# *PS LA 2013/6 - Collection from goods and services tax (GST) groups, GST joint ventures and other entities of debts arising from indirect tax laws*

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# Practice Statement Law Administration

# PS LA 2013/6

*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 where it is considered incorrect. Where this occurs, tax officers 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.*

**SUBJECT:** **Collection from goods and services tax (GST) groups, GST joint ventures and other entities of debts arising from indirect tax laws**

**PURPOSE:** **To outline the policy in relation to:**

- **indirect tax sharing agreements for the collection from GST groups and GST joint ventures of debts arising from indirect tax laws including amounts arising under the GST law, the wine tax law, the luxury car tax law and the fuel tax law, and**
- **the collection from other entities that are not GST groups or GST joint ventures of debts arising from indirect tax laws.**

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## STATEMENT

1. This practice statement needs to be read in conjunction with Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts*.

2. The decisions and actions taken by tax officers must be consistent with the commitments made by the Australian Taxation Office (ATO) in the *Taxpayers' Charter*. Tax officers are also expected to follow the directions of the Corporate Management Practice Statement PS CM 2007/01 *Respecting clients' rights of review*.

3. This practice statement sets out the policy in relation to:

   - the collection from GST joint ventures and GST groups of debts arising from indirect tax laws, including amounts arising under the goods and services tax law, the wine tax law, the luxury car tax law and the fuel tax law, and in particular the use of indirect tax sharing agreements (ITXSA), and
   - the collection from other entities that are not GST joint ventures or GST groups of debts arising from indirect tax laws.

## TERMS USED

4. The following terms are used in this practice statement:

   ***Clear exit*** – is the situation referred to in paragraphs 444-80(1A)(d) and 444-90(1A)(d) of Schedule 1 to the *Taxation Administration Act 1953* (TAA) in which a contributing participant of a GST joint venture or a contributing member of a GST group leaves the GST joint venture or GST group respectively and is not liable to pay an indirect tax amount of the GST joint venture or GST group for the tax period in which the contributing participant or contributing member leaves the GST joint venture or GST group.

***Exited member*** – refers to a member of a GST group that has left that GST group and a participant of a GST joint venture that has left the GST joint venture.

***Increasing adjustment*** – means an amount arising under one of the provisions listed in the table provided within the definition of 'increasing adjustment' in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

***Indirect tax amount*** – is a reference to a debt under any of the following laws:

- the GST law as defined in section 195-1 of the GST Act
- the wine tax law as defined in section 33-1 of the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act)
- the luxury car tax law as defined in section 27-1 of the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act), and
- the fuel tax law as defined in section 110-05 of the *Fuel Tax Act 2006*.

***Indirect tax sharing agreement (ITXSA)*** – refers to an indirect tax sharing agreement as referred to in subsections 444-80(1A) and 444-90(1A) of Schedule 1 to the TAA.

***Joint and several liability*** – means that two or more persons (including companies) are each liable for the full amount of a debt. They may be sued jointly in a single action or severally in separate actions.

***Tax period*** – is the period for which a GST net amount is calculated. Generally, it will be either a quarter ending 31 March, 30 June, 30 September or 31 December or alternatively an individual month.

## EXPLANATION

## COLLECTION FROM GST GROUPS AND GST JOINT VENTURES

### Introduction

5. The law that applies in respect of the obligations of both GST joint ventures and GST groups for indirect tax amounts, incurred by the GST joint venture and the GST group are very similar.[1] Accordingly, much of the policy in relation to the recovery of these liabilities from GST joint ventures and GST groups is considered together in the following paragraphs.

6. For ease of reference, in the following paragraphs:

   - a reference to 'group' includes reference to both a GST group and a GST joint venture
   - a reference to 'representative member' includes reference to both a representative member of a GST group and a joint venture operator of a GST joint venture, and
   - a reference to 'member' includes reference to a member of a GST group (excluding the representative member) and a participant of a GST joint venture,

   unless specific reference is made to a GST joint venture, a joint venture operator or a participant of a GST joint venture.

[1] See sections 444-80 and 444-90 of Schedule 1 to the TAA.

7. The liabilities referred to in the following paragraphs include the indirect tax amounts of the GST group payable by the representative member of the GST group and the indirect tax amounts of the GST joint venture payable by the GST joint venture operator.

### Recording and accounting for liabilities and credits

8. A group's liability will be recorded on the representative member's Integrated Client Account. When determining another member's indirect tax amount, consideration will be given to the tax period or periods for which that member was part of the group and whether or not it is excluded from the joint and several liability rules which are contained in subsections 444-80(1) and 444-90(1) of Schedule 1 to the TAA. See also Law Administration Practice Statement PS LA 2011/20 *Payment and credit allocation*.

9. The provisions in Division 3 of Part IIB of the TAA relating to the treatment of payments and credits extend to the allocation and application of such amounts between the members of a group. Refer also to PS LA 2011/20.

### General rules – joint and several liability

10. Although a representative member of a group takes on responsibility for payment of the group's indirect tax amounts, each member of the group is jointly and severally liable for those debts.[2]

11. The ATO will initially pursue action against the representative member of the group. However, in appropriate circumstances, the ATO will choose to pursue recovery action from one or more members of the group. It should be noted that subsections 444-80(1) and 444-90(1) of Schedule 1 to the TAA do not apply to members who are prohibited from becoming liable for another entity's debts because of the operation of an Australian law, for example, some financial institutions.

12. The ATO may decide to proceed against all members of the group or any particular member or members who are jointly and severally liable based on considerations of the most expedient means of recovery.

13. Relevant factors in deciding the most expedient means of recovery may include, but are not limited to, the following:

- a representative member with a history of non-payment of tax debts
- a group with a history of payment only being made after action is initiated against members
- the ability to collect payment promptly from one or more particular members
- where it is known that action against the representative member will not be successful in achieving full payment, will not be cost effective, or would result in undue delays
- where it is known that assets are being dissipated by members of the group and this dissipation puts collection of unpaid group liabilities at risk

[2] See subsections 444-80(1) and 444-90(1) of Schedule 1 to the TAA.

- the opportunity to include the indirect tax law group debt in an action being initiated against a particular member for that member's other tax-related liabilities
- where the ATO needs to prove in an insolvency administration of a member, that is, to make a claim in the insolvency administration, and
- the opportunity to collect an amount due to a member from a third party.

### Deferring the payment time of a group liability

14. The Commissioner may defer the time for payment of an indirect tax amount in accordance with the policy outlined in Law Administration Practice Statement PS LA 2011/14 *General debt collection powers and principles*.

15. It would be rare for the Commissioner to grant a deferral because the group has not made adequate arrangements to ensure that the group's indirect tax amounts are met on time. A deferral would not be available solely because a group has not completed an ITXSA relating to that particular debt. Where a deferral has been granted, general interest charge (GIC) on any unpaid amount will begin to accrue from the deferred date.

### Arrangements to pay indirect tax amounts by instalments

16. The Commissioner may grant an arrangement to pay the indirect tax amounts by instalments in accordance with the policy in PS LA 2011/14. It would be rare for the Commissioner to grant such an arrangement where the group continually neglects to make adequate arrangements to ensure that the group's indirect tax amounts are met on time.

17. When considering an arrangement proposal, the Commissioner will look to the position of the entire group and the situation and actions of all the members as well as those of the representative member.

18. Unlike a deferral of time to pay, an arrangement to pay by instalments does not alter the date from which the GIC begins to accrue, that is, the due date of the liability. The GIC component of the debt should be factored into any arrangement to pay by instalments.

### Contributing members' liabilities – general considerations

19. If the representative member defaults in its payment obligations in respect of an indirect tax amount, a member which is jointly and severally liable for the full amount of that liability or liable to the extent of its contribution amount under an ITXSA (see discussion commencing at paragraph 25 of this practice statement), should contact the ATO to discuss payment options if it is unable to make a full payment of its liability.

20. Generally, the liability of the member entity would be treated as any other tax-related liability and this practice statement as it relates to the collection of liabilities would apply. When applying this policy, the member's circumstances would at first instance be considered in isolation. Submissions that other members of the group (and the representative member) are in a better position to meet the liability would not be given great weight in reaching any decision regarding collection of the liability from a particular member.

21. An arrangement to pay, a deferral of recovery action or any other agreement entered into with a particular member does not affect the Commissioner's rights in respect of, nor prevent action being taken against, other members jointly and severally liable for all or part of the same group liability.

22. To simplify the negotiation process, it would be acceptable if representations were made on behalf of one or more members through the representative member, provided the representative member is properly authorised in writing to do so. It is understood that for various reasons, some entities, particularly exited members, may prefer to have separate representation. However:

- the ATO would need to ensure that the secrecy and privacy concerns of all entities were addressed
- the representative members would need to ensure that there was no conflict of interest, and
- the entities may need to ensure that they have a legal right of access to the relevant records, for example, of the representative member, for the purposes of negotiation.

## Disputed debts

23. Where a group liability is subject to a dispute and legal action for recovery against the representative member has been deferred in accordance with an arrangement as detailed in Law Administration Practice Statement PS LA 2011/4 *Recovering disputed debts*, the Commissioner will also defer commencing action against members.

24. However, even when a 50/50 arrangement has been accepted or any other agreement is in place to defer recovery action, it will be a condition that the Commissioner may rescind that agreement and commence recovery action where it is considered that the associated risk requires such action, for example, dissipation of assets. (See Law Administration Practice Statement PS LA 2011/6 *Risk and risk management in the ATO*). When considering the risk, the Commissioner will look to the position of the entire group and the situation and actions of all the members as well as the representative member.

## Indirect tax sharing agreements

### *General rules*

25. For tax periods commencing on and after 1 July 2010, an ITXSA may be entered into between a representative member and one or more members to limit the exposure of one or more members to their joint and several liability for the indirect tax amount under subsection 444-80(1) or subsection 444-90(1) of Schedule 1 to the TAA.

    Note that the *representative member's* exposure to the group's indirect tax amount *cannot* be limited by an ITXSA. It remains liable to the full extent of the debt.

26. The exposure of each member to the indirect tax amount will depend on the terms of the ITXSA provided that all legislative requirements of an ITXSA are met. An ITXSA prescribes a contribution amount to one or more members.[3] This is an amount determined in accordance with the terms of the agreement which specifies the extent to which a member will be liable for the group's indirect tax law liability for the relevant period.

[3] See paragraphs 444-80(1A)(b) and 444-90(1A)(b) of Schedule 1 to the TAA.

27. It is possible for a member to have a 'nil' or zero contribution amount.

28. A member, which is not a party to the ITXSA, will continue to be jointly and severally liable for the full indirect tax amount incurred on behalf of the group by the representative member.

29. If a member, which is a party to an ITXSA, leaves the group before the representative member is required to give the Commissioner a GST return for a tax period covered by the ITXSA, it is able to have a clear exit provided that certain conditions are satisfied. This is discussed further at paragraph 96 of this practice statement.

30. In order to be valid an ITXSA must also satisfy other requirements prescribed in the legislation under sections 444-80 and 444-90 of Schedule 1 to the TAA. These are also considered in further detail below.

### *Directors' responsibilities*

31. Directors of members would be aware that they need to consider their statutory and common law responsibilities as directors of that entity when becoming a party to an ITXSA. In particular, they would need to be aware of any obligation to the representative member and/or the Commissioner that may result from them entering into the ITXSA.

32. As the ITXSA is an agreement between the representative member and group members (that is, the ATO is not a party to the agreement), it is expected that the resolution of the content of the document and the finalisation of the arrangements to pay the representative member's debt by the due date will be resolved by the directors.

33. Given the issues that may need consideration in compiling ITXSAs, it may be prudent for directors to seek legal and accounting advice in relation to all aspects of sections 444-80 and 444-90 of Schedule 1 to the TAA.

### *Tax periods covered by an ITXSA*

34. An ITXSA must cover the total of all such liabilities relating to a single tax period.

35. While the subsections 444-80(1A) and 444-80(1B) of Schedule 1 to the TAA prescribe a separate ITXSA for each single tax period, the Commissioner will recognise a document that covers multiple tax periods as a separate ITXSA for each tax period. Accordingly, even if one ITXSA is found to be invalid, this would not mean that other ITXSAs covered by the document would be invalid.

36. In relation to a document that covers multiple periods, there is a possibility that the ITXSA will be 'updated' from time to time in relation to future liabilities. Considerable care will be required in drafting the ITXSA and amending an ITXSA. (Refer to the discussion commencing at paragraph 57 of this practice statement.)

### *Indirect tax amounts for a tax period must not be covered by multiple agreements*

37. The object of the ITXSA provisions is that there should be a reasonable allocation of the total indirect tax amounts for a tax period among one or more members in accordance with a single agreement. Where that liability is dealt with in two or more agreements, that liability cannot be considered to be covered by an ITXSA for the purposes of section 444-80 or section 444-90 of Schedule 1 to the TAA.

### *Amendment of an indirect tax amount*

38. The possibility of future amendments to liabilities should be a consideration of all parties entering into an ITXSA as well as prospective purchasers in due diligence considerations in company acquisitions. (See further discussion of amended liabilities commencing at paragraph 127 of this practice statement.)

### *Form of an ITXSA*

39. Under the terms of the legislation, a copy of an ITXSA must be given to the Commissioner within 14 days of a written notice issued by the Commissioner to the representative member requiring it to provide a copy of the agreement. Further, the copy of an ITXSA must be given to the Commissioner in the 'approved form'.[4]

40. Failure to satisfy either of these requirements will render the ITXSA invalid.[5]

41. Section 388-50 of Schedule 1 to the TAA allows the Commissioner to specify the information to be provided in an 'approved form'. Further, paragraph 388-50(1)(c) of Schedule 1 to the TAA requires that the approved form contains not only the information the Commissioner requires, but also 'any further information, statement or document as the Commissioner requires, whether in the form or otherwise.'

42. However, in recognising that the ITXSA is primarily an agreement between members of the group, the Commissioner has specified only the minimum requirements necessary for an ITXSA to be considered to be in the 'approved form'. Provided the ITXSA legally binds the parties concerned and the minimum requirements listed below are satisfied, the actual form of the ITXSA (for example, a Deed) is up to the members of the group and their advisers.

### *Approved form requirements*

43. Each ITXSA:

- must be in writing
- must show the date of execution
- must specify the names of the representative member and each contributing member
- must specify which indirect tax law liability or liabilities it covers
- must specify the tax period to which the indirect tax law liability or liabilities relate
- must specify the method used to allocate the group liability or liabilities, which must provide for a reasonable allocation of the **total amount** of the indirect tax law liabilities for that tax period
- must be properly executed by or on behalf of the representative member and each contributing member, and
- must either:
  - specify the exact contribution amount for each contributing member for the relevant liability, or

[4] Subsections 444-80(1D) and 444-90(1D) of Schedule 1 to the TAA.
[5] Subsections 444-80(1D) and 444-90(1D) of Schedule 1 to the TAA.

- if and when required to be produced to the Commissioner, include a schedule signed by the representative member:
    - specifying the relevant liabilities and periods as specified in the Commissioner's notice to produce
    - stating the name and Australian business number or Australian Company Number of the representative member and each contributing member
    - stating the contribution amount of each contributing member in respect of that liability or each of the liabilities
    - declaring that 'the schedule includes the names of all the ITXSA contributing members in relation to that liability or liabilities for that/those period/s and the contribution amount or amounts as calculated under the ITXSA', and
    - must, if and when required to be produced to the Commissioner, include any Deeds of Assumption in relation to the particular liability or liabilities for the particular period/s.

***Approved form requirements – explanation***

44. It is acceptable that one document could cover multiple ITXSAs. (Refer to discussion commencing at paragraph 34 of this practice statement).

45. Execution of the ITXSA by a person properly authorised or, if appropriate, under a Power of Attorney would be acceptable as per standard commercial practice provided it is legally binding. Section 127 of the *Corporations Act 2001* may be relevant in certain cases.

46. Specific amounts (which can be 'nil' amounts if appropriate) can be shown in the ITXSA as being the relevant contribution amounts of each contributing member for the relevant indirect tax amounts.

47. However, if these specific amounts are not shown in the body of the ITXSA itself, then, if and when the ITXSA is produced to the Commissioner, the representative member must also produce the schedule and any Deeds of Assumption or similar documents used. The working papers used to calculate the contribution amounts **do not** have to be produced at that time but may be requested by the Commissioner if necessary. The non-provision of the working papers when an ITXSA is requested does not impact on whether or not a group liability is covered by an ITXSA. However, the non-provision of the working papers following any formal request under section 353-10 of Schedule 1 to the TAA at a later date would be a prosecutable offence.

48. To emphasise, the schedule referred to above **does not** have to be in existence just before the time at which the representative member of the group is required to give the Commissioner a GST return for a tax period (but groups may find it convenient to compile the schedule at that time). The fact that a schedule is not in existence just before this time does not impact on whether or not a group liability is covered by an ITXSA.

49. Secondly, a schedule would need to be provided in all cases except where specified amounts were allocated to each contributing member in the body of the ITXSA itself.

50. The figures provided in the ITXSA or in the schedule are to be definitive. That is, any discussions between the representative member and members as to the correctness of the figures will need to be resolved prior to the production of the ITXSA and schedule. A deferral of time to lodge the ITXSA and/or schedule while these matters are resolved is unlikely to be granted.

51. While all members do not have to be a contributing member, it is suggested that groups review their ITXSAs regularly in case some adjustment is required due to members exiting or new members joining the group. These exits and entries may affect the reasonableness of an allocation methodology used in a pre-existing ITXSA. The question of whether all members should enter into an ITXSA may also be of relevance to prospective purchasers of these companies in their due diligence considerations.

52. Even if a member does not trade during a particular tax period, this may not preclude it from being a party to an ITXSA. Nor would its participation in an ITXSA necessarily affect the reasonableness of the allocation of a group liability under that ITXSA. For example, a method that results in a 'nil' allocation to a non-trading entity would, of itself, have no bearing on whether the group liability was considered to have been reasonably allocated amongst the representative member and all the contributing members.

### *Timing*

53. In order that an indirect tax amount for a tax period may be covered by an ITXSA, the ITXSA must be in place before the representative member is required to give the Commissioner a GST return for the tax period.

54. The Commissioner has no power to allow execution of an ITXSA after this date. However, if the Commissioner defers the representative member's due date for lodgment, then the ITXSA must be in place at that later date. It would be rare for the Commissioner to grant a deferral because the group has not made adequate arrangements to ensure that the ITXSA was not in place before the due date for lodgment. A deferral would not be available solely because a group has not completed an ITXSA relating to that particular tax period. (Refer to Law Administration Practice Statement PS LA 2011/15 *Lodgment obligations, due dates and deferrals*).

55. If an ITXSA in respect of the liability for a tax period is executed after the due date of the relevant GST return, it is invalid and has no effect. The Commissioner will not accept, and the legislation does not allow, an ITXSA executed on a particular date to have effect from an earlier date.

56. Further, a document covering multiple ITXSAs over multiple tax periods which has been executed on a particular date – but purports to have effect from an earlier date – would not be acceptable in relation to any debt relating to a GST return for which the lodgment date occurred *prior* to the date of execution. However, such a document may nevertheless be accepted in relation to relevant debts relating to GST returns which have a lodgment date after the date of execution.

### *Amending an ITXSA*

57. The effect of 'amending' an ITXSA may be that a new or updated agreement replaces the previous agreement. Where an agreement covering liabilities for multiple tax periods (that is, multiple ITXSAs) is amended, members need to ensure that the original ITXSA does not cease to have effect with respect to pre-existing liabilities and that any amended ITXSA does not create adverse consequences with respect to pre-existing liabilities or clear exit arrangements which have already taken place.

58. ITXSAs may need to be amended for a number of reasons, for example:

- the introduction of a new member or members to the group
- the exit of a member or members from the group, and/or
- the concurrent exit and introduction of members to the group.

59. Considerable care will be needed in drafting the original ITXSA if groups wish to ensure that the ITXSA remains valid and avoid (where possible) the necessity for all current and former ITXSA parties to sign all amendments. It will also be necessary to address (when drafting or redrafting) the impact of amended assessments on entities that were part of the group for a relevant tax period, even if not at the same time.

60. If it is intended to replace an existing ITXSA dealing with a particular group liability that has a future due date with a new ITXSA that deals with the same future liability, it should be clear that the new ITXSA completely voids the earlier ITXSA. If not, it may be considered that the liability is dealt with by two agreements, with the result that both would be void under the terms of the legislation. It should also be carefully noted that if the existing ITXSA is already dealing with pre-existing group liabilities, then the existing ITXSA is only void with respect to future liabilities, not with respect to pre-existing liabilities.

61. If the Commissioner requires an ITXSA to be produced in relation to the liability for a particular tax period, members will need to produce the ITXSA as it existed just prior to the due date of the relevant GST return for the relevant tax period. This will require careful attention to document controls.

### *Execution of ITXSAs by exited members or liquidated members*

62. As discussed above, for an ITXSA to be in the approved form, it needs to be legally executed by or on behalf of each contributing member that is a party to the agreement.

63. There may arise situations in which, before the due date for lodgment of a GST return, an ITXSA must be entered into or amended after a member has left the group and that member needs to be a party to the ITXSA as otherwise:

- the exited member could not obtain a clear exit, and
- a reasonable allocation of the group liability could not be achieved.

64. The failure of the exited member to be a party to the ITXSA will potentially result in all contributing members, including it, being jointly and severally liable to the full extent of the indirect tax amount for the tax period (that is, the liability would not be covered by an ITXSA). Similarly, any change to the methodology used in an ITXSA could mean that an exiting member that had made a payment of what it had considered to be its contribution amount to the representative member may not have achieved a clear exit (if that contribution amount were to change as a result of the change in methodology).

65. A difficulty arises if an ITXSA needs to be signed by a member that has been deregistered and thus no longer legally exists. Clearly, that former member cannot sign the ITXSA nor can it authorise anyone to sign on its behalf.

66. Depending on the ITXSA methodology used and the financial position of the entity throughout the relevant tax period, this may not be an issue. This is particularly in the event that the liquidated member is allocated a 'nil' liability (which is not unusual in periods during which an insolvent entity is under insolvency administration). Note also that not every member has to be a party to an ITXSA.

### *'Reasonable allocation' of contribution amounts under an ITXSA*

67. In order for an ITXSA to apply to a group's indirect tax amounts for a particular tax period, the contribution amounts for each contributing member must represent a 'reasonable allocation', among the representative member and the contributing members, of the group's total indirect tax amounts for that period.[6]

68. An ITXSA may specify fixed contribution amounts for each contributing member. These contribution amounts must represent a 'reasonable allocation' among the representative member and the contributing members. Alternatively an ITXSA may prescribe a method of allocation under which contribution amounts may be determined. In such cases, it will be necessary to ensure that any method of allocation prescribed under the ITXSA will ultimately produce contribution amounts that represent a 'reasonable allocation' among the representative member and contributing members.

69. Without prescribing the method that a group may adopt for allocation of the indirect tax law liability, examples of what the Commissioner would consider as being possible bases of allocation are:

- Allocations on the basis of each contributing member's contribution to that liability. Under this method of allocation, each member's contribution amount is calculated as if that member were not part of a GST group.[7]

  As most intra-group transactions are treated as if they are not taxable supplies (subsection 48-40(2) of the GST Act), the calculation of each member's contribution amount also ignores intra-group transactions. However, when applying this method of allocation to GST joint ventures, note that, in contrast to GST groups, only certain specified transactions between the joint venture operator and a participant are not treated as taxable supplies (subsection 51-30(2) of the GST Act). Transactions between participants in a GST joint venture, for example, would not be ignored for the purposes of calculating their contribution amounts under this methodology.

  Calculations under this method of allocation may result in some members having a (notional) liability, while others may be in a net credit position (notional refund members). The credits which accrue to notional refund members (that is, the input tax credits that remain after offsetting amounts of GST) may be taken into account in two ways:

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[6] See paragraphs 444-80(1A)(c) and 444-90(1A)(c) of Schedule 1 to the TAA.

[7] While reference in this practice statement to a GST group is taken to include reference to a GST joint venture (see paragraph 6 of this practice statement), we have also provided a specific illustration of the operation of this method of allocation to GST joint ventures in example 4 of the Appendix to this practice statement.

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| Notional refund members may choose to have the amount of their credit transferred between group members so that the notional refund members receive a 'nil' allocation and the members in a net liability position receive an allocation of a share of the credit.<br>This approach may be summarised as follows:<br>• determine the notional indirect tax amount for each contributing member on the basis that it is not part of a group<br>• allocate the notional refund members a 'Nil' liability under the ITXSA, and<br>• apportion the amount of any credits to members with a tax liability or allocate to each ITXSA contributing member (that still has a notional tax liability) a portion of the indirect tax law liability on a pro rata basis.<br>Note, that any increase in the group's liability following an amended assessment resulting from incorrectly over claimed credits by a notional refund member should, in principle, increase the contribution amounts of the other members which had previously been reduced by the allocation of the (incorrectly claimed) credits. Although it was the notional refund member who incorrectly over claimed the credits, the ITXSA allocation methodology spreads the adjustment across other members of the group. This does not jeopardise the reasonableness of the allocation.<br>Refer to example 1 in the Appendix for an illustration of how these types of allocations may work in practice. | Alternatively, the methodology may dictate that the credits accrued by the notional refund members should not be used by the other group members. That is, the notional refund members will have a 'nil' contribution amount, but the amount of their credits will not be redistributed amongst the other members in the group.<br>As the contribution amounts of the other members are not reduced by the notional refund members' credits, the total amount of the ITXSA contribution amounts payable by all contributing members will exceed the net amount payable by the group.<br>However, this method of allocation may nonetheless be considered reasonable.<br>Under this method of allocation, any increase in the group's liability following an amended assessment resulting from incorrectly over claimed credits by a notional refund member will, in principle, be attributed to that member such that it will now have a contribution amount equal to the amount of the increased liability. The contribution amounts of the other members will not need to be amended.<br>Refer to example 2 in the Appendix for an illustration of how these types of allocations may work in practice. |

- Allocations of a proportion of unquantified indirect tax amounts by using historical information if, at the time an ITXSA is put in place, the quantum of the liabilities which it is intended to cover have not been determined. For instance, the amount allocated to an ITXSA contributing member could be calculated using the average contribution of that entity to the indirect tax law liabilities over the last 12 months. However, changes in the group's structure, for example, because of entries and/or exits, or changes to individual member's operations, may mean that the contribution amounts calculated under this method would need to be adjusted to account for these movements. Depending on the timing and significance of these changes, a new ITXSA using a different methodology may need to be entered into.
- Allocations on the basis of each contributing member's ability to pay that liability. However, if, at the time of allocation, the directors were aware that events would occur that would severely affect one or more member's ability to pay their allocation, but the directors ignored that information, then the allocation may be viewed as unreasonable. If it was the case that, at the due date for lodgment of the GST return, the entire group lacked sufficient funds to meet the liability for that tax period, an allocation may be considered reasonable despite one or more contributing members being incapable of paying their contribution amount (for example, the entire group was insolvent as opposed to only one or more contributing members being insolvent).

70. It is assumed that all the methods of allocation outlined in paragraph 69 of this practice statement are made on the basis of the sum of all indirect tax liabilities for that tax period, such that each contributing member receives an allocation based on a portion of the total amount of the liabilities. However, it is also possible for each indirect tax amount to be accounted for and apportioned separately. For example, a group may consider it appropriate to separate the GST, LCT and WET component liabilities and apply the allocation method or methods to each individual component against the contributing members. It should be noted, however, that the legislation requires that ultimately there must be a single amount ('a particular amount') that is determinable in respect of each contributing member. Further, it is this amount that must represent a reasonable allocation of the group's liability among the representative member and the contributing members.

71. The methods of allocation outlined above are not intended to be prescriptive and other methods using financial information normally available to the group may be acceptable. This is provided that each contributing member's contribution amount can ultimately be considered to represent a reasonable allocation of the total indirect tax law liability of the group for that tax period.

72. It is also accepted that the methods of allocation outlined in paragraph 69 of this practice statement may result in certain entities being liable for less than, or more than, they would be if they were not members of a group.

73. As will be seen in the examples contained in the Appendix of this practice statement, there may be cases where the representative member is a contributor to the group's indirect tax law liability for a tax period, and the amount allocated to the ITXSA contributing members (other than the representative member) is less than 100% of the total amount of the liability because a portion of the liability is a notional allocation to the representative member. This is acceptable as long as the requirements of the legislation (for example, the allocations represent a reasonable allocation of the total amount of indirect tax payable in relation to that tax period) are satisfied.

74. It is recognised that the financial position of individual members may change between the date on which the ITXSA is entered into and the date (if any) on which the contribution amount is pursued by the Commissioner, particularly where the contribution amount is pursued some years after the due date. Accordingly, it is possible that a contributing member may not be able to pay its full contribution amount by the time the Commissioner seeks to recover that amount. However, provided that the original allocation was in accordance with the methodology of the ITXSA and was reasonable at the due date for lodgment of the GST return and provided, also, that there are no adverse circumstances relating to the validity of the ITXSA (for example, the ITXSA was part of an arrangement to prejudice recovery), the Commissioner will recognise the ITXSA as being valid.

### *Partially unreasonable allocation invalidates the entire ITXSA*

75. As the ITXSA must make a reasonable allocation of the total amount payable under the indirect tax laws for that tax period, an unreasonable allocation of part of the total amount to one contributing member will invalidate the entire ITXSA. The law does not allow an ITXSA to be valid only in respect of some contributing members and not others.

### *Arithmetic errors*

76. Arithmetic errors in determining the actual contribution amount for a member, by applying the ITXSA to the indirect tax law liability, would not of themselves make the allocation unreasonable. However, an adjustment would be required to the schedule to ensure that the correct liabilities and contribution amounts were reflected. In respect of non-arithmetic errors, the ATO may also accept the ITXSA if the mistake is not material but this would also depend largely on the circumstances of the case.

### *Other contractual arrangements between members and representative member*

77. Groups may decide to use the ITXSA for other purposes. Provided these do not affect the reasonableness of the allocation under the ITXSA or prejudice the rights of the Commissioner to recover the debt, this would be of no concern to the Commissioner. For instance, the following internal arrangements are not relevant to determining whether there has been a 'reasonable allocation', even if they are included in the ITXSA:

- financing of ongoing tax liabilities (even if this requires different contributions from group members than would be ascertained under the 'reasonable allocation' clauses)
- the treatment of refunds received, or
- the requirements for balancing adjustments between the ITXSA liabilities and other tax liabilities as shown in entities' accounts.

78. A group may choose to incorporate the terms of the tax funding or other private contractual arrangements in a separate agreement. Again, these agreements are generally of no concern to the Commissioner, subject to the 'prejudice recovery' provisions in the legislation. That is, while a tax funding or other arrangement may have no bearing on the determination of whether there has been a 'reasonable allocation', if it is designed to frustrate the ability of a member to pay its contribution amount, it would be seen to 'prejudice recovery' under paragraphs 444-80(1C)(b) and 444-90(1C)(b) of Schedule 1 to the TAA.

### *Arrangement to prejudice recovery*

79. The provisions relating to ITXSAs will not apply, and the members will thereby be exposed to joint and several liability for the full amount of the group's indirect tax law liability for the tax period, if:

- the ITXSA was entered into as part of an arrangement, and
- a purpose of the arrangement was to prejudice the recovery by the Commissioner of the indirect tax amount.

80. Examples of such arrangements could be:

- where the allocation to a contributing member was based on capacity to pay, seemed reasonable at the time the ITXSA was made, and remained so at the due date for lodgment of the group's GST return, but it was always known that, by the time the Commissioner may attempt to collect from that member, its circumstances would be such that it would not be in a position to meet its liability, and
- where the allocation to a contributing member was based on notional tax liability, but the individual amounts were artificially distorted by selective allocations of credits or other measures that appeared designed to shift the liabilities to entities which are less likely to be able to meet them.

81. Some of the factors to be taken into account in determining whether an arrangement had a purpose of prejudicing recovery include:

- the disposing of assets in solvent or asset-rich members of the group
- the uncommercial sale of assets, including the sale of an exiting member.

82. The existence of an ITXSA in itself would not be seen as an arrangement to prejudice recovery.

### *Formal notice requesting a copy of the ITXSA*

83. The notice to provide the ITXSA under subsection 444-80(1D) or subsection 444-90(1D) of Schedule 1 to the TAA is issued to the representative member, and it is the representative member's responsibility to provide the copy of the agreement in the approved form. If the representative member does not provide the ITXSA on request within the 14 day timeframe required under the legislation, the ITXSA will be considered not to apply to the liability and the members will be fully exposed, jointly and severally, to the full amount of the group's indirect tax amounts.

84. The Commissioner will not issue a notice under subsection 444-80(1D) or subsection 444-90(1D) requiring the provision of an ITXSA at a time before the due date for lodgment of the GST return. This is because, until that time, an ITXSA may not exist.

85. The Commissioner may defer the time for lodgment of an approved form and, in this case, an ITXSA through the operation of section 388-55 of Schedule 1 to the TAA. For the policy on deferring the lodgment time, refer to PS LA 2011/15.

86. Generally, a deferral of time to lodge the ITXSA would be very unlikely if delays would exacerbate the recovery position or the group was non-cooperative in attending to its obligations. Generally, the granting of a deferral would be unlikely in cases other than where non-compliance was due to circumstances that were beyond the control of the representative member. An example may be where a liquidator has been appointed and all the records of the group are unable to be located immediately.

87. It should be noted that a deferral of the time to provide a copy of an ITXSA does not alter the time that an ITXSA needs to be in place.

88. In some circumstances, such as when negotiating a payment arrangement, the Commissioner may informally request a copy of any ITXSA to which an entity is a signatory or request the ITXSA under section 353-10 of Schedule 1 to the TAA. These requests and the compliance or non-compliance by the requested party to provide a copy of an ITXSA have no impact on the liability status of the contributing members.

### *Commissioner's review of an ITXSA*

89. As amounts determined under an ITXSA are only enforced once a representative member defaults on its obligations, the Commissioner does not expect to require the production of a significant number of ITXSAs. Further, while an ITXSA could provide a reasonable allocation of liability at a particular point of time, depending on the allocation methodology used, the reasonableness of the allocation may change due to later events. Accordingly, it would be of questionable benefit to taxpayers for the Commissioner to review ITXSAs as they are compiled and it would be administratively impossible to review all ITXSAs in a meaningful way in a reasonably brief time.

90. Accordingly, the fact that the Commissioner may have received a copy of an ITXSA (either informally or through a request under subsection 444-80(1D) or subsection 444-90(1D) of Schedule 1 to the TAA) and has taken no further action does not imply that the Commissioner considers that the ITXSA is valid or provides a reasonable allocation of the relevant amounts.

91. Similarly, if the Commissioner took steps for recovery on the basis that there was an ITXSA but at some future point it is concluded that the indirect tax amount was not covered by an ITXSA, for example, because the allocation of the liability under the ITXSA was not reasonable, then the previous actions of the Commissioner would not prevent the law operating as if the debt is *not* covered by an ITXSA (that is, all contributing members are jointly and severally liable for the full amount of the group's indirect tax amounts).

### *Payment by a member to a representative member not sufficient*

92. A payment made by a member to the representative member does not automatically extinguish the liability of the member to the Commissioner. That is, the member could still be required to make a payment to the Commissioner of their contribution amount or of the full amount of the group's indirect tax amount (depending on whether an ITXSA applies). This is so even if the amount paid to the representative member is equal to what would be required under the ITXSA, or is equal to the full amount of the group's liability. An exception to this rule is where a member makes a clear exit payment to the representative member – this is discussed at paragraph 94 of this practice statement.

93. For this reason, the characterisation of payments (to representative members or otherwise) may need to be considered by members, for example, whether it is a loan or paid in escrow.

## Recovery from an exited member

### *Clear exit*

94. A member that has left the group is referred to as an exited member. An exited member remains liable for the GST group's indirect tax amounts incurred by the representative member for the period during which it was a member.

95. A member is able to make a clear exit if:

- the liability for a tax period was covered by an ITXSA (that is, the ITXSA relates to the liability and satisfies all legislative requirements)
- the contributing member leaves the group before the representative member is required to give to the Commissioner a GST return for that tax period, and
- before the day on which the representative member is required to give to the Commissioner a GST return for that tax period, the contributing member pays to the representative member the contribution amount in relation to that tax period or an amount that is the reasonable estimate of the contribution amount.

96. Therefore, the following debts cannot be subject to the clear exit rules:

- an indirect tax amount for a tax period that is not covered by an ITXSA, or
- an indirect tax amount for a tax period where the lodgment of the GST return to which it relates has already become due at the time of the exit.

### *If leaving the group prejudices recovery*

97. A member will not leave the group 'clear' of a group liability if the exit was part of an arrangement, a purpose of which was to prejudice the recovery by the Commissioner of some or all of the amount of the group liability or liabilities.[8]

98. For example, an arrangement in which a member is deliberately transferred out of the group as part of a broader arrangement for the purpose of putting most of the group's assets out of the group would be regarded as prejudicial to the recovery of the liability.

[8] Paragraphs 444-80(1B)(a) and 444-90(1B)(a) of Schedule 1 to the TAA.

***Summary of ATO collection action against exited members and exited participants***

99. Broadly:

*Where the GST return is due prior to the time of the exit*

- An exited member which has joint and several liability for the full amount of the group indirect tax amount where the lodgment of the GST return to which it relates was due prior to the time of the exit will generally be pursued as a 'last resort', that is, if it is unlikely that the debt can be recovered from other members. (The law does not allow a clear exit in relation to this debt.)
- An exited member which is allocated a contribution amount under an ITXSA for a group debt where the lodgment of the GST return to which it relates was due prior to the time of the exit may need to be pursued for its contribution amount to enable full collection of that debt. (The law does not allow a clear exit in relation to this debt.)
- An exited member which is allocated a contribution amount under an ITXSA for a group debt arising entirely from an amendment after the exit but where the lodgment of the GST return to which it relates was due prior to the time of the exit will generally not be pursued unless its activities contributed to the need for the amendment or it had (notionally) used credits that were extinguished in whole or part by that amendment. This is, however, only a general rule to which there may be exceptions in which the Commissioner will exercise the right to pursue the exited member.

*Where the GST return is due after the time of the exit*

- An exited member which is jointly and severally liable for the full amount of the group indirect tax amount where the due date for the lodgment of the GST return to which it relates was after the exit will generally be pursued as a 'last resort'.
- An exited member which is allocated a contribution amount under an ITXSA for a group debt where the due date for lodgment of the GST return to which it relates was after its exit, generally may need to be pursued for its contribution amount to enable full collection of that debt if it has not exited 'clear'.
- An exited member which has an ITXSA liability for a group debt where the due date for lodgment of the GST return to which it relates was after its exit will not be pursued if it has exited 'clear'.

  An exited member may have exited 'clear' of the liability even where that liability is subsequently amended, so long as the clear exit payment it made to the representative member was sufficient to cover the ultimate (post-amendment) contribution amount.

- Where a subsequent amendment to a liability results in an increased contribution amount to the exited member under the ITXSA which was not taken into account in its 'clear exit' payment to the representative member (that is, the 'clear exit' payment was not made of its ultimate, post-amendment contribution amount, or a reasonable estimate of that amount), the member is not taken to have exited 'clear' of that liability. In such cases, while the member remains liable for that debt, it will generally not be pursued. This is however, only a general rule to which there may be exceptions. The Commissioner will exercise his discretion to pursue this entity in certain circumstances which he deems appropriate, including, but not limited to, cases where:
  - its activities contributed to the need for the amendment
  - it had (notionally) used credits that were extinguished in whole or part by that amendment, or
  - it had expected, or should have expected, that there would be an amended assessment.

### *Exit upon dissolution of the group*

100. If the group is dissolved under section 48-70 of the GST Act or under section 51-70 of the GST Act, all members will each effectively have left the group.

101. The date of effect of the dissolution is the date of exit of the members from the group. If this date occurs before the due date for lodgment of the group's GST return, it is possible for members to achieve a clear exit in respect of the liability which relates to that return by complying with the clear exit requirements in subsection 444-80(1B) or subsection 444-90(1B) of Schedule 1 to the TAA.

### *ITXSA found to be invalid*

102. Generally, if an exiting member exits and makes a payment to the representative member of its contribution amount relating to a tax period before the GST return's due date for lodgment for that period, it will exit 'clear' of the group's indirect tax amounts for that tax period. A 'clear exit' is available to a contributing entity regardless of the allocation methodology used provided that the allocation is reasonable and the other requirements of the law are met.

103. However, if the ITXSA under which that contribution amount was made is found to be invalid (for example, because the allocation of the liability was unreasonable), then the exited member will not be taken to have exited 'clear' of the liability. It will be jointly and severally liable for the full amount of the group's liability for that period.

104. Its exposure to full joint and several liability will arise regardless of whether the allocation under the ITXSA to the exited member itself was reasonable or the 'clear exit' payment to the representative member would otherwise have enabled the entity to leave clear of the group liability.

### *Reasonable estimate of contribution amount*

105. If an exiting member wishes to leave the group clear of a particular liability and its contribution amount for that group liability cannot be determined before the due date for lodgment of the relevant GST return, a reasonable estimate of that contribution amount must be made.[9]

106. For a reasonable estimate of the contribution amount to be made, the estimate needs to relate to, and be based on, the relevant ITXSA.

107. Depending on the method of allocation prescribed in the ITXSA, it may be possible to make use of various data from group accounts or the member's own accounts.

108. If there is prior knowledge of an event which may impact on the reasonableness of the amount, then this needs to be factored into the estimate calculation. Such events could include:

- adjustments for taxable extraordinary or abnormal transactions
- an audit (or notice of an intended audit) by the ATO, the result of which would require that the member modify its treatment of certain transactions, or
- pending court cases that may impact on the member's financial or taxation position.

109. The contribution amount (or reasonable estimate of that contribution amount) required to be paid will in most cases need to be calculated in consultation with the representative member. The representative member will have access to group records and greater knowledge of the expected quantum of the relevant liability for the tax period as well as the exiting member's likely allocation under an ITXSA.

### *Payment of contribution amount to representative member on exit*

110. Documentary evidence that the exiting member had paid to the representative member the contribution amount, or a reasonable estimate of that amount, would need to be retained by the exiting member in the event that it is later needed to prove that it had left the group clear of a particular liability. Generally, standard commercial documentation would suffice.

111. If a payment is meant to cover two liabilities, for example, for two tax periods for which lodgment of GST returns have not yet become due, then accounting records should disclose the amount of each component.

112. If payment of the contribution amount is made to the representative member by the leaving entity, and the representative member subsequently fails to pay this amount to the Commissioner, this alone does not affect the clear exit of the entity, provided that all the requirements of a 'clear exit' payment in subsections 444-80(1B) and 444-90(1B) of Schedule 1 to the TAA are met.

113. The payment of the contribution amount or its reasonable estimate needs to be made by the time the GST return to which it relates is due to be lodged by the representative member.

[9] See subsections 444-80(1B) and 444-90(1B) of Schedule 1 to the TAA.

114. The term 'paid' has been considered in case law (for example, *Brookton Co-operative Society Ltd v. FCT* (1981) 147 CLR 441; 81 ATC 4346; (1981) 11 ATR 880) and may mean:

- an actual payment, that is, a sum of money or a bill of exchange, is handed over directly to a representative member to extinguish a liability
- a payment by agreed set-off where cross-liabilities in money exist (see Spargo's case - *Re Harmony and Montague Tin and Copper Mining Co.* (1873) 8 Ch App 407 and *FC of T. v. Steeves Agnew & Co. (Vic.) Pty Ltd* (1951) 82 CLR 408 at 420-1), or
- a transfer of property other than money or a bill of exchange, that is, by a transfer in kind.

115. In regard to the above points, it must be remembered that subsections 444-80(1B) and 444-90(1B) of Schedule 1 to the TAA require payment to be made by the leaving contributing member to the representative member. Therefore, payment made by the purchaser or payment made to a vendor, being an entity other than the representative member, would not meet the statutory requirement.

116. A 'mere book entry' is not considered a form of payment. Any such book entry must result from a clear contractual arrangement between the parties which establishes a debt. *(Manzi v. Smith* (1975) 49 ALJR 376 at 377; (1975) 7 ALR 685 at 687-688; see also *Brookton Co-operative Society Ltd v. FCT* (1981) 147 CLR 441; 81 ATC 4346; (1981) 11 ATR 880.) The establishment and recording of a debt cannot be considered as payment.

117. It may be possible that the payment of the contribution amount by the exiting member is also made in satisfaction of the conditions of a private tax funding arrangement between the representative member and the exiting member. However, the Commissioner is strictly concerned with the satisfaction of the 'clear exit' requirements under subsections 444-80(1B) and 444-90(1B) of Schedule 1 to the TAA. That is, whether the relevant legislative requirements for a 'clear exit' have been met and a 'clear exit' payment can be properly substantiated. Whether the payment by the member to the representative member is also made pursuant to a tax funding arrangement is largely irrelevant to the question of whether these requirements have been satisfied.

### *Contribution amount 'nil'*

118. If the contribution amount (or the reasonable estimate of that amount) that otherwise would be required to be paid to the representative member under subsections 444-80(1B) and 444-90(1B) of Schedule 1 to the TAA is determined to be 'nil' then no payment is necessary to allow the exiting member to leave the group clear of the relevant group liability. However, documentation demonstrating the calculation of the 'nil' amount would need to be retained to support the assertion of a clear exit should that claim later need to be proven to the Commissioner or a court.

### *Adjustment of contribution amount after due date for lodgment of the GST return*

119. It may sometimes be realised that the contribution amount paid by the leaving member to the representative member was too much or too little compared to the actual contribution amount as calculated under the ITXSA at a later date.

120. If the estimate of the contribution amount paid to the representative member was found to be too much, then a repayment by the representative member to the exited member (or the purchaser of the exited member) can occur without impacting on any clear exit, provided the resulting net amount paid to the representative member still represents a reasonable estimate of that contribution amount.

121. However, any extra amounts paid by the exited member **after** the due date for lodgment of the relevant GST return **cannot** be taken into account when determining whether the amount paid was a reasonable estimate of the contribution amount. That is not to say that, if an adjustment amount is required to be paid by the exited member to the representative member under their own contractual arrangements, the original amount paid was not a reasonable estimate of the contribution amount.

***Reasonable estimate of contribution amount different to final contribution amount calculated under an ITXSA***

122. If the 'reasonable estimate' of the contribution amount paid to the representative member before the due date for lodgment is less than the contribution amount that was later determined under the ITXSA (for example, when all data is available for determination of the various contribution amounts), there is no need to make any compensatory adjustments to the contribution amounts of any other ITXSA contributing members to make up the shortfall.

123. For example, if the exiting member leaves the group on 1 September and makes a payment of a reasonable estimate that its monthly contribution for the August tax period under the ITXSA would be $25,000 but, upon a recalculation of monthly figures on or after 21 September and applying the ITXSA the amount should have been $25,500, there is no need to reallocate the additional '$500' to other members.

124. The reason that no adjustment is necessary to the other ITXSA contributing members' contribution amounts is that, under the ITXSA, an amount would still have been allocated to the exited contributing member. However, if the ITXSA provides for a reallocation of the $500 to other members, this would not, in itself, invalidate the ITXSA, as long as all amounts ultimately allocated amongst the members represented a reasonable allocation of the total amount of the group liability.

125. On the other hand, one element of the clear exit test is that the amount paid to the representative member is a reasonable estimate of the exiting member's contribution amount. Therefore, providing the amount paid to the representative member at the time of exit can be shown to be a reasonable estimate of the final contribution amount, then a clear exit is still possible.

126. It should be noted that, in any case, the representative member remains liable for 100% of the GST group's liability and will be responsible for any shortfall arising in the circumstances considered above.

## Amended liabilities

### *Amended liabilities – general rules*

127. In some cases, amendments to a member's liability may be taken into account in a GST return which is due prospectively (that is, a return for which due date for lodgment has not yet passed) even though they relate to transactions occurring in a previous tax period. For example, an increasing adjustment relating to a transaction in a previous tax period may be taken into account in a later tax period in which the taxpayer becomes aware of the adjustment.

128. However, there may be circumstances in which an amendment needs to be made to a return which was lodged in respect of an earlier tax period, causing a debt (or further debt) to arise in respect of that tax period.

129. Similarly, an amended assessment could issue in respect of an assessment made by the Commissioner of the representative member's net amount for an earlier tax period, resulting in an increased liability for that tax period.

130. All members will potentially be affected by an amended liability. The following discussion deals with cases in which an amendment needs to be made to a return lodged in respect of an earlier tax period.

### *Amended liabilities and ITXSAs*

131. If the amended liability is not covered by an ITXSA, all members will be jointly and severally liable for the full extent of the group's indirect tax amount for the tax period.

132. For an amended liability to be covered by an ITXSA, it must be covered by the same ITXSA that applies in respect of the original liability.

133. This is because there can only be one ITXSA in respect of a particular tax period.[10]

134. The ITXSA must be in existence before the due date of the GST return in respect of the period which it covers.

135. A liability resulting from the amendment will be considered to be addressed by the ITXSA provided that it is drafted in terms which are broad enough to cover amended liabilities. For example, it could prescribe a broad methodology under which the indirect tax law liability for that period can be ascertained, without specifying specific or fixed amounts that may be invalidated upon an amended assessment.

136. If, for example, a contribution-to-liability method is used as the basis for allocation under an ITXSA, the effect would be to allocate the increased liability from the amendment to those entities whose transactions resulted in the amendment. This additional allocation may be an indirect allocation if credits are reduced in one member and, therefore, those members that used those credits (under one variation of this methodology) will have their liabilities increased.

[10] See subsections 444-80(1E) and 444-90(1E) of Schedule 1 to the TAA.

137. There may be other allocation methods in which the additional liability arising from the amended assessment is not allocated to members responsible for the increased debt. An example is where liability is apportioned on a 'capacity to pay' basis, under which the contributing members which have the greatest ability to pay the group debt continue to be responsible for the payment of the liability – and thereby have their allocations increased as a result of the amendment – notwithstanding that the increased liability arose from the activities of another member.

138. In all cases, however, the final (post amendment) liability must be reasonably allocated among the representative member and contributing members.

139. There may be situations in which the Commissioner may have required the production of the ITXSA prior to the amended assessment because the original assessment was also unpaid. Accordingly, it is unlikely that any schedule showing the actual ITXSA liabilities from the application of the methodology to the original group liability would include the distribution of the amended liability. In these cases, the Commissioner may require the production of the ITXSA with an amended schedule within 14 days of the amendment, reflecting the new apportionments to members from the application of the prescribed methodology to the amended assessment.

### *Amended liabilities and clear exit*

140. Where an exited member makes adjustments to supplies and acquisitions that were attributable in a period in which it was in the group but these adjustments are attributable to a period *after* it left the group, this will not result in an amended assessment for the group but is an amendment to the exited member. The following paragraphs relate only to the amendment of a liability for a tax period in which the exited member was part of the group, and for which it seeks to achieve a clear exit.

141. As a general principle, the effect of any amendment on a clear exit could be due to:

- the allocation under that ITXSA no longer being considered reasonable and thus invalidating the ITXSA, for example, if the original allocation was of a specific amount, or
- the amount paid by the exited member no longer being considered a reasonable estimate. For example, the allocation methodology is based on notional tax incurred by each member, the amendment was due to the exited member's activities, and it ought to have been aware of the possible amendment at the time of leaving. That is, it was unlikely that the directors actually believed they were making a 'reasonable estimate' in view of other matters known to them but not to other relevant parties.

Note that if the exited member had no knowledge of other entities' activities that led to the amendment, then, depending on the method of allocation, its clear exit may be unaffected, that is, it still may have paid a reasonable estimate of its liability at the time of leaving.

142. An ITXSA will not be considered to have made an unreasonable allocation because it limits the exposure of an exited member under an amendment of the group's assessment to that part of the increased debt that arose from the exited member's own activities.

143. The position of an exited member in respect of its ability to achieve a clear exit in the event of a subsequently amended liability is as follows:

- If the member exits before the due date of the relevant GST return, any payment it made to the representative member prior to its exit may not be sufficient to gain a clear exit if it does not take into account the increase in its contribution amount following the amended assessment.

  A clear exit can only be achieved in this case if the entity made a payment of that contribution amount, or a reasonable estimate of that amount, to the representative member prior to its departure.

  A clear exit may also be obtained if the entity could not have expected that an amended assessment would issue at a later time and makes a payment of its pre-amendment contribution amount, or a reasonable estimate of that amount; that is, it doesn't contribute to, and could not have expected, the increased amount arising from the amendment.

  As to whether the entity could have anticipated an amended assessment, it is expected that usually, the exiting member will need to consult with the representative member in calculating its contribution amount or a reasonable estimate of that amount. The representative member will often be in a better position to anticipate any future amended assessments of the group liability and, therefore, to advise accordingly of any likely increase in the contribution amount. However, an unexpected amended assessment resulting, for example, from undisclosed activities of another member of which neither the exiting member nor the representative member were (at the time of exit) aware, may not affect the 'reasonableness' of the entity's pre-amendment contribution amount.

  Conversely, a clear exit would not be obtained if the member could have expected that an amended assessment would issue at a later time and doesn't make any contribution on exit towards the additional liability.

- If the member leaves the group at any time after the due date for lodgment of the GST return for the liability, the clear exit provisions will not apply to that liability. This is even if the amended assessment may not yet have issued at the time of departure.

  This is because subsections 444-80(1B) and 444-90(1B) of Schedule 1 to the TAA require the leaving time of the member to be before the day on which the representative member is required to give to the Commissioner a GST return for that tax period.

- If the contribution amount for the member is a fixed sum under the ITXSA and does not allow for a variation following the issue of an amended assessment, the allocation may not be considered to be 'reasonable' pursuant to paragraphs 444-80(1A)(c) and 444-90(1A)(c) of Schedule 1 to the TAA. The liability in question may therefore, not be taken to be covered by the ITXSA.

### Allocation of payments received by the Commissioner

144. The Commissioner may receive payments from the representative member or, following a demand being issued to a member, from that member. Payments in respect of the group's liabilities or contribution amounts by the representative member or members will be allocated as follows:

- A payment to the Commissioner by the representative member where members are jointly and severally liable for the full amount of the group's liability will be offset against the representative member's liability and all the members' liabilities.
- A payment to the Commissioner by a member where members are jointly and severally liable for the full amount of the group's liability will be offset against all members' liabilities and the representative member's liability.
- A payment to the Commissioner by a member where an effective ITXSA exists will be offset against that member's liability and the representative member's liability.
- This in turn may, depending on the way in which the liability is allocated under the ITXSA, reduce the liability of some or all of the other members. This is because all members are still jointly and severally liable for the debt. The joint and several liability of each member is limited under the ITXSA, but not entirely extinguished and replaced by it. In other words, the ITXSA does not create a separate and distinct liability from that which is jointly and severally owed, but limits the exposure of the contributing members to that liability.

  Again, depending on the ITXSA allocation, the reduction in the representative member's liability from one member's payment may affect other members whose contribution amounts exceed the balance payable by the representative member after the offset. The joint and several liability of these entities will be reduced to equal the balance recoverable from the representative member after the offset. This means that in some cases, there may be no reduction in the member's liability (namely where their contribution amount is below this balance).
- A payment to the Commissioner by the representative member where an effective ITXSA exists will be offset against the representative member's liability. This may, depending on the way in which the liability is allocated under the ITXSA, reduce the liability owed by members whose contribution amount exceeds the balance payable by the representative member after the offset. The joint and several liability of these entities will be reduced to equal the balance recoverable from the representative member after the offset. This means that in some cases, there may be no reduction in the member's liability (namely where their contribution amount is below this balance).

145. The total amount recovered from the representative member and members for the group's indirect tax amounts in that tax period will be no more than the total indirect tax law liability for that period.

### General interest charge

146. GIC accrues on any net fuel amount or amount of indirect tax that remains unpaid after the time by which it is due to be paid.[11]

[11] See section 105-80 of Schedule 1 to the TAA.

147. GIC arising from the group's indirect tax amounts is itself an amount payable under 'indirect tax law' under the terms of sections 444-80 and 444-90 of Schedule 1 to the TAA. It is therefore subject to the joint and several liability and ITXSA provisions prescribed under those sections.

148. As part of the legislative requirement that the ITXSA cover the 'total amount payable under indirect tax laws', the GIC must also be covered by the ITXSA . If not, the ITXSA will not be regarded as having satisfied all legislative requirements and consequently, all members will be jointly and severally liable for the full amount of the total indirect tax amounts for the tax period in question.

149. An ITXSA to which a particular debt relates could apportion a continually accruing amount of GIC amongst the members of the group. For example, it is possible that a member who is attributed 40% of the primary indirect tax law liability of the group may also, consistently, be attributed 40% of the GIC accruing on this liability. Another way of looking at it is to allocate 40% of the total amount of the indirect tax amounts of the group, inclusive of GIC, to the member, with any future accrual of GIC to continue to be attributed in the same proportion.

150. Requests for remission of GIC will be taken into account in accordance with the policy under Law Administration Practice Statement PS LA 2011/12 *Administration of general interest charge (GIC) imposed for late payment or under estimation of liability*. When considering requests for remission, the circumstances of the entire group may be taken into account. It would be rare for the Commissioner to grant such a remission where the group continually neglects to make adequate arrangements to ensure that the group's taxation liabilities are met on time.

151. However, the submissions made by the representative member in supporting its application for GIC remission may take into account particular circumstances pertaining to individual members of the group.

152. Should a remission of the representative member's GIC occur, the liability of the contributing members will be reduced accordingly.

## COLLECTING FROM ENTITIES OTHER THAN ENTITIES IN GST GROUPS OR GST JOINT VENTURES

### Representatives of incapacitated entities

153. Representatives of incapacitated entities are required to lodge GST and fuel tax returns for tax periods during which they are registered in that capacity and are personally liable to pay any GST and fuel tax law debts they incur during that period.

154. For a more detailed examination of the responsibilities of representatives of incapacitated entities in respect of these liabilities refer to Law Administration Practice Statement PS LA 2011/16 *Insolvency – collection, recovery and enforcement issues for entities under external insolvency administration.*

### GST religious groups

155. Each GST religious group member is required to lodge GST returns for its own external transactions. Transactions with other GST religious group members are excluded from the calculation of the net amount returned.

156. GST religious group members are only liable for amounts payable on their own external transactions. That is, there is no joint and several liability for amounts payable by one or more of the GST religious group members. Similarly, there is no provision to allow for credits to be offset between GST religious group members.

### GST branches

157. As liabilities of a registered GST branch remain the responsibility of the parent entity, any recovery action will be taken against that parent entity. The liabilities of all branches should be included in such actions.

### Non-profit sub-entities

158. Obligations of a non-profit sub-entity (NPSE) under the GST law or fuel tax law are imposed under section 444-85 of Schedule 1 to the TAA on each entity responsible for the management of the sub-entity. Subsection 444-85(2) of Schedule 1 to the TAA imposes a joint and several liability on those persons for amounts payable under the GST law or fuel tax law by the NPSE. Alternatively, those persons may become jointly liable under common law.

159. The question of who is responsible for the management of a particular NPSE and when legal recovery action is appropriate, will be determined by the facts of each case.

160. Before commencing legal action for the recovery of the GST or fuel tax law debts of a NPSE, advice must be obtained from the relevant technical area.

### Supplies in satisfaction of debts

161. Any GST payable under section 105-5 of the GST Act by a creditor, either registered or required to be registered, forms part of the creditor's net amount for the relevant tax period.

162. A creditor that is neither registered nor required to be registered and who makes a taxable supply under section 105-5 of the GST Act, is required to lodge a GST return within 21 days after the end of the month in which the relevant supply was made. Payment of the GST is due by the same date. This liability is a distinct tax-related liability for recovery purposes.

### Government entities

163. A government entity registered for GST purposes is treated as if it were an entity responsible for all GST and fuel tax law obligations.

164. Liability to GST cannot extend to the Commonwealth or to its various Departments and Agencies. Instead the Finance Minister may direct that moneys collected or notionally credited be transferred between accounts operated by the Commonwealth.

165. For State or Territory government entities, liability would ultimately rest with the Crown in the right of the relevant State or Territory.

166. Before commencing legal action to recover an amount due by a government entity, advice must be obtained from the relevant technical area.

**Wine producer rebates – associated producers**

167. Division 19 of Part 4 of the WET Act provides an entitlement for a wine producer to claim a rebate of up to $500,000 in a financial year (subsection 19-15(2) of the WET Act).

168. An entity is liable to pay any excess claims of producer rebates (section 19-25 of the WET Act). An amount payable under that section is treated as if it were wine tax payable at the end of the financial year and is attributable to the last tax period of the financial year. For a registered entity, the liability would form part of the entity's net amount for that last tax period.

169. However, a group of associated producers are only entitled to claim between them the maximum rebate of $500,000 (subsection 19-15(3) of the WET Act).

170. As per section 19-20 of the WET Act, producers are associated producers if:

- one is connected to the other pursuant to section 152-30 of the *Income Tax Assessment Act 1997* (ITAA 1997) (that is, if one entity controls the other or if both entities are controlled by a third entity, but without the exception in subsection 152-30(8) of the ITAA 1997 that severs the link between producers where an intermediary is a public entity)
- one is under an obligation to act, or might reasonably be expected to act, in accordance with the directions of the other in relation to their affairs
- each of them is under an obligation to act, or might reasonably be expected to act, in accordance with the directions of the same third entity
- a controller (within the meaning of section 9 of the *Corporations Act 2001)*, or
- one is under an obligation to act in accordance with the directions of a third producer and the third producer is under an obligation to act, or might reasonably be expected to act, in accordance with the directions of the second producer.

171. If a producer is an associated producer of one or more other producers for a financial year and the producer rebates claimed by those producers as a group of associated producers for the financial year is more than $500,000, then each producer member of the group of associated producers is jointly and severally liable to pay an amount equal to the excess. However, none of the individual producer members is liable to pay an amount that exceeds the sum of the amounts of producer rebates that that producer claimed for the financial year (subsections 19-25(2) and 19-25(3) of the WET Act).

172. In appropriate circumstances, the ATO will choose to pursue recovery of excess rebates claimed by a group of associated producers from one or more of the associated producers.

173. The ATO may decide to proceed against all associated producers or any particular producer or producers who are liable based on considerations of the most expedient means of recovery.

174. Relevant factors in deciding the most expedient means of recovery may include, but are not limited to, the following:

- the ability to collect payment promptly from one or more particular producers
- the opportunity to include the debt in an action being initiated against a particular producer for that producer's other tax-related liabilities

- the need to prove in an insolvency administration of a producer, and
- the opportunity to collect an amount due to a producer from a third party.

175. Given the limited nature of the joint and several liability created by subsection 19-25(3) of the WET Act, it will often be necessary to pursue the majority, if not all, associated producers to ensure that the entire debt is recoverable.

## APPENDIX: EXAMPLES OF REASONABLE ALLOCATION UNDER AN ITXSA

### *Example 1: Contribution to liability method where credits are allocated*

176. In this example, we make the following assumptions:

- X Co is the representative member of the GST group (the group).
- A Co, B Co and C Co are also members of the group and have entered into an ITXSA with X Co covering indirect tax amounts payable in respect of period Y. The ITXSA was entered into before X Co was required to give the Commissioner a GST return for period Y.
- The members ordinarily make supplies to, and acquisitions from, entities outside the group except for A Co which primarily makes supplies to the other members of the group.
- The method of allocating the contribution amounts for each member of the group under the ITXSA is based on each member's individual contribution to the group's liability (the contribution to liability method) taking GST, input tax credits (ITC) and adjustments into account. The contribution amounts are subsequently allocated on a pro-rata basis.
- For the purposes of applying the contribution to liability method, A Co's net indirect tax law liability is determined to be a credit as a result of primarily making supplies to other members of the group (which are treated as not being taxable supplies). This credit is applied to, and reduces, the indirect tax law liabilities payable by the group.
- The group's indirect tax law liability for period Y remains unpaid and the Commissioner commences recovery action against the members of the group. The table below summarises the information from the ITXSA that X Co as the representative member provides the Commissioner with respect to period Y:

| | *GST group* *(X Co is the representative member)* | *Contributing members' liabilities* | | | |
|---|---|---|---|---|---|
| | | *X Co* | *A Co* | *B Co* | *C Co* |
| Indirect tax law liabilities: GST – ITC | 60,000 | 50,000 | (40,000) | 25,000 | 25,000 |
| Balance payable | 60,000 | | | | |
| % of liability | 100% | 50% | 0% | 25% | 25% |
| ITXSA contribution amounts | 60,000 | 30,000 (Note – for the representative member, this is a notional allocation) | 0 | 15,000 | 15,000 |

***Notes:***

- B Co and C Co's exposure to joint and several liability is limited each to $15,000.
- Despite A Co having a 'nil' contribution amount it is still necessary for it to be a participant in the ITXSA to avoid joint and several liability.

- While X Co as the representative member remains 100% liable for the group debt, it can be allocated an amount under the ITXSA in accordance with a methodology aimed at a reasonable allocation among the representative member and the contributing members. The result is that while X Co has a notional allocation of $30,000 under the ITXSA, it continues to be fully liable for the debt, and the contributing members' liabilities are limited to the extent of their allocations pursuant to the ITXSA.
- If an amended assessment issues, reversing A Co's credit and thereby increasing the group's indirect tax law liability by $40,000, the members' contribution amounts under the ITXSA would need to be amended. The contribution amounts would be increased, in accordance with the allocation method by the following amounts:

| | *GST group* *(X Co is the representative member)* | *Contributing members' liabilities* | | | |
|---|---|---|---|---|---|
| | | X Co | A Co | B Co | C Co |
| Additional liability (over claimed credits) | 40,000 | | | | |
| % of liability | 100% | 50% | 0% | 25% | 25% |
| *Increase to contribution amounts* | *40,000* | *20,000* (Note – for the representative member, this is a notional allocation) | *0* | *10,000* | *10,000* |

***Example 2: Contribution to liability method where credits are not allocated***

177. In this example, we make the following assumptions:

- X Co is the representative member of the GST group (the group).
- A Co, B Co and C Co are also members of the group and have entered into an ITXSA with X Co covering indirect tax amounts payable in respect of period Y. The ITXSA was entered into before X Co was required to give the Commissioner a GST return for period Y.
- The members ordinarily make supplies to, and acquisitions from, entities outside the group except for A Co which primarily makes supplies to the other members of the group.
- The method of allocating the contribution amounts for each member of the group under the ITXSA is based on each member's individual contribution to the group's liability (the contribution to liability method). However, each member's allocation is not made on a pro-rata basis.
- For the purposes of applying the contribution to liability method, A Co's net indirect tax law liability is determined to be a credit as a result of primarily making supplies to other members of the group (which are treated as not being taxable supplies). This credit reduces the indirect tax law liabilities payable by the group.

*Note: When applying this method of allocation to GST joint ventures, be mindful that in contrast to GST groups, only certain specified transactions between the joint venture operator and a participant are not treated as taxable supplies (subsection 51-30(2) of the GST Act). Transactions between participants in a GST joint venture, for example, would not be ignored for the purposes of calculating their contribution amounts under this methodology.*

- The group's indirect tax law liability for period Y remains unpaid and the Commissioner commences recovery action against the members of the group. The table below summarises the information from the ITXSA that X Co as the representative member provides the Commissioner with respect to period Y:

| | *GST group* *(X Co is the representative member)* | *Contributing members' liabilities* | | | |
|---|---|---|---|---|---|
| | | *X Co* | *A Co* | *B Co* | *C Co* |
| Indirect tax law liabilities: GST – ITC | 80,000 | 20,000 | (40,000) | 50,000 | 50,000 |
| Balance payable | 80,000 | | | | |
| ITXSA contribution amounts | 120,000 (but the Commissioner cannot recover more than the total of 80,000) | 20,000 (Note – for the representative member, this is a notional allocation) | 0 | 50,000 | 50,000 |

***Notes:***

- While X Co as the representative member remains 100% liable for the group debt, it can be allocated an amount under the ITXSA in accordance with a methodology aimed at a reasonable allocation among the representative member and the contributing members. The result is that while X Co has a notional allocation of $20,000 under the ITXSA, it continues to be fully liable for the debt, and the contributing members' liabilities are limited to the extent of their allocations pursuant to the ITXSA.
- As the contribution amount for each member is not calculated on a 'pro rata' basis, B Co and C Co's liability remains at $50,000. This is the indirect tax law liability which B Co and C Co would have on their own if the representative member was not responsible for the obligations and entitlements of the group.
- As a result, the sum of all the members' contribution amounts (including X Co's notional contribution amount) is more than the GST group's total indirect tax law liability. In this case, the sum of the members' contribution amounts is $120,000, while the GST group's total indirect tax laws liability is only $80,000.

- However, the Commissioner cannot recover more than the sum of the group's total indirect tax law liability of $80,000 from the group. That is, while the Commissioner may recover the full amount of the contributing liability allocated to a member, he cannot recover more than $80,000 from the group in total. Therefore, if $50,000 is recovered from B Co, the Commissioner can only recover the balance of $30,000 from the remaining members. Alternatively, the Commissioner has the right to recover up to $50,000 from C Co, but if this debt is fully satisfied by C Co, the Commissioner can only pursue the balance of $30,000 from X Co and B Co.
- If an amended assessment issues, reversing A Co's credit and thereby increasing the group liability by $40,000, only A's contribution amount would need to be amended. In this case, A Co's contribution amount would be increased by $40,000, representing the amount which it had over claimed. The other members' contribution amounts under the ITXSA would not need to be amended.

***Example 3: Chain supply scenario***

*Note: The scenario contemplated in this example does not apply to GST joint ventures, since it involves intra-group supplies which, under the law applying to GST groups, are not treated as taxable supplies.*

178. In this example, we make the following assumptions:

- X Co is the representative member of the group.
- A Co, B Co and C Co are members of the group and have entered into an ITXSA with X Co covering indirect tax amounts payable in respect of period Z. The ITXSA was entered into before X Co was required to give the Commissioner a GST return for period Z.
- The group manufactures and sells goods through a supply chain comprising the members. The goods are manufactured by X Co and supplied to A Co which in turn supplies to B Co, and then to C Co, which as the retailing entity supplies the goods to customers outside of the group.
- As with Example 1, the group uses the contribution to liability method under the ITXSA in which the member's contribution amount is based on its individual contribution to the group's liability.
- The group's indirect tax law liability for period Z remains unpaid and the Commissioner commences recovery action against the members of the group. The table below summarises the information from the ITXSA that X Co as the representative member provides the Commissioner with respect to period Z:

| | *GST group (X Co is the representative member)* | *Contributing members' liabilities* | | | |
|---|---|---|---|---|---|
| | | *X Co* | *A Co* | *B Co* | *C Co* |
| Indirect tax law liabilities:<br>GST – ITC | | 0 | 0 | 0 | 60,000 |
| Balance payable | 60,000 | | | | |
| % of liability | 100% | 0% | 0% | 0% | 100% |
| ITXSA | 60,000 | 0 | 0 | 0 | 60,000 |

| | | | | | |
|---|---|---|---|---|---|
| contribution amounts | | | | | |

***Notes:***

- As intra-group supplies and acquisition are not treated as taxable supplies or creditable acquisitions for GST purposes, the only entity that makes taxable supplies in period Z is C Co as the supplier of the goods to customers outside of the group. Consequently, 100% of the group's indirect tax law liability is attributed to C Co under the terms of the ITXSA.
- Despite X Co having a 'nil' notional allocation under the ITXSA it continues to be responsible for 100% of the liability.
- Despite A Co and B Co having a 'nil' contribution amounts it is still necessary for each entity to be a participant in the ITXSA to avoid joint and several liability.
- This method of allocation may be considered reasonable provided there is no arrangement which has a purpose of prejudicing recovery of the liability. A greater degree of scrutiny will be given to the matter if, for example, C Co possesses insufficient assets to satisfy the liability.

***Example 4: Contribution to liability method - joint ventures***

179. In this practice statement, reference to a GST group is also taken to include reference to GST joint ventures: see paragraph 6. As such, the contribution to liability methods outlined in examples 1 and 2, have equal application to both GST groups and GST joint ventures. This example further illustrates the application of the methods to a specific scenario concerning GST joint ventures:

    - X Co, A Co, B Co and C Co enter into a joint venture to extract a mineral from a mining tenement in which they own in specific shares. The joint venture agreement establishes that the purpose of the joint venture is to extract the mineral from the deposit.
    - Each of the participants receives a specific, agreed share of the joint venture product. In this case, the product is the extracted mineral deposit.
    - The participants agree that the mineral deposits may then be sold by X Co on their behalf.
    - The Commissioner approves the entities as participants of a GST joint venture, with X Co as the joint venture operator.
    - Where a GST joint venture is formed under Division 51 of the GST Act, the joint venture operator deals with the GST liabilities and entitlements arising from its dealings in the course of activities for which the joint venture was entered into on behalf of the participants in the joint venture.
    - If the joint venture operator makes a supply or acquisition on behalf of a participant in relation to joint venture activities, it is liable to pay any resulting GST and is entitled to any resulting input tax credit.[12]

[12] See sections 51-30 and 51-35 of the GST Act.

- The contribution to liability method attributes the GST liability to a participant arising from dealings made on its behalf by the joint venture operator. Under this method, each participant will be liable for its own contribution to the joint venture's GST debt.
- If the contribution to liability method is adopted in which credits notionally accrued to a participant are allocated among the other participants that have a notional debt, the table in example 1 illustrates the resulting allocation:

| | *GST joint venture* *(X Co is the joint venture operator)* | *Contributing participants' liabilities* | | | |
|---|---|---|---|---|---|
| | | *X Co* | *A Co* | *B Co* | *C Co* |
| Indirect tax law liabilities: GST – ITC | 60,000 | 50,000 | (40,000) | 25,000 | 25,000 |
| Balance payable | 60,000 | | | | |
| % of liability | 100% | 50% | 0% | 25% | 25% |
| ITXSA contribution amounts | 60,000 | 30,000 (Note – for the joint venture operator, this is a notional allocation) | 0 | 15,000 | 15,000 |

***Notes***

- The sale of the mineral deposits from the joint venture by X Co has resulted in a GST liability of $60,000 to the GST joint venture.
- Of this amount, $25,000 represents the amount of GST incurred by X Co as a result of making supplies of mineral deposits on behalf of B Co, and a further $25,000 represents GST from supplies made by X Co on behalf of C Co.
- A Co's GST liability is determined to be a credit as a result of a large number of creditable acquisitions made by X Co on its behalf. This credit is applied to, and reduces, the indirect tax law liabilities payable by the group.
- As a result, B Co and C Co's exposure to joint and several liability is limited each to $15,000.
- Despite A Co having a 'nil' contribution amount it is still necessary for it to be a participant in the ITXSA to avoid joint and several liability.
- While X Co as the joint venture operator remains 100% liable for the group debt, it can be allocated an amount under the ITXSA in accordance with a methodology aimed at a reasonable allocation among the joint venture operator and the participants. The result is that while X Co has a notional allocation of $30,000 under the ITXSA, it continues to be fully liable for the debt, and the participants' liabilities are limited to the extent of their allocations pursuant to the ITXSA.
- The consequence of an amended assessment reversing A Co's credit is considered in example 1 above.

***Example 5: Contribution to liability method - joint ventures - where credits are not allocated***

180. If the contribution to liability method is adopted in which credits notionally accrued to a participant are ***not*** allocated to the other participants, the table in example 2 illustrates the resulting allocation:

| | *GST joint venture (X Co is the joint venture operator)* | *Contributing participants' liabilities* | | | |
|---|---|---|---|---|---|
| | | *X Co* | *A Co* | *B Co* | *C Co* |
| Indirect tax law liabilities:<br>GST – ITC | 80,000 | 20,000 | (40,000) | 50,000 | 50,000 |
| Balance payable | 80,000 | | | | |
| ITXSA contribution amounts | 120,000<br>(but the Commissioner cannot recover more than the total of 80,000) | 20,000<br>(Note – for the joint venture operator, this is a notional allocation) | 0 | 50,000 | 50,000 |

***Notes***

- The sale of the mineral deposits from the joint venture by X Co has resulted in a GST liability of $80,000 to the GST joint venture.
- Of this amount, $50,000 represents the amount of GST incurred by X Co as a result of making supplies of mineral deposits on behalf of B Co, and a further $50,000 represents GST from supplies made by X Co on behalf of C Co.
- A Co's GST liability is determined to be a credit as a result of a large number of creditable acquisitions made by X Co on its behalf. This credit is not applied to the indirect tax law liabilities payable by the group.
- While X Co as the joint venture operator remains 100% liable for the joint venture debt, it can be allocated an amount under the ITXSA in accordance with a methodology aimed at a reasonable allocation among the joint venture operator and the participants. The result is that while X Co has a notional allocation of $20,000 under the ITXSA, it continues to be fully liable for the debt, and the participants' liabilities are limited to the extent of their allocations pursuant to the ITXSA.
- As the contribution amount for each participant is not calculated on a 'pro rata' basis, B Co and C Co's liability remains at $50,000. This is the indirect tax law liability which B Co and C Co would have on their own if X Co was not responsible for the obligations and entitlements of the group.
- As a result, the sum of all the participants' contribution amounts (including X Co's notional contribution amount) is more than the GST joint venture's total indirect tax law liability. In this case, the sum of the participants' contribution amounts is $120,000, while the GST joint venture's total indirect tax laws liability is only $80,000.
- However, the Commissioner cannot recover more than the sum of the joint venture's total indirect tax law liability of $80,000 from the joint venture.

- That is, while the Commissioner may recover the full amount of the contributing liability allocated to a participant, he cannot recover more than $80,000 from the joint venture in total. Therefore, if $50,000 is recovered from B Co, the Commissioner can only recover the balance of $30,000 from the remaining participants. Alternatively, the Commissioner has the right to recover up to $50,000 from C Co, but if this debt is fully satisfied by C Co, the Commissioner can only pursue the balance of $30,000 from X Co and B Co.
- The consequence of an amended assessment reversing A Co's credit is considered in example 2 above.

| | |
|---|---|
| Subject references | clear exit<br>contribution amount<br>contribution to liability method<br>Government entities<br>GST branches<br>GST groups<br>GST joint ventures<br>GST religious groups<br>indirect tax amounts<br>indirect tax sharing agreement<br>joint and several liability<br>non-profit sub-entities<br>reasonable allocation<br>representatives of incapacitated entities<br>wine producer rebates |
| Legislative references | ANT(GST)A 48-40(2)<br>ANT(GST)A 48-70<br>ANT(GST)A Div 51<br>ANT(GST)A 51-30<br>ANT(GST)A 51-30(2)<br>ANT(GST)A 51-35<br>ANT(GST)A 51-70<br>ANT(GST)A 105-5<br>ANT(GST)A 195-1<br>ANT(LCT)A 27-1<br>ANT(WET)A 33-1<br>ANT(WET)A Pt 4 Div 19<br>ANT(WET)A 19-15(2)<br>ANT(WET)A 19-15(3)<br>ANT(WET)A 19-20<br>ANT(WET)A 19-25<br>ANT(WET)A 19-25(2)<br>ANT(WET)A 19-25(3)<br>Corporations Act 2001 9<br>Corporations Act 2001 127<br>Fuel Tax Act 2006 110-05<br>ITAA 1997 152-30<br>ITAA 1997 152-30(8)<br>TAA 1953 Pt IIB Div 3<br>TAA 1953 Sch1 105-80<br>TAA 1953 Sch1 353-10<br>TAA 1953 Sch1 388-50<br>TAA 1953 Sch1 388-50(1)(c)<br>TAA 1953 Sch1 388-55<br>TAA 1953 Sch1 444-80<br>TAA 1953 Sch1 444-80(1)<br>TAA 1953 Sch1 444-80(1A)<br>TAA 1953 Sch1 444-80(1A)(b)<br>TAA 1953 Sch1 444-80(1A)(c)<br>TAA 1953 Sch1 444-80(1A)(d)<br>TAA 1953 Sch1 444-80(1B)<br>TAA 1953 Sch1 444-80(1B)(a)<br>TAA 1953 Sch1 444-80(1C)(b)<br>TAA 1953 Sch1 444-80(1D) |

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|---|---|
| | TAA 1953 Sch1 444-80(1E)<br>TAA 1953 Sch1 444-85<br>TAA 1953 Sch1 444-85(2)<br>TAA 1953 Sch1 444-90<br>TAA 1953 Sch1 444-90(1)<br>TAA 1953 Sch1 444-90(1A)<br>TAA 1953 Sch1 444-90(1A)(b)<br>TAA 1953 Sch1 444-90(1A)(c)<br>TAA 1953 Sch1 444-90(1A)(d)<br>TAA 1953 Sch1 444-90(1B)<br>TAA 1953 Sch1 444-90(1B)(a)<br>TAA 1953 Sch1 444-90(1C)(b)<br>TAA 1953 Sch1 444-90(1D)<br>TAA 1953 Sch1 444-90(1E) |
| Related practice statements | PS LA 2011/4<br>PS LA 2011/6<br>PS LA 2011/12<br>PS LA 2011/14<br>PS LA 2011/15<br>PS LA 2011/16<br>PS LA 2011/18<br>PS LA 2011/20<br>PS CM 2007/01 |
| Case references | Brookton Co-operative Society Ltd v. FCT (1981) 147 CLR 441; 81 ATC 4346 (1981) 11 ATR 880<br>FC of T. v. Steeves Agnew & Co. (Vic.) Pty Ltd (1951) 82 CLR 408<br>Re Harmony and Montague Tin and Copper Mining Co. (1873) 8 Ch App 407<br>Manzi v. Smith (1975) 132 CLR 671; (1975) 49 ALJR 376; 7 ALR 685 |
| Other references | Taxpayers' Charter |
| File references | 1-4JBCLHS |
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