

# ***PS LA 2004/11 - The Commissioner's discretions to treat a particular document as a tax invoice or an adjustment note.***

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# Practice Statement Law Administration

**PS LA 2004/11**

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*This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.*

*Taxpayers can rely on this law administration practice statement to provide them with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this law administration practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.*

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**SUBJECT:** The Commissioner's discretions to treat a particular document as a tax invoice or an adjustment note

**PURPOSE:** To guide ATO personnel about when and how the statutory discretions contained in subsections 29-70(1B) and 29-75(1) of the *A New Tax System (Goods and Services Tax) Act 1999* should be exercised.

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## SCOPE

1. The Commissioner has a discretion under subsection 29-70(1B) of *the A New Tax System (Goods and Services Tax) Act 1999 (GST Act)*<sup>1</sup> to treat as a tax invoice a particular document that does not meet the requirements of a tax invoice. A similar discretion exists under subsection 29-75(1) in relation to adjustment notes.
2. This practice statement:
  - (i) discusses the discretion under subsection 29-70(1B) to treat a document as a tax invoice;
  - (ii) provides guidance to ATO staff about when the discretion is unnecessary or is not appropriate;
  - (iii) provides guidance to ATO staff as to how the Commissioner may exercise the discretion;
  - (iv) highlights other matters to be considered while considering the discretion, and after making a decision; but
  - (v) does not consider the Commissioner's discretion under subsection 134-20(1) in respect of third party adjustment notes.
3. The principles for the exercise of this discretion under subsection 29-70(1B) in this practice statement apply equally to recipient created tax invoices (RCTIs) and the discretion in respect of adjustment notes under subsection 29-75(1) even though not specifically discussed in the practice statement.

## BACKGROUND

4. A document that meets all of the information requirements of subsection 29-70(1) is a tax invoice.<sup>2</sup> However, recipients may receive documents from suppliers that do not meet all of those requirements and as a result are not valid tax invoices.
5. Subsection 29-70(1B) enables the Commissioner to exercise discretion to treat a particular document as a tax invoice. The discretion must be exercised on a case by case basis having regard to the particular facts and circumstances of each individual case. The decision should be made in good faith and without bias.

<sup>1</sup> All legislative references are to the GST Act unless otherwise stated.

<sup>2</sup> See Goods and Services Tax Ruling GSTR 2013/1 *Goods and services tax: tax invoices*.

6. When the Commissioner exercises the discretion to treat a document as a tax invoice, that document is a tax invoice as defined in section 195-1. The document for which the discretion has been exercised is treated as a tax invoice for the taxable supply component of the supply from the date it was created. This treatment applies for the purposes of both the supplier and recipient.
7. Goods and Services Tax Ruling GSTR 2000/17 *Goods and services tax: tax invoices* contained examples of where the discretion under former section 29-70(1) had been exercised in respect of a number of different documents. GSTR 2000/17 was withdrawn and replaced by GSTR 2013/1.
8. The Commissioner has made a number of determinations under subsection 29-10(3)<sup>3</sup> to provide certainty and facilitate compliance in situations where the discretion had previously been exercised in GSTR 2000/17 and other rulings products.

## STATEMENT

### Exercise of the Commissioner's discretion

9. ATO personnel must ensure they are authorised to make the decision (check the [Taxation Authorisations Guidelines here](#) – link available to ATO personnel only), and must follow their area's work practices when recording their decision and communicating that decision to the applicant.
10. Exercise of the Commissioner's discretion should be considered in situations where:
  - there is a creditable acquisition
  - a recipient is required to hold a tax invoice to claim an input tax credit (ITC) but the document held does not meet the requirements of a tax invoice – (see paragraph 17 for when the recipient is not required to hold a tax invoice)
  - the request is within the 4 year time limits under Division 93 (which broadly imposes a four-year time limit on the claiming of ITCs); and
  - it is reasonable to exercise the discretion on the basis of the relevant facts and circumstances, and the exercise of the discretion would not be inappropriate or unnecessary.
11. Exercise of the discretion should also be considered in cases where the recipient is able to apply subsection 29-70(1A) but chooses to request an exercise of the Commissioner's discretion under subsection 29-70(1B) – see paragraph 19.
12. The need for the exercise of the discretion may arise for a number of different reasons, all of which can not be discussed in this practice statement. Broadly, the main reasons for exercise of the discretion will be on request of a recipient or during ATO verification activities in respect of the recipient's entitlement to claim ITCs. A supplier can also make a request for exercise of the Commissioner's discretion– this is discussed further at paragraph 28.

### **Relevant factors to consider in the exercise of the discretion**

13. Some factors that may be relevant are set out below. ATO personnel should consider all the relevant factors when reaching a decision. This list is not exhaustive. The decision will usually involve a consideration of a number of factors together rather than just one factor alone. No one factor is determinative on whether the discretion should or should not be exercised.

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<sup>3</sup> See the table in Appendix 2 to GSTR 2013/1.

- Did the recipient make a reasonable attempt to obtain a valid tax invoice from the supplier? The ATO expects the recipient to make a genuine attempt to contact the supplier and request a valid tax invoice before the recipient makes a request to the Commissioner to exercise the discretion. However, the recipient is not expected to go to extraordinary lengths or great expense.
- Does the recipient have evidence that demonstrates an entitlement to claim an ITC despite not having a valid tax invoice? This can be any type of evidence that demonstrates that a creditable acquisition was made and that the recipient was entitled to the ITC.
- Does the recipient have a good compliance history? Was the recipient aware that a valid tax invoice was not held at the time the ITC was claimed? If so, can the recipient otherwise demonstrate that it was making a genuine attempt to comply in the circumstances. Do the recipient's prior compliance behaviour, knowledge of the requirements and actions point to future compliance?
- Does the recipient have adequate record keeping systems? What is 'adequate' will vary as smaller enterprises will often have different controls or checks from larger enterprises. It could include, for example, frequency of internal audits, sample checks of claims made, training of accounting staff and instruction manuals for staff. Adequate systems will usually result in adequate records being kept and fewer missing or misplaced tax invoices. It is likely that absence of a tax invoice is a one off rather than common occurrence. In contrast, a recipient with a poor record keeping system is more likely to have more tax invoices that would be misplaced or missing. Exercise of the Commissioner's discretion is not intended to cover situations where recipients are unable to keep adequate records.
- Considering the recipient's knowledge, skills and experience, was it reasonable for the recipient to assume that a valid tax invoice was held or to believe that a particular document complied with the tax invoice requirements? For example, if the recipient is a new business entrant it is likely that the recipient's knowledge, skills and experience would be less than that of a recipient that has an established business that has been operating for a longer period of time.

### ***Decision Tree***

14. The following decision tree diagrammatically provides guidance on the steps involved in the decision making process on whether to, and how to, exercise the discretion.
15. The decision tree assumes that the recipient has made a request for the exercise of the Commissioner's discretion. However, the decision tree and the remaining explanation in this practice statement are equally relevant to other situations where the exercise of the Commissioner's discretion might be required regardless of how the need for the exercise of the discretion originated. For example, during an audit, ATO personnel may identify that an invalid tax invoice was held and might consider exercise of the Commissioner's discretion to treat an available document as a tax invoice. Similarly, a supplier might request an exercise of the Commissioner's discretion in respect of a recipient created tax invoice, or as a result of the internal system changes.



### **Creditable acquisition**

16. Section 11-5 explains what a creditable acquisition is. A recipient is entitled to an ITC for any creditable acquisition it makes. The amount of ITC is equal to the GST payable on the supply of the thing acquired. Generally a tax invoice is required before a recipient can claim (attribute) an ITC in respect of a creditable acquisition.

### **Circumstances where a recipient is not required to hold a tax invoice**

17. A recipient that has made a creditable acquisition generally must not claim an ITC if they do not hold a valid tax invoice, except in the following circumstances if:
- the value of the taxable supply is \$75 or less or the amount of the decreasing adjustment is \$75 or less<sup>4</sup>
  - the Commissioner determines in writing that the requirement does not apply<sup>5</sup>
  - second hand goods have been acquired and a record of the acquisition has been made<sup>6</sup>
  - creditable acquisitions are made of 'reverse charged' supplies made by non-residents, or<sup>7</sup>
  - the GST on a taxable supply is payable by the recipient because of section 15C of Division 2 of the *A New Tax System (Goods and Services Tax Transition) Act 1999* (GST Transition Act).<sup>8</sup>
18. Where the recipient is not required to hold a tax invoice in order to claim an ITC there is no need to consider the exercise of the discretion under subsection 29-70(1B).

### **Subsection 29-70(1A)**

19. Under subsection 29-70(1A), a recipient may treat a document issued by the supplier that does not meet all of the tax invoice requirements as a tax invoice. This is the case where the document would comply with all the tax invoice requirements but for the fact it does not contain certain information and the recipient is able to clearly ascertain that information from other documents given to the recipient by the supplier.<sup>9</sup>
20. If this is the case, there is no need to consider the exercise of the Commissioner's discretion under subsection 29-70(1B). The ITC will be attributable to the tax period in which the recipient treats the document as a tax invoice, in accordance with section 29-10. All the relevant documents must be held when an ITC is claimed.

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<sup>4</sup> See subsections 29-80(1), 29-80(2) and regulation 29-80.01 of A New Tax System (Goods and Services Tax) Regulations 1999. Also see paragraph 58 of Goods and Services Tax GSTR 2013/1.

<sup>5</sup> Subsection 29-10(3). Appendix 2 of GSTR 2013/1 provides a summary of circumstances where the Commissioner has determined under subsection 29-10(3) that an ITC may be attributable without a tax invoice. The relevant provision for adjustment notes is subsection 29-20(3).

<sup>6</sup> Subsection 66-17(1).

<sup>7</sup> Subsection 83-35(3).

<sup>8</sup> Division 2 of Part 3 of the GST Transition Act applies to agreements spanning both 1 July 2000 and 1 July 2005. In the circumstances described in section 15C of that Act, the GST on a taxable supply made under such an agreement is payable by the recipient (to the extent the supply is made on or after a certain date occurring on or after 1 July 2005). Section 15H of that Act provides that subsections 29-10(3) and 29-20(3) do not apply, so that, respectively, an ITC may be claimed without holding a tax invoice or a decreasing adjustment made without holding an adjustment note.

<sup>9</sup> See paragraphs 42 to 49 of GSTR 2013/1.

21. However, the recipient has a choice to either apply subsection 29-70(1A) as described above, or make a request for the Commissioner to exercise the discretion under subsection 29-70(1B).<sup>10</sup>
22. ATO personnel that receive requests for the exercise of the Commissioner's discretion, should ensure that applicants are aware of their ability to apply subsection 29-70(1A) in certain circumstances, and if an applicant is able to apply that subsection then there is no need for the exercise of the discretion under subsection 29-70(1B).
23. If the applicant is aware of the operation of subsection 29-70(1A) but still requests the exercise of the discretion under subsection 29-70(1B), ATO personnel will need to make a decision on whether or not to exercise the discretion on the basis of all the relevant facts in accordance with this practice statement.

#### ***Four year time limits***

24. Where the recipient made a request to the Commissioner to treat a document as a tax invoice, ATO personnel will need to note the date this request was made. If the request was made within the relevant four-year period for claiming ITCs and the Commissioner agrees to the request, the recipient's entitlement to the ITC will not cease (it does not matter whether the Commissioner's agreement is provided before or after the end of the four-year period).<sup>11</sup> ATO personnel should note that although an assessment cannot be amended outside the period of review to allow an ITC not previously taken into account, the ITC can still be claimed in a later assessment as a request to exercise the discretion creates an exception to the four year limit to claim the ITC.
25. For more information on the four-year time limit for the claiming of ITCs see [Time Limits on GST Refunds](#).

#### ***When discretion is not necessary***

26. In some circumstances it might not be necessary for ATO personnel to consider the exercise of the discretion. This may be the case, for example, if:
  - the recipient held a valid tax invoice, at the time they claimed the ITC in their activity statement, but the document has been subsequently lost or destroyed – this is considered further at paragraph 34
  - a document is missing certain required information, but the missing information can be clearly ascertained from other documents provided by the supplier to the recipient. The document can then be treated by the entity that received it as a valid tax invoice under subsection 29-70(1A)<sup>12</sup>

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<sup>10</sup> See paragraph 49 of GSTR 2013/1.

<sup>11</sup> Subsections 93-10(3) of the GST Act and 105-55(2A) in Schedule 1 to the *Tax Administration Act 1953* that apply to requests to the Commissioner to treat a document as a tax invoice relate to tax periods that start before 1 July 2012. Subsection 93-10(5) applies for tax periods that start on or after 1 July 2012.

<sup>12</sup> See paragraphs 42 to 50 of GSTR 2013/1 for a discussion of subsection 29-70(1A).

- a document does not contain enough information to enable the identity or the Australian Business Number (ABN) of the recipient of the supply (who is a member of the GST group) to be clearly ascertained. However, the document contains sufficient information to clearly ascertain the identity of the GST group, the representative member, or another member of the GST group<sup>13</sup>
- there are particular circumstances where the Commissioner has made a determination that ITCs may be attributable to a tax period without holding a tax invoice<sup>14</sup>
- a recipient has made a request to the Commissioner to treat a document as a tax invoice for the purposes of attributing an ITC to a tax period and, at the time the request was made, the recipient had ceased to be entitled to the ITC under Division 93 - this is considered further at paragraph 23
- the recipient has also made a request to the supplier to issue a valid tax invoice, and the 28 day period that the supplier has to provide a tax invoice has not expired.<sup>15</sup>

### ***When discretion is not appropriate***

27. In some circumstances it might not be appropriate for ATO personnel to consider the exercise of the discretion. This may be the case, for example, if:
- there is evidence of fraud or evasion by the entity making the request;<sup>16</sup> or
  - there is other relevant GST compliance work being undertaken in relation to the same entity **and** it is appropriate for the discretion to be considered during that other work. In such cases, ATO personnel should follow any relevant work allocation procedures. If there are no such procedures, the two work areas should negotiate the most appropriate area to consider the decision.

### **Supplier making a request for exercise of the discretion**

28. A supplier may also request exercise of the Commissioner's discretion in respect of a document that does not, or will not, meet the tax invoice requirements. Unlike requests by recipients that have a direct impact on the recipient's entitlement to claim ITCs, supplier requests are generally in respect of compliance matters or to lessen the cost of compliance for suppliers and recipients.

<sup>13</sup> Subsections 48-57(1) and (3). See paragraphs 24 to 27 of GSTR 2013/1. This does not apply to an RCTI. Therefore a recipient issuing an RCTI must include their identity on the document rather than just identifying the GST group or another member of the GST group.

<sup>14</sup> Subsection 29-10(3). These circumstances are summarised in the table in Appendix 2 of GSTR 2013/1.

<sup>15</sup> Subsection 29-70(2). If after the 28 day period the supplier has not complied with the request to provide a tax invoice, the recipient need not make a new request for the exercise of the discretion to be considered.

<sup>16</sup> Refer to Law Administration Practice Statement PS LA 2008/6 *fraud or evasion* and [GST guidelines for dealing with suspected fraud](#).

29. Such requests, for example, may be in respect of:
- machinery of government changes<sup>17</sup>
  - internal systems changes
  - mergers and acquisitions.
30. To seek an exercise of the discretion the supplier would need to make a request in relation to particular documents that do not, or will not, meet the requirements of a valid tax invoice. The discretion would be exercised in respect of those documents for a limited period depending on the facts and circumstances for that particular case, for example for three months while the supplier changes its systems.

***Requests that should be escalated***

31. The following requests should be escalated to an EL2 officer for consideration on whether or not the discretion should be exercised:
- the request for the exercise of the discretion was made by the supplier
  - the request for the exercise of the discretion was made by a recipient that issues recipient created tax invoices
  - a determination under subsection 29-10(3) might be more appropriate or a determination has been requested
  - the application of this practice statement produces a result that does not seem sensible or practical
  - a request for the exercise of the discretion is requested by a recipient before the supply has even occurred and before a document is sought or obtained from the supplier.

These decisions may, for example, involve a higher risk either in terms of the potential revenue or the wider GST system compliance issues involved.

32. Often a request is made by a particular entity in respect of their individual circumstances. However, a decision may be capable of applying to a wider group of clients, for example to a specific industry. Consideration should be given to whether the issue should be escalated (for example, as a potential high risk technical issue<sup>18</sup>) and whether it might best be contained in a public ruling product. Decisions that could apply widely but are made for a particular entity only, could diminish community confidence in the way the ATO administers the tax laws unless the reasons for confining the decision are capable of transparent explanation to other stakeholders.
33. EL2 officers can approach their relevant SES officer for guidance in situations that they consider warrants such escalation.

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<sup>17</sup> For explanation see the ATO guide: [GST and machinery of government changes](#).

<sup>18</sup> Law Administration Practice Statement PS LA 2012/1 discusses the management of high risk technical issues.

## **Other things to be considered**

### ***Lost or destroyed tax invoices and adjustment notes***

34. During a field visit or other verification activity, ATO personnel may decide that a valid tax invoice was held at the time of lodging the activity statement but has been subsequently lost or destroyed. ATO personnel must consider all the facts of the case in making a decision on this issue. If the officer accepts that a valid tax invoice was held at the time of lodging the activity statement, then the input tax credit is attributable to that tax period, provided the other requirements for attribution have been met.<sup>19</sup> There is no need to consider whether to exercise the discretion. In making this decision, ATO personnel must also consider whether the recipient has kept adequate records under section 382-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

### ***Third party enquiries***

35. ATO personnel may need to make enquiries of the supplier or other parties in order to obtain the necessary information about a transaction. There may be a reason for the supplier's behaviour (not issuing a valid tax invoice) that the recipient does not know. For example, if the supplier is not registered or required to be registered or if the margin scheme has been applied in cases, there is no obligation for the supplier to provide a tax invoice. In such cases, ATO personnel must follow their work area procedures for obtaining information from other parties (for example, the [Access and Information Gathering Manual](#)).

### ***Parties in dispute over some aspect of the transaction***

36. If the parties to a transaction are in dispute (for example over the terms of the contract, performance or payment) ATO personnel must take care not to become involved in the dispute itself (for example by appearing to 'take sides'). However, it may be necessary to ascertain various facts in order to determine whether to exercise the Commissioner's discretion. For example, it may be necessary to determine whether a taxable supply has been made or the price of that supply. In these circumstances there will be a need to gather sufficient information or evidence to make a decision. This may include needing to interpret a term of a contract or make contact with the supplier. If legal action or arbitration between the parties has commenced, ATO personnel must discuss the issue with their manager who may need to consult with the Review and Litigation area.

## **Other matters to consider if a decision is made not to exercise the discretion**

### ***Shortfall Penalty***

37. If the Commissioner does not exercise the discretion and the recipient has claimed an input tax credit, the net amount for that tax period will be assessed without allowance for the input tax credit which may result in a shortfall. If there is a shortfall a shortfall penalty may apply.
38. PS LA 2012/5 *Administration of penalties for making false or misleading statements that result in shortfall amounts* outlines the Commissioner's policy on shortfall penalties.

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<sup>19</sup> See sections 29-5, 29-10 and 29-20.

### **General interest charge**

39. General interest charge may be imposed on the resultant shortfall of the recipient's net amount. PS LA 2011/12 *Administration of general interest charge (GIC) imposed for late payment or under estimation of liability* outlines the Commissioner's policy in respect of general interest charge.

### **Record keeping penalty**

40. If the recipient fails to retain relevant tax invoices, it may be liable to a penalty for failing to keep records. The Commissioner's policy in relation to record keeping penalty is detailed in PS LA 2005/2 *Penalty for failure to keep or retain records*.

### **Review Rights**

41. A decision made under either subsections 29-70(1B) or 29-75(1) is not a reviewable GST decision under subsection 110-50(2) of Schedule 1 to the TAA.
42. However, a recipient who is not satisfied with our decision can contact us and we will review the decision as good administrative practice under the *Taxpayers' Charter*. They may also seek a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.
43. Alternatively, where an assessment is made of their net amount, a recipient can object under the provisions of Part IVC of the TAA. For example, the recipient may wish to dispute the ATO personnel decision that a creditable acquisition has not been made.

### Amendment History

<b>Date of amendment</b>	<b>Part</b>	<b>Comment</b>
29 May 2014	Contact details	Updated.
31 October 2013	Various	Updated to align position to GSTR 2013/1 (that was updated as a result of legislative amendment resulting from BoT Recommendation 9). Also minor updates for other Board of Tax Measures.
15 September 2009	Contact details	Updated.
16 October 2007	Paragraphs 12 and 14 Footnotes 9 and 16	Change value of taxable supply to \$75 Add reference to regulation 29-80.01
1 July 2006		Update references to section 70 of the TAA to section 382-5 of Schedule 1 of the TAA Update references to subsection 62(2) of the TAA to subsection 110-50(2) of Schedule 1 of the TAA Update reference to section 37 of the TAA to section 105-60 of Schedule 1 of the TAA
1 March 2006		Amendments to the GST Transition Act in February 2005 to do with long-term non-reviewable contracts, created a further class of transactions that do not require tax invoices or adjustment notes

Subject references	adjustment notes Commissioner's discretion Determinations four-year time limit general interest charge record keeping penalty recipient created tax invoices recipient created adjustment notes shortfall penalty tax invoices
Legislative references	ANTS(GST)A 1999 11-5 ANTS(GST)A 1999 29-5 ANTS(GST)A 1999 29-10 ANTS(GST)A 1999 29-10(3) ANTS(GST)A 1999 29-20 ANTS(GST)A 1999 29-20(3) ANTS(GST)A 1999 29-70(1) ANTS(GST)A 1999 29-70(1A) ANTS(GST)A 1999 29-70(1B) ANTS(GST)A 1999 29-70(2) ANTS(GST)A 1999 29-75(1) ANTS(GST)A 1999 29-80(1) ANTS(GST)A 1999 29-80(2) ANTS(GST)A 1999 48-57(1) ANTS(GST)A 1999 48-57(3) ANTS(GST)A 1999 66-17(1) ANTS(GST)A 1999 83-35(3) ANTS(GST)A 1999 Div 93 ANTS(GST)A 1999 93-10(3) ANTS(GST)A 1999 93-10(5) ANTS(GST)A 1999 134-20(1) ANTS(GST)A 1999 195-1 ANTS(GSTT)A 1999 Pt 3 Div 2 ANTS(GSTT)A 1999 15C ANTS(GSTT)A 1999 15H ANTS(GST)R 1999 29-80.01 TAA 1953 Sch 1 105-55(2A) TAA 1953 Sch 1 105-60 TAA 1953 Sch 1 110-50(2) TAA 1953 Sch 1 382-5 TAA 1953 Pt IVC AD(JR)A 1977
Related public rulings	GSTR 1999/1 GSTR 2000/1 GSTR 2000/17 GSTR 2000/26 GSTR 2013/1 A New Tax System (Goods and Services Tax) Adjustment Note Information Requirements Determination 2012
Related practice statements	PS LA 2005/2 Penalty for failure to keep or retain records PS LA 2008/6 Fraud or evasion PS LA 2011/12 Administration of general interest charge

	(GIC) imposed for late payment or under estimation of liability PS LA 2012/1 Management of high risk technical issues and engagement of officers in the Tax Counsel Network PS LA 2012/5 Administration of penalties for making false or misleading statements that result in shortfall amounts
Other references	Taxation Authorisation Guidelines Taxpayers' Charter Access and Information Gathering Manual Time Limits on GST Refunds GST and machinery of government changes PS CM 2007/01 <i>Respecting clients' rights of review</i>
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