the State of Western Australia* (1996) 189 CLR 253; (1996) 96 ATC 5167; (1996) 34 ATR 531, the High Court considered whether the State Authorities Superannuation Board, a statutory corporation constituted in New South Wales whose primary function was to manage and administer superannuation schemes for New South Wales public service employees, was liable to pay stamp duty and any related penalties under the *Stamp Act 1921* (WA) (Stamp Act). Under section 4(1) of the Stamp Act, the Crown was the Crown in right of Western Australia. In relation to liability to pay stamp duty, the High Court applied the decision in *Bropho* and held that 'by the exemptions which it grants in favour of the Crown, the Stamp Act manifests a clear intention that the Crown should otherwise be bound by its provisions…'[29]

57. In deciding this issue, McHugh and Gummow JJ highlighted the point made by Latham CJ in *Cain v. Doyle* that where a particular statutory regime provides for both civil remedies as well as for enforcement by the criminal law, the Crown may be liable to civil remedies but be immune from prosecution if such intent can be derived from the statutory scheme on its proper construction.[30]

Rebuttal of presumption in the context of the uniform penalty regime applying to State and Territory bodies

58. The uniform penalty regime includes provisions that apply generally to all entities including government bodies. The provisions in the TAA use the term 'you' or 'entity' when referring to the type of entity that is covered by the provisions. The term 'you' refers to entities generally unless expressly limited.[31] The definition of 'entity' includes a 'body politic'. To determine whether the presumption against the uniform penalty regime binding the Crown has been rebutted, the statutory scheme as a whole must be taken into account.

59. The uniform penalty regime was inserted in Schedule 1 to the TAA as part of amendments that streamlined the various penalty provisions that existed in different taxation laws.[32] The uniform penalty regime provides a framework under which a penalty is imposed where a taxpayer fails to satisfy the same type of obligation which may be imposed under different taxation laws.

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[29] Per Brennan CJ, Dawson, Toohey and Gaudron JJ in *State Authorities Superannuation Board v. Commissioner of State Taxation for the State of Western Australia* (1996) 189 CLR 253 at 269; 96 ATC 5167 at 5171; (1996) 34 ATR 531 at 536.

[30] *State Authorities Superannuation Board v. Commissioner of State Taxation for the State of Western Australia* (1996) 189 CLR 253 at 277; 96 ATC 5167 at 5175; (1996) 34 ATR 531 at 542.

[31] Subsection 3AA(2) of the TAA provides that expressions in Schedule 1 to the TAA have the same meaning as the ITAA 1997. Section 995-1 of ITAA 1997 defines 'you to have the same meaning as section 4-5 of the ITAA 1997. Section 4-5 provides that the term 'you' applies to entities generally unless expressly limited.

[32] Inserted by *A New Tax System (Tax Administration) Act (No. 2) 2000*.

60. There are some features of the uniform penalty regime which bear some of the characteristics of a penalty tax system rather than a traditional administrative penalty scheme. For example, Division 284 requires the Commissioner to assess culpability of the relevant entity's behaviour in determining the base penalty amount. Distinguishing levels of culpability on the basis of intention or recklessness is a concept drawn from criminal law. Having regard to this feature, a conclusion might be drawn that the presumption against statutory provisions binding the Crown is probably applicable in respect of the uniform penalty regime.

61. However, there are countervailing features of the regime which suggest that the presumption may be rebutted. These features are that the operation of the penalty scheme is relatively automatic, with the amount of the penalty set in the legislation (even where the amount is adjusted as a result of considerations of culpability). In contrast, in a civil penalty system, the penalty is enforced in a manner akin to criminal prosecution where the value of the penalty is a matter for a court once a breach of a provision has been proved.[33] The scheme of penalties under the uniform penalty regime can be distinguished from the penalty considered by the High Court in *Cain v. Doyle* as it would not require the Crown to be convicted before the penalty would be applied.

62. It is the Commissioner's view that the uniform penalty regime does apply to State and Territory bodies. This is because having regard to the nature of the penalties imposed, the manner in which they are imposed and their application to entities generally, the Commissioner considers that the general presumption against the uniform penalty regime applying to the Crown is rebutted.

Rebuttal of presumption in relation to GIC and SIC applying to State and Territory bodies

63. Similar to penalties under the uniform penalty regime, the GIC and the SIC are also imposed automatically by operation of law.

64. The GIC is imposed by operation of provisions in various taxation laws. The GIC is calculated under Part IIA of the TAA and applies interest at the base interest rate calculated under subsection 8AAD(2) of the TAA plus 7 percentage points.

65. The SIC is imposed under Division 280 on shortfalls of income tax, petroleum resource rent tax or excess contributions tax that are revealed when the Commissioner amends an assessment relating to those taxes. The SIC replaced the GIC on those types of shortfalls and applies a lower interest rate than the GIC.

[33] See for example the operation of the civil penalties in the *Trade Practices Act 1974* or the *Corporations Act 2001*.

66. Respective provisions of the TAA relating to the GIC and SIC state that these interest charges do not apply to the Commonwealth or an authority of the Commonwealth.[34] It may be inferred, from the specific exemption of the Commonwealth or an authority of the Commonwealth from GIC and SIC, that the legislature intended these interest charges would apply to the States and Territories.

67. Accordingly, it is the Commissioner's view that, having regard to the manner in which the GIC and SIC are imposed and their application to entities generally, the presumption that the Crown is not bound by the GIC and SIC is rebutted in relation to the States and Territories.[35] The GIC and SIC provisions can apply to a State or Territory body.

Constitutional issues regarding taxation – section 114 of the Constitution

68. The Commonwealth's legislative power in relation to taxation[36] is subject to section 114 of the Constitution.[37] Section 114 provides that:

> A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

69. The High Court of Australia has considered the application of section 114 of the Constitution in cases involving taxes that are within the general administration of the Commissioner. These include fringe benefits tax[38], income tax[39], capital gains tax[40], sales tax[41] and excise.[42]

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[34] Subsection 8AAB(3) of the TAA in relation to GIC and subsection 280-103(2) of Schedule 1 to the TAA in relation to SIC.

[35] Section 7 of the *Australian Capital Territory (Self-Government) Act 1988* and section 5 of the *Northern Territory (Self-Government) Act 1978* establish a separate body politic for the respective Territories. Section 69A of the *Australian Capital Territory (Self-Government) Act 1988* and section 51 of the *Northern Territory (Self-Government) Act 1978* provide broadly that where an Act binds each of the States the Act also binds the Territory (unless the Act specifically provides otherwise).

[36] Paragraph 51(ii) of the Constitution

[37] For the purposes of applying section 114 of the Constitution, it is not directly relevant whether the body in question shares the immunities of the Crown (as discussed in paragraphs 50 to 67 of this Ruling).

[38] *The State of Queensland v. The Commonwealth of Australia* (1987) 162 CLR 74; 87 ATC 4029; (1987) 18 ATR 158 (*The First FBT Case*).

[39] *The State of South Australia and Another v. The Commonwealth of Australia and Another* (1992) 174 CLR 235; 92 ATC 4066; (1992) 23 ATR 10 (*South Australia*).

[40] *South Australia*

[41] *Deputy Commissioner of Taxation v. State Bank of New South Wales* (1992) 174 CLR 219; 92 ATC 4079; (1992) 23 ATR 1 (*The State Bank Case*).

[42] *Attorney-General of NSW v. Collector of Customs for NSW* (1908) 5 CLR 818; [1908] HCA 28; 14 ALR 516 (*Steel Rails Case*).

70. Although section 114 of the Constitution is worded in broad terms, in that it applies to 'any tax' and 'on property of any kind', the course of judicial decisions since 1904 indicates a preference for a narrow or strict interpretation.[43] The circumstances in which the High Court has determined if a tax is a 'tax on property of a State' and whether a body is 'a State' for the purposes of section 114 are discussed below. The discussion below does not consider whether a tax is a tax on property of the Commonwealth because the Commonwealth is not subject to its own taxation laws, and in any case the question of section 114 does not arise in that context.[44]

71. If section 114 of the Constitution applies in a particular circumstance, the relevant body does not have a legal taxation liability. However, there may be provisions in State legislation which provide the legal authority for State entities to voluntarily comply with the relevant legislation where it does not otherwise apply.[45] Amounts paid under these State legislative schemes are referred to as 'notional liabilities' for the purposes of this Ruling.

'Tax on property' of a State

72. The High Court in *State of Queensland v. Commonwealth of Australia* (1987) 162 CLR 74; (1987) 87 ATC 4029; (1987) 18 ATR 158 (*The First FBT case*) stated that the expression 'tax on property' in the context of section 114 of the Constitution is a concept that should be given its ordinary meaning:

> In its context in s. 114 of the Constitution, a 'tax on property' is neither a term of art nor a concept with clearly settled legal meaning. Nor, in that context, do the words express a concept susceptible of elucidation by means of a formula reflecting precise criteria. Rather, the section refers to a 'tax on property' as that expression is ordinarily understood.[46]

73. It is the character or substance of the tax that will help in determining whether a tax should be properly classed as a tax on property. A tax framed as a tax on transactions will nevertheless be a tax on property if the tax in substance is a tax on ownership or holding of property. In *The State of South Australia and Another v. The Commonwealth of Australia and Another (1992) 174 CLR 235; 92 ATC 4066; (1992) 23 ATR 10 (South Australia)*, it was stated that:

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[43] *South Australia* 174 CLR 235 at 247; 92 ATC 4066 at 4069; (1992) 23 ATR 10 at 14.
[44] Refer to paragraph 37 of this Ruling.
[45] For example, in relation to GST, see paragraph 93 of this Ruling.
[46] Per Mason, Brennan and Deane JJ in *The State of Queensland v The Commonwealth of Australia* 162 CLR 74 at 96; 87 ATC 4029 at 4040; (1987) 18 ATR 158 at 170.

> Although the distinction between tax on property and a tax on transactions has continued to be a very important factor in the interpretation and application of the section, it has been acknowledged that a tax framed as a tax on transactions may nevertheless in some circumstances amount to a tax on property, that is, a tax on the ownership or holding of property. That is because the prohibition contained in s 114 is a matter of substance rather than of form and because a tax imposed by reference to the ownership or holding of property may take the form of a tax on transactions.[47]

74. The High Court decisions which have considered the question of whether a particular tax is a tax on property are outlined below. For those taxes not covered by the discussion in paragraphs 75 to 80 of this Ruling, refer to PS LA 2011/26 for the procedure that the Commissioner will follow in such cases.

Fringe benefits tax

75. The High Court in *The First FBT case* held that fringe benefits tax was not a tax on property for the purposes of section 114 of the Constitution. The High Court considered the following in making its decision:

- the tax is imposed on private use of a car by the employee or its associates;
- the tax is imposed because the employer provides a benefit to the employee in connection with employment;
- a benefit is not limited to benefits associated with property and includes any right, privilege, service or facility;
- the fringe benefits tax attracted would be the same regardless of whether the State owned or hired the property used to provide the fringe benefit; and
- a tax will only be a tax on property where it is tied to property by the circumstances which the legislation makes decisive of the liability to pay it.[48]

[47] *South Australia* 174 CLR 235 at page 249 per Mason CJ, Deane, Toohey and Gaudron JJ; 92 ATC 4066 at 4070; (1992) 23 ATR 10 at 16.
[48] *The State of Queensland v. The Commonwealth of Australia* (1987) 162 CLR 74 at 98-104; 87 ATC 4029 at 4041-4044; (1987) 18 ATR 158 at 172-176.

Income tax[49]

76. The High Court in *South Australia* considered whether income tax on interest income received from monies lent and on net capital gains made on the disposal of property was a tax for the purposes of section 114 of the Constitution. The High Court decided that income tax on interest income on monies lent was not a tax on property for the following reasons:

- the tax is imposed not upon the ownership or holding or property belonging to the taxpayer but upon gains of a revenue kind in the form of interest on money lent derived by the taxpayer in the relevant period;
- the tax is imposed upon the taxable income derived during the year of income by the taxpayer and assessable income and taxable income are concepts, not descriptions of property of the taxpayer; and
- the income tax assessment acts focus on the notion of derivation which is divorced from the ownership and holding of property.[50]

77. However, the High Court in *South Australia* did acknowledge that income tax could be a tax on property in certain circumstances. As stated by Mason CJ, Deane, Toohey and Gaudron JJ at page 252:

> However, it is conceivable that the particular relationship between a type of income and the property which produces it might be such that the income tax imposed by the Act on taxable income calculated by reference to that type of income is, for relevant purposes, a tax on the property.

78. In relation to tax on net capital gains, the High Court in *South Australia* held that it was a tax on property for the purposes of section 114 of the Constitution for the following reasons:

- the tax on the net capital gains is imposed as a result of disposal by the State of property it owned;
- the disposal of the property is an exercise of a right arising from ownership of the property; and
- the amount of capital gain on which the tax is imposed is calculated by reference to the State's period of ownership. [51]

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[49] To the extent that an entity is subject to income tax – see paragraph 33 of this Ruling.
[50] *South Australia* 174 CLR 235 at 250-252; 92 ATC 4066 at 4071-4072; (1992) 23 ATR 10 at 17-19.
[51] *South Australia* 174 CLR 235 at 254-255; 92 ATC 4066 at 4073; (1992) 23 ATR 10 at 20.

Sales tax

79. In *Deputy Commissioner of Taxation v. State Bank of New South Wales* (1992) 174 CLR 219; (1992) 92 ATC 4079; (1992) 23 ATR 1 (*The State Bank Case*), the High Court considered whether sales tax was a tax on property for the purposes of section 114 of the Constitution. The sales tax was assessed on the State Bank of New South Wales on its use of paper that it manufactured. The High Court held that the sales tax was a tax on property for the purposes of section 114 for the following reasons:

- the sales tax was imposed on the State Bank of New South Wales on its use of property;
- sales tax attaches to the use of the property, which is an exercise of a right central to the ownership of the property; and
- the character of the sales tax was of a tax on property as sales tax imposed under the relevant provision was imposed on three ways in which the owner of the property exercised their right of ownership.[52]

Excise

80. Excise is not a tax on property for the purposes of section 114 of the Constitution. In *Attorney-General of NSW v. Collector of Customs for NSW* (1908) 5 CLR 818; [1908] HCA 28; 14 ALR 516 (*Steel Rails Case*), the High Court held that Commonwealth customs duty imposed on steel rails imported by NSW from overseas was not a tax on property. Rather it was a tax on movement of goods. Further, in *South Australia*, Dawson J explained:

> No doubt customs duties and, for that matter, excise duties, may be said to be taxes on goods because the incidence of the tax is determined by some step taken in relation to the goods. But because the taxes are levied upon a step taken in relation to the goods – a transaction – and not upon the goods themselves, as in the case of a tax upon the simple holding or ownership of the goods, they are not a tax upon property *qua* property.[53]

Meaning of 'State'

81. The High Court has judicially considered whether a body is 'the State' for the purposes of section 114 of the Constitution. A majority of these cases involved statutory corporations. However, the Commissioner considers that the principles developed by the High Court apply equally to other structures, such as a trust.

82. These principles are discussed in GSTR 2006/5.

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[52] *The State Bank Case* 174 CLR 219 at 226-229; 92 ATC 4079 at 4081-4082; (1992) 23 ATR 1 at 3-5.
[53] *South Australia* 174 CLR 235 at 259; 92 ATC 4066 at 4075-4076; (1992) 23 ATR 10 at 23.

Section 114 of the Constitution and the Territories

83. By its terms, the immunity in section 114 of the Constitution does not extend to the Territories. Consequently, the Commonwealth may impose a tax on the property of a Territory or a body that is part of a Territory.

Application of the uniform penalty regime and interest charges to Commonwealth bodies, State bodies and Territory bodies

84. Penalties under Division 284 require the existence of a tax-related liability for the base penalty amount to be calculated.[54] A 'tax-related liability' is defined in section 255-1 as:

> a pecuniary liability to the Commonwealth arising directly under a *taxation law (including a liability the amount of which is not yet due and payable).

85. In circumstances where section 114 of the Constitution prohibits the imposition of an amount of tax under a taxation law, a body may have an obligation arising under a State law or from Ministerial directions, to pay to the Commissioner the notional equivalent of what would have been payable under a taxation law. This amount is a 'notional taxation liability' that is not a tax-related liability.

86. Penalties under Division 284 cannot apply to any shortfall of a notional taxation liability as that liability is not a tax-related liability.

87. However, the imposition of penalties under Divisions 286[55] and 288[56] does not rely on the existence of a tax-related liability but on a failure to comply with an obligation arising under taxation law. The penalties imposed under these Divisions would apply to State and Territory bodies.[57]

88. Similar to penalties under Division 284, liability to the GIC or SIC also relies on the existence of tax-related liability. Therefore, the GIC and SIC do not apply to a notional taxation liability.

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[54] A liability under subsection 284-75(3) requires the existence of a tax-related liability. The remaining provisions in Division 284 require a shortfall amount or scheme shortfall amount, which also relate back to the existence of a tax-related liability.
[55] See paragraph 26 of this Ruling.
[56] See paragraph 27 of this Ruling.
[57] See discussion at paragraphs 58 to 62 of this Ruling.

Goods and services tax

Application to Commonwealth bodies

89. Subsection 177-1(1) of the GST Act provides that the Commonwealth and untaxable Commonwealth entities are not liable to pay GST payable under that Act. However, it is the Parliament's intention that the Commonwealth and untaxable Commonwealth entities should be notionally liable to pay GST and be notionally entitled to input tax credits.

90. Subsection 177-1(2) of the GST Act provides that the Finance Minister may give such directions as are necessary or convenient to give effect to the requirement of subsection 177-1(1) of the GST Act and, in particular, may give directions in relation to the transfer of money within an account, or between accounts operated by the Commonwealth or an untaxable Commonwealth entity.

91. The uniform penalty regime and interest charges will not apply to a Commonwealth body in relation to GST. Penalties under Division 284 of Schedule 1 to the TAA do not apply as the liability to pay GST is a notional liability. Penalties under Divisions 286 and 288 of Schedule 1 to the TAA do not apply to a Commonwealth body because the GST Act does not apply to the Commonwealth generally.

Application to State and Territory bodies

92. Section 114 of the Constitution created difficulties for the design of the GST. As noted recently by Perram J in *TT-Line Company Pty Ltd v. Federal Commissioner of Taxation*:[58]

> Section 114 of the Constitution prohibits the imposition by the Commonwealth of 'any tax on property of any kind belonging to a State'. That prohibition made impossible the imposition by the Commonwealth upon the States of a tax on supplies of the kind contemplated in the legislation introducing the GST. At least in relation to the provision of supplies of property, the interposition of a State at any point along the supply chain would have disrupted the process of credits upon which the system depends. The introduction of the GST could not practically proceed therefore unless the States voluntarily agreed to subject themselves to it.

[58] At paragraph 66: (2009) 181 FCR 400; [2009] FCAFC 178; 2009 ATC 20-157; (2009) 74 ATR 771.

93. To overcome these difficulties, the Commonwealth and each of the States and Territories came to an agreement under the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*[59] that they will operate as if they were subject to the GST legislation. They will be entitled to register, will pay GST or make voluntary or notional payments where necessary and will be entitled to claim input tax credits in the same way as non-Government organisations.[60]

94. The States achieved this by enacting specific legislation[61] providing the legal authority for State entities to voluntarily comply with the GST legislation where it would not otherwise apply. These Acts broadly provide the relevant State's bodies with the authority to voluntarily pay notional GST, and to do things that would be necessary or expedient to do if they were liable for the GST, where the amount would have been payable but for section 114 of the Constitution[62] and the exclusion in section 5 of each of the GST Imposition Acts.[63]

95. While the uniform penalty regime applies to a State body or a Territory body, the uniform penalty regime, specifically Division 284 cannot apply in relation to any notional GST liability of a State body for reasons outlined in paragraphs 84 to 87 of this Ruling. Penalties under Divisions 286 and 288 apply to a State or Territory body.

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[59] It is noted that the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* was replaced by the *Intergovernmental Agreement on Federal Financial Relations* in 2008.

[60] Paragraph 17 of the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* or paragraph A28 of its successor, the *Intergovernmental Agreement on Federal Financial Relations.*

[61] The relevant State Acts are: *GST and Related Matters Act 2000* (QLD), *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW), *National Tax Reform (State Provisions) Act 2000* (SA), *National Taxation Reform (Commonwealth-State Relations) Act 1999* (TAS), *National Taxation Reform (Consequential Provisions) Act 2000* (Vic), *State Entities (Payments) Act 1999* (WA).

[62] The manner in which each of the State Acts achieves this is slightly different; the main difference being how the liability is defined. In New South Wales, Queensland, Victoria and Western Australia, the liability is the amount of tax payable, under the GST law, which is defined and imposed as GST. In South Australia, the liability is the amount of tax payable under the GST law. In Tasmania, a State entity is required to comply with the GST law as if the imposition of GST was not prevented by section 114 of the Constitution, and section 5 of each of the GST Imposition Acts had not been enacted.

[63] *A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999; A New Tax System (Goods and Services Tax Imposition –Excise) Act 1999;* and *A New Tax System (Goods and Services Tax Imposition –General) Act 1999*.

96. Under section 105-80 a State or Territory body has a liability to the GIC where any of the GST which the body is liable to pay remains unpaid after the time by which the liability is due to be paid. The GIC can only apply to a legal liability and does not apply to any notional GST liability for reasons outlined in paragraph 90 of this Ruling. All liabilities of a Territory body are legal GST liabilities.[64] A State body may have a legal GST liability, a notional GST liability or both.[65]

97. The SIC does not apply to GST.

Fringe benefits tax

Application to Commonwealth bodies

98. Sections 4 and 5 of the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* provide for the notional application of fringe benefits tax in relation to benefits provided in respect of the employment of Commonwealth employees.

99. Section 7 of the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* provides that the Finance Minister may give such directions as are necessary or convenient to give effect to that Act.

100. The uniform penalty regime and interest charges do not apply to a Commonwealth body in relation to FBT. Penalties under Division 284 of Schedule 1 to the TAA do not apply as the liability to pay FBT by the Commonwealth is a notional liability. Penalties under Divisions 286 and 288 of Schedule 1 to the TAA do not apply to a Commonwealth body because the FBT Act does not apply to the Commonwealth generally.

Application to State and Territory bodies

101. The uniform penalty regime applies to a State or Territory body as they are required to comply with obligations under the FBT Act.

102. As stated in paragraph 75 of this Ruling, the High Court has held that FBT is not a tax on property of a State for the purposes of section 114 of the Constitution. Therefore, liability to FBT is always a legal taxation liability.

103. Under section 93 of the FBTAA, a State or Territory body will have a liability to GIC where any of the tax or penalty under Part 4-25 of Schedule 1 to the TAA remains unpaid after the time by which it is due to be paid. Under section 112B of the FBTAA, a State or Territory body will have a liability to GIC on a shortfall in quarterly instalment of FBT if the notional tax is less than 90% of the assessed tax for the year and the assessed tax has become due and payable.

[64] See paragraph 83 of this Ruling.
[65] See paragraphs 68 to 80 of this Ruling.

104. The SIC does not apply to FBT.

Wine equalisation tax

Application to Commonwealth bodies

105. Subsection 27-20(1) of the WET Act provides that the Commonwealth and untaxable Commonwealth entities[66] are not liable to pay wine tax payable under that Act. However, it is the Parliament's intention that the Commonwealth and untaxable Commonwealth entities should be notionally liable to pay the wine tax payable and be notionally entitled to wine tax credits.

106. Subsection 27-20(2) of the WET Act provides that the Finance Minister may give such directions as are necessary or convenient to give effect to the requirement of subsection 27-20(1) of the WET Act and, in particular, may give directions in relation to the transfer of money within an account, or between accounts operated by the Commonwealth or an untaxable Commonwealth entity.

107. The uniform penalty regime and interest charges do not apply to a Commonwealth body in relation to WET. Penalties under Division 284 of Schedule 1 to the TAA do not apply as the liability to pay WET is only a notional liability. Penalties under Division 286 and 288 of Schedule 1 to the TAA do not apply to a Commonwealth body because the WET Act does not apply to the Commonwealth generally.

Application to State and Territory bodies

108. Section 1-4 of the WET Act binds the Crown in right of each of the States, the ACT and NT. However, it does not make the Crown liable to be prosecuted for an offence.

109. The uniform penalty regime applies to a State or a Territory body if they have failed to comply with obligations under the WET Act and section 114 of the Constitution does not apply to the relevant liability.

110. Under section 105-80 a State or Territory body will have a liability to the GIC where any of the indirect tax which the body is liable to pay remains unpaid after the time by which the liability is due to be paid. The GIC can only apply to a legal liability to pay an indirect tax amount (including a wine tax amount) and does not apply to any notional liability for reasons outlined in paragraph 88 of this Ruling. A Territory body will always have a legal liability to pay an indirect tax amount.[67] A State body may have a legal liability or a notional liability to pay an indirect tax amount.[68]

111. The SIC does not apply to WET.

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[66] Section 33-1 of the WET Act provides that the meaning of untaxable Commonwealth entity has the same meaning as section 177-1 of the GST Act.
[67] See paragraph 83 of this Ruling.
[68] See paragraphs 68 to 80 of this Ruling.

Luxury car tax

Application to Commonwealth bodies

112. Subsection 21-1(1) of the LCT Act provides that the Commonwealth and untaxable Commonwealth entities[69] are not liable to pay luxury car tax payable under the Act. However, it is the Parliament's intention that the Commonwealth and untaxable Commonwealth entities should be notionally liable to pay the luxury car tax payable and notionally have luxury car tax adjustments.

113. Subsection 21-1(2) of the LCT Act provides that the Finance Minister may give such directions as are necessary or convenient to give effect to the requirement of subsection 21-1(1) of the LCT Act and, in particular, may give directions in relation to the transfer of money within an account, or between accounts operated by the Commonwealth or an untaxable Commonwealth entity.

114. The uniform penalty regime and interest charges will not apply to a Commonwealth body in relation to LCT. Penalties under Division 284 of Schedule 1 to the TAA do not apply as the liability to pay LCT is only a notional liability. Penalties under Divisions 286 and 288 of Schedule 1 to the TAA do not apply to a Commonwealth body because the LCT Act does not apply to the Commonwealth generally.

Application to State and Territory bodies

115. Section 1-3 of the LCT Act binds the Crown in right of each of the States, the ACT and NT. However, it does not make the Crown liable to be prosecuted for an offence.

116. The uniform penalty regime applies to a State or Territory body if they have failed to comply with obligations under the LCT Act.

117. Under section 105-80 a State or Territory body will have a liability to pay the GIC where any of the indirect tax amount (including a luxury car tax amount) which the body is liable to pay remains unpaid after the time by which the liability is due to be paid. The GIC can only apply to a legal taxation liability and does not apply to any notional liability for reasons outlined in paragraph 88 of this Ruling.

118. The SIC does not apply to LCT.

[69] Section 27-1 of the LCT Act provides that the meaning of untaxable Commonwealth entities is the same as in section 177-1 of the GST Act.

Excise

119. Excise is a tax imposed upon certain goods which have been produced or manufactured domestically, that is, goods produced or manufactured in Australia for local consumption. It does not apply to goods produced or manufactured in Australia and then exported. There are 3 broad categories of excisable goods being alcohol excisable goods, tobacco excisable goods and petroleum excisable goods.

120. Excise is administered primarily through the *Excise Act 1901* and related regulations. The goods on which excise duty is payable are listed on the schedule to the *Excise Tariff Act 1921*.

121. Under section 54A of the Excise Act, Commonwealth authorities may be liable to pay excise duty. The term 'Commonwealth authority' is defined in section 4 of the Excise Act as an authority or body established for a purpose of the Commonwealth by or under a law of the Commonwealth.

122. The Excise Act is otherwise silent on its application to the Commonwealth, the States or Territories.

123. Although the Excise Act is silent on its application to the Commonwealth, the States and Territories, it discloses an intention to regulate the manufacture and importation of particular goods irrespective of the identity of the proposed importer, and would be rendered less effective if it did not do so. Therefore, it is considered that the better view is that the Excise Act will apply to the Commonwealth, States[70] and Territories.

124. The uniform penalty regime, except subdivision 284-B and interest charges regime[71], applies to a State or Territory body in relation to Excise to the extent it is capable of applying[72].

Fuel tax credits

125. The object of the fuel tax law is to provide a single system of fuel tax credits that are paid to reduce or remove the incidence of fuel tax[73] levied on taxable fuels, ensuring that fuel tax is effectively only applied to fuel used in private vehicles and for certain other private purposes and fuel used on-road in light vehicles for business purposes.

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[70] Excise is not a tax on property for the purposes of section 114 of the Constitution – see paragraph 80 of this Ruling.

[71] Subsection 2(2) of the TAA provides that, despite the definition of 'taxation law' in subsection 2(1) of the TAA (which refers to the definition in the ITAA 1997), an Excise Act is not a taxation law for the purposes of Part III of the TAA or Subdivision 284-B in Schedule 1 of the TAA (dealing with penalties relating to statements).

[72] The Excise Act provides for its own penalties, sanctions and obligations (see for example Part X and Part XA of the Excise Act).

[73] Liability for fuel tax currently arises under the *Excise Act 1901*, the *Excise Tariff Act 1921*, the *Customs Act 1901* and the *Customs Tariff Act 1995*.

Application to Commonwealth bodies

126. Subsection 95-10(1) of the FTA provides that it is the Parliament's intention that the Commonwealth and untaxable Commonwealth entities[74] should be notionally entitled to fuel tax credits and have notional fuel tax adjustments.

127. Subsection 95-10(2) of the FTA provides that the Finance Minister may give such directions as are necessary or convenient to give effect to the requirement of subsection 95-10(1) of the FTA and, in particular, may give directions in relation to the transfer of money within an account, or between accounts operated by the Commonwealth or an untaxable Commonwealth entity.

128. The uniform penalty regime and interest charges do not apply to a Commonwealth body in relation to fuel tax credits. Penalties under Division 284 of Schedule 1 to the TAA do not apply as the entitlement to fuel tax credits and fuel tax adjustments is only a notional entitlement. Penalties under Divisions 286 and 288 of Schedule 1 to the TAA do not apply to a Commonwealth body because the Commonwealth is not bound by the FTA generally.

Application to State and Territory bodies

129. Section 1-15 of the FTA binds the Crown in right of each of the States, the ACT and NT. However, it does not make the Crown liable to be prosecuted for an offence.

130. Section 114 of the Constitution does not apply to fuel tax credits as there is no tax imposed under that Act.

131. The uniform penalty regime will apply to a State or Territory body if they have failed to fulfil an obligation under the FTA to the extent that it relates to the State body or Territory body's legal entitlement to fuel tax credits.

132. Under section 105-80 a State or Territory body will have a liability to the GIC where any of the indirect tax or net fuel amount which the body is liable to pay remains unpaid after the time by which the liability is due to be paid. The GIC can only apply to a legal liability to pay the net fuel amount and does not apply to any notional liability for reasons outlined in paragraph 88 of this Ruling.

133. The SIC does not apply to fuel tax credits.

Energy credits, cleaner fuel grants, product stewardship benefits

134. The *Energy Grants (Credits) Scheme Act 2003* (EGCSA), the *Energy Grants (Cleaner Fuels) Scheme Act 2004* (EGCFSA) and the *Product Stewardship (Oil) Act 2000* (PSOA) provide a scheme through which excise revenue is returned to the community.

[74] Section 110-5 of the FTA provides that the meaning of untaxable Commonwealth entities is the same as in section 177-1 of the GST Act.

135. The EGCSA, EGCFSA and PSOA are silent on their application to the Commonwealth or a Commonwealth body.

136. Section 2A of the EGCSA and section 5 of the PSOA provide that the Crown in right of each of the States, the ACT and the NT are bound by the legislation. However, it does not make them liable to be prosecuted for an offence. The EGCFSA is silent on its application to the States and Territories.

137. Section 114 of the Constitution does not apply as these are grants and credits which are not taxes.

138. The uniform penalty regime applies to a State or Territory body as they have a legal entitlement to the credits and grants provided under the EGCSA, EGCFSA and PSOA.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; MT 2008/1;
MT 2008/2; MT 2008/3;
GSTR 2006/5

Subject references:

- Australian states & territories
- Commonwealth taxation powers
- constitutional law
- energy grants (credits) scheme
- excise
- failure to furnish information
- failure to furnish returns
- false or misleading statements
- FBT penalties
- Federal state financial relations
- Fuel tax credits
- general interest charge
- goods and services tax
- government agencies
- government entities
- government related entities
- GST Commonwealth payments
- GST miscellaneous
- GST penalties
- income tax penalties
- late lodgment of tax returns
- law, litigation & legislation
- notional tax
- penalties
- product stewardship oil scheme
- shortfall interest charge
- shortfalls
- state and territory bodies
- tax administration
- taxation statements
- wine equalisation tax

Legislative references:

- ITAA 1936
- ITAA 1936 Part III
- ITAA 1936 Division 1AB
- ITAA 1936 24AT
- ITAA 1997
- ITAA 1997 4-5
- ITAA 1997 50-25
- ITAA 1997 960-100
- ITAA 1997 995-1
- TAA 1953
- TAA 1953 2(1)
- TAA 1953 2(2)
- TAA 1953 3AA(2)
- TAA 1953 Part IIA
- TAA 1953 8AAB(2)
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- TAA 1953 8AAG
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- TAA 1953 Sch 1
- TAA 1953 Sch 1 105-80
- TAA 1953 Sch 1 255-1
- TAA 1953 Sch 1 Part 4-25
- TAA 1953 Sch 1 Div 280
- TAA 1953 Sch 1 280-103(2)
- TAA 1953 Sch 1 280-160
- TAA 1953 Sch 1 Div 284
- TAA 1953 Sch 1 Subdiv 284-B
- TAA 1953 Sch 1 284-75(1)
- TAA 1953 Sch 1 284-75(2)
- TAA 1953 Sch 1 284-75(3)
- TAA 1953 Sch 1 284-75(4)
- TAA 1953 Sch 1 284-80
- TAA 1953 Sch 1 284-90(1)
- TAA 1953 Sch 1 Subdiv 284-C
- TAA 1953 Sch 1 Div 286
- TAA 1953 Sch 1 Div 288
- TAA 1953 Sch 1 298-20
- ANTS(GST)A 1999 1-4
- ANTS(GST)A 1999 177-1
- ANTS(GST)A 1999 177-1(1)
- ANTS(GST)A 1999 177-1(2)
- ANTS(GST)A 1999 195-1
- ANTS(LCT)A 1999 1-3
- ANTS(LCT)A 1999 21-1
- ANTS(LCT)A 1999 21-1(1)
- ANTS(LCT)A 1999 21-1(2)
- ANTS(LCT)A 1999 27-1
- ANTS(WET)A 1999 1-4
- ANTS(WET)A 1999 27-20
- ANTS(WET)A 1999 27-20(1)
- ANTS(WET)A 1999 27-20(2)
- ANTS(WET)A 1999 33-1
- FBTAA 1986 93
- FBTAA 1986 112B
- FBTAA 1986 135S
- FBTAA 1986 163(3)

- FTA 2006 1-15
- FTA 2006 95-10
- FTA 2006 95-10(1)
- FTA 2006 95-10(2)
- FTA 2006 110-5
- A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999 5
- A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999 5
- A New Tax System (Goods and Services Tax Imposition – General) Act 1999 5
- A New Tax System (Luxury Car Tax Imposition – Customs) Act 1999 5
- A New Tax System (Luxury Car Tax Imposition – Excise) Act 1999 5
- A New Tax System (Luxury Car Tax Imposition – General) Act 1999 5
- A New Tax System (Tax Administration) Act (No.2) 2000
- A New Tax System (Wine Equalisation Tax Imposition – Customs) Act 1999 5
- A New Tax System (Wine Equalisation Tax Imposition – Excise) Act 1999 5
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