PS LA 2004/11 - Treating a document as a tax invoice or adjustment note

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PS LA 2004/11
Treating a document as a tax invoice or adjustment note

This Law Administration Practice Statement provides guidance to staff in relation to exercising the Commissioner's discretion to treat a document as a tax invoice or adjustment note.

This Practice Statement is an internal ATO document and is an instruction to ATO staff.

Taxpayers can rely on this Practice Statement to provide them with protection from interest and penalties in the following way. 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 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.

1. What this Practice Statement is about

Tax invoices and adjustment notes are key integrity measures of the goods and services tax (GST) system. Subject to some exceptions, a recipient must hold these documents before they can claim an input tax credit (ITC) or attribute a decreasing adjustment from an adjustment event when completing their activity statement.[1]

Where a document does not meet the specific requirements for a valid tax invoice or adjustment note, ATO officers may be required to exercise the Commissioner's discretions in the GST Act[2] to treat the document as a valid tax invoice or an adjustment note.

Such requests commonly come from a recipient or as part of a compliance activity. They may also arise as part of an objection, a review in the Administrative Appeals Tribunal (AAT), or following a decision of the Federal Court (the Court).

This Practice Statement provides guidance on how you should exercise the Commissioner's discretions, including as part of an objection, review or appeal.

Attachment A to this Practice Statement sets out the decision-making process as a flowchart.

This Practice Statement should be read in conjunction with Goods and Services Tax Rulings GSTR 2013/1[3] and GSTR 2013/2[4] which set out the information requirements for tax invoices and adjustment notes.

This Practice Statement does not apply to third-party adjustment notes.[5]

2. When exercise of the Commissioner's discretion is not required

Exercise of the Commissioner's discretion is not required if the law allows an ITC to be claimed without a valid tax invoice, or a decreasing adjustment to be attributed without an adjustment note.[6]

Some examples include where:

- the value of the taxable supply or the amount of the decreasing adjustment is $75 or less[7]
- the Commissioner has waived the requirement to hold a tax invoice or adjustment note[8]
- the GST is reverse-charged, for example, for certain supplies by non-residents outside the indirect tax zone[9], or
- a recipient can treat a document as a tax invoice[10] because the missing details can be ascertained from other documents from the supplier. (You should still consider exercising the Commissioner's discretion if asked to do so by the recipient.)

[1] A tax invoice may also provide evidence that GST has been passed on to another entity. See section 142-25 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). All legislative references in this Practice Statement are to the GST Act unless otherwise specified.
[2] Subsections 29-70(1B) and 29-75(1).
[3] GSTR 2013/1 *Goods and services tax: tax invoices*.
[4] GSTR 2013/2 *Goods and services tax: adjustment notes*.
[5] Section 134-20 sets out the requirements for third-party adjustment notes. See Third Party Adjustment Note Information TPANI 2020/D1 Draft Explanatory Statement Goods and Services Tax: Third Party Adjustment Note Information Requirements Determination 2020.
[6] See GSTR 2013/1 and GSTR 2013/2 for all circumstances where a tax invoice or adjustment note is not required to be held to claim an ITC or attribute a decreasing adjustment.
[7] See section 29-80 and sections 29-80.01 and 29-80.02 of the *A New Tax System (Goods and Services Tax) Regulations 2019*.
[8] See subsections 29-10(3) and 29-20(3). The Commissioner must have determined this in writing.
[9] See subsection 83-35(3).
[10] See subsection 29-70(1A). Note that there is no corresponding provision for adjustment notes.

3. Threshold considerations to exercising the Commissioner's discretion

You would only consider exercising the Commissioner's discretion where:

- there is a creditable acquisition[11] or decreasing adjustment[12]
- a tax invoice or adjustment note is required to claim the ITCs or attribute the decreasing adjustment
- the time limits to claim the ITC or attribute the decreasing adjustment have not expired.[13]

If these conditions are met, you then need to consider the individual facts and circumstances of the taxpayer. In particular, you need to consider if these indications are reasonable to exercise the Commissioner's discretion.

Some factors you should consider in reaching that decision are set out in this Practice Statement. Other factors may also be relevant, such as where the recipient or supplier have lost records following a natural disaster or some other event particular to their business.

4. APS levels and monetary limits determine who can exercise the power

Before exercising the Commissioner's discretion, you must refer to the *Taxation Authorisation Guidelines* to see which of these apply to you when considering if it is reasonable to exercise the discretion.Your decision on whether it is reasonable to exercise the Commissioner's discretion must be made in good faith and without bias. Consider the following issues when making this decision.

Evidence of entitlement to the ITC or adjustment

- Does the recipient have evidence demonstrating they are entitled to claim an ITC or attribute a decreasing adjustment?
- Can the recipient show they acquired, paid or are liable to pay for a taxable supply, or that an adjustment event has occurred?

Recipient's behaviour

- Has the recipient made a reasonable and genuine attempt to obtain a tax invoice or adjustment note from the supplier before requesting that we exercise the Commissioner's discretion? The recipient is not expected to go to extraordinary lengths or great expense.
- If the recipient has already claimed the ITC or attributed the adjustment:
  - Did the recipient make an error? For example, did they mistakenly believe the document they held was a valid tax invoice or adjustment note?
  - Was the recipient aware that they did not hold a valid tax invoice or adjustment note, but they made a claim or attribution anyway?

Recipient's compliance history and experience

- Does the recipient have a good compliance history and maintain adequate record-keeping systems?
- Is the absence of a tax invoice or adjustment note a one-off or a common occurrence?
- What are the recipient's knowledge, skills, experience and circumstances? For example, it may be understandable for a new small business entrant to have a lower level of knowledge and experience than an established or large enterprise.

Additional considerations for objections and litigation

- There are some additional considerations that apply in relation to exercising the Commissioner's discretion as part of an objection or litigation matter. For example
  - Did we do or advise something that contributed to the recipient not asking the supplier for a tax invoice or adjustment note, or result in the supplier's refusal to provide those documents?
  - If considerable time has passed since the tax period in dispute, would it still be reasonable for the recipient to ask the supplier for a valid tax invoice or adjustment note?

[11] Defined in section 11-5. Limited registration entities cannot make creditable acquisitions. See section 146-10.

[12] See Division 19 on decreasing adjustments arising from adjustment events.

[13] See Division 93 and Division 155 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

5. When it is not appropriate to exercise the Commissioner's discretion?

It would not be appropriate to exercise the Commissioner's discretion if:

- there is evidence of fraud or evasion
- it is less than 28 days since the recipient asked the supplier to provide a valid tax invoice or adjustment note
- the recipient is no longer entitled to claim the ITCs or attribute the decreasing adjustment because the time limits have expired (and there are no special circumstances to extend the time)
- the recipient is simply unwilling to keep records
- the Court has found the recipient is entitled to an ITC or decreasing adjustment but the appeal period for the decision has yet to expire
- other compliance activity is under way, and it is more appropriate to consider exercise of the Commissioner's discretion as part of that work.

6. Effect of exercising the Commissioner's discretion

When the Commissioner's discretion is exercised in respect of a 'particular document', effectively that document was always a tax invoice or adjustment note. This means that the normal rules apply to claim the ITC or attribute a decreasing adjustment to the tax period **when that document was first held**.

Therefore, upon exercise of the Commissioner's discretion, the recipient will not need to make an adjustment to an earlier tax period if it claimed an ITC or attributed a decreasing adjustment without a valid tax invoice or adjustment note.

7. Who can exercise the Commissioner's discretion and when to escalate?

You can only exercise the Commissioner's discretion up to the monetary limit applicable to your Australian Public Service (APS) level. For example, an APS 6 can determine a document is a tax invoice or adjustment note for ITCs or decreasing adjustments of up to $50,000, whereas the limit for an APS 4 is $5,000.

These amounts and levels may vary from time to time. Before making your decision, refer to the *Taxation Authorisation Guidelines* to ensure you are properly authorised. If you are not authorised, you will need to escalate the making of the decision to someone who is.

In addition, requests to exercise the Commissioner's discretion should be escalated to an Executive Level 2 (EL 2) officer where:

- the supplier made the request to treat the document as a tax invoice or adjustment note[14]
- a recipient makes the request in relation to a recipient-created tax invoice
- the supplier or recipient has requested a determination to waive the requirements for a tax invoice or adjustment note[15], or this would be more appropriate
- the amount of the ITC or decreasing adjustment is more than $100,000 (and you are not at the EL 2 or Senior Executive Service level)
- applying the principles in this Practice Statement would produce a result that is not sensible or practical.

You should provide the EL 2 officer with the relevant facts, issues and supporting evidence to assist them in making their decision.

8. Third-party enquiries

You may need to ask the supplier or other parties why they didn't issue a tax invoice or adjustment note when requested. In such cases, you should follow your work area's procedures to acquire information from third parties.[16]

If the parties are in dispute over some aspect of the transaction, do not become involved in their dispute. If they have begun legal action, discuss the issue with your manager to determine a course of action.

If the recipient has been charged GST by an unregistered supplier, you may need to refer the supplier's details to ATO*intelligence* Discover for follow-up action.

9. Penalties and general interest charge

If the Commissioner's discretion is not exercised, shortfall penalties and general interest charge may apply to amounts incorrectly claimed. The recipient may also be liable to a penalty for failing to keep proper records. You should refer to the relevant policies when making any decisions about applying or

[14] For example, the supplier realises the invoice they issued was defective but system or other issues prevent them from reissuing it. A similar issue may arise for recipient-created invoices.

[15] Subsections 29-10(3) or 29-20(3).

[16] See also *Our approach to information gathering*.

remitting penalties and or interest – see under *More information* of this Practice Statement.

10. Part IVC objections, reviews and appeals

Taxpayers cannot object against a decision to exercise the Commissioner's discretion as it is not a reviewable GST decision under the GST Act.[17] However, they may object to an assessment[18] that excludes an ITC or decreasing adjustment as a result of that decision.

Where the Commissioner disallows that objection or allows it in part, the taxpayer can apply to the AAT for a review of the objection decision; or they can appeal to the Court against the objection decision.[19]

In reviewing the assessment, the AAT (standing in the shoes of the Commissioner) can make a decision on whether to exercise the Commissioner's discretion.

However, if the matter is referred to the Court and it finds the taxpayer is entitled to an ITC or decreasing adjustment, it can only remit the matter back to the Commissioner to exercise the discretion.[20] If the matter is remitted, we must make our decision on the Commissioner's discretion and communicate it in writing to the taxpayer as soon as possible.

To prevent delays finalising a dispute, we should deal concurrently with issues relating to:

- ITC or decreasing adjustment entitlements
- failure to hold a tax invoice or adjustment note
- exercise of the Commissioner's discretion.

We should communicate our decision on exercising the Commissioner's discretion, or arguing a certain position, to the taxpayer as early as possible. This will enable the taxpayer to make an informed decision on whether to continue with the litigation.

When the AAT is to review an assessment involving the use of the Commissioner's discretion, our submissions should outline the relevant facts and the reasons for or against exercising the discretion. This will assist the AAT to make a decision on whether to exercise the discretion.

11. What other review rights are there against an exercise of the Commissioner's discretion?

While there are no rights to object against a decision to exercise the Commissioner's discretion, taxpayers may ask for an independent internal review by someone not involved in making the original decision.

Alternatively, taxpayers may seek judicial review by the Court[21], who will review the decision-making process and whether it was flawed or involved an error of law. The Court cannot remake the decision but may remit the decision back to us to remake according to law.[22]

12. More information

For more information, see:

- GSTR 2013/1 *Goods and services tax: tax invoices*
- GSTR 2013/2 *Goods and services tax: adjustment notes*
- PS LA 2005/2 *Penalty for failure to keep or retain records*
- PS LA 2008/6 *Fraud or evasion*
- PS LA 2009/9 *Conduct of ATO litigation and engagement of ATO Dispute Resolution*
- PS LA 2011/12 *Remission of General Interest Charge*
- PS LA 2012/5 *Administration of the false or misleading statement penalty - where there is a shortfall amount*
- ATO*intelligence* Discover (available internally only)
- Our approach to information gathering
- Taxation Authorisation Guidelines (available internally only)

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[17] Section 110-50 of Schedule 1 to the TAA.
[18] See Part IVC of the TAA.
[19] See Part IVC of the TAA.
[20] See paragraph 103 to 110 of Law Administrative Practice Statement PS LA 2009/9 *Conduct of ATO litigation and engagement of ATO Dispute Resolution* (PS LA 2009/9).
[21] This is under the *Administrative Decisions (Judicial Review) Act 1977* or section 39B of the *Judiciary Act 1903*. See paragraphs 93 to 97 of PS LA 2009/9.
[22] See paragraph 94 of PS LA 2009/9.

Attachment A

The following flowchart explains the decision-making process involved in exercising the Commissioner's discretion.

