

## The essential update on GST as it affects you

### Legislative update

On 28 June 2010, the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Bill 2010* was enacted. This Bill makes a number of important changes to the GST law which are effective from 1 July 2010. The most relevant changes relate to:

- ▶ tax invoices;
- ▶ GST groups; and
- ▶ the GST rulings regime.

These changes are discussed in the paragraphs below.

### Tax invoice changes

The requirements regarding valid tax invoices have changed. The stated reason for these changes is to provide greater flexibility but the new changes could pose problems for some, for example, builders.

Valid tax invoices must be held at the time of claiming GST credits and must be issued by the supplier (unless it is a recipient created tax invoice (**RCTI**)). The new rules require that they contain enough information for the following to be "clearly ascertained":

- ▶ the supplier's identity and ABN;
- ▶ the recipient's identity or recipient's ABN (in respect of tax invoices where the price is at least \$1,000 or higher);
- ▶ what is supplied including the quantity and price;
- ▶ the extent to which each item is "taxable" for GST purposes;
- ▶ the date;
- ▶ the amount of GST payable in relation to each item;
- ▶ the nature of the sale;
- ▶ where issued by the recipient, that any GST payable is payable by the supplier; and
- ▶ that the document was intended to be a tax invoice.

Where these requirements are not met, the document may still be treated as a valid tax invoice where:

- ▶ it would otherwise comply with the tax invoice requirements but for the missing information; and
- ▶ the missing information can be obtained from other documents issued by the supplier (or recipient as relevant).

Whilst the new rules do provide greater flexibility in the treatment of documents as tax invoices, they still require strict record keeping procedures and appropriate retention of other documentation (such as contractual documents or correspondence) to substantiate missing information.

It is still important to review tax invoices to ensure that they meet the requirements and where they do not meet these requirements to ensure that relevant associated documentation is maintained on file.

### GST groups

#### Tax invoice requirements

Tax invoice requirements have also been relaxed for GST groups so that documents that do not clearly identify the actual recipient of the supply will still be treated as valid tax invoices (assuming that the other requirements are satisfied) where the document contains enough information to ascertain one of the following:

- ▶ the GST group;
- ▶ the representative member of the GST group; or
- ▶ another member of the GST group.

The relaxation of tax invoice rules for GST groups is a welcome change and will allow businesses operating within a GST group to better align their commercial practices with the tax invoice requirements.

### **Entering and exiting GST groups**

GST group members can now enter and exit GST groups within a particular tax period (rather than only at the beginning of a tax period).

This will be most important for those groups looking to sell or acquire a new business. These changes are commercially appropriate allowing the date of acquisition/sale to be motivated by commercial rather than tax considerations.

### **Forming GST groups**

GST groups no longer need to seek approval from the Commissioner of Taxation (**Commissioner**) to form a GST group. As long as the GST grouping requirements are met, the representative member need only notify the Commissioner of the intention to form a GST group (using the approved form).

The effective date of the GST group will generally be a prospective date although the Commissioner does have a discretion to allow retrospective GST grouping. Whether the Commissioner will exercise this discretion will be determined on a case by case basis.

### **Indirect tax sharing agreements**

Similar to Income Tax Sharing Agreements, GST group members will now have the option to enter into Indirect Tax Sharing Agreements (**ITSA**) for the purposes of dealing with the joint and several liability issue that otherwise arises as a result of GST grouping.

ITSA's allow a GST group member to limit its exposure to a GST liability upon leaving the group to the agreed "contribution amount" under the ITSA.

An effective ITSA must:

- ▶ be between the representative member of the GST group and one or more members of that GST group; and
- ▶ set out the manner in which the "contribution amount" for each member is to be determined for a particular tax period.

The contribution amount must represent a "reasonable allocation" amongst the representative member and each contributing member of the total GST amount that would be payable by the members of the GST group as a result of joint and several liability.

An ITSA will be effective for a particular tax period as long as it has been entered into before the BAS is due for that tax period.

If you are a member of a GST group, we would strongly advise that you enter into an ITSA to properly manage the issue of joint and several liability. Timing is fundamental to ensure that an ITSA is effective as retrospective application is not possible.

We can assist you with the preparation of an ITSA using specially formulated precedent documents. Please contact your PKF Indirect Tax adviser to discuss.

### **GST Rulings regime**

Prior to these amendments, there were a broad range of documents produced by the Commissioner which qualified as a "public ruling" for GST administration purposes and upon which, as a result, a taxpayer could rely upon.

The changes implemented under the Bill effectively narrow the definition of what is a GST public ruling upon which a taxpayer can rely upon. As a result, the Commissioner has recently reconsidered a number of documents he has previously published to determine whether they will be characterised as a "public ruling".

Where you have relied upon the Commissioner's views on a particular issue, it should be ensured that the Commissioner's view is still current and is the subject of a valid private or public ruling.

Note that it is important to be able to demonstrate "reliance" on the Commissioner's public ruling. The fact that your circumstances may fall within a ruling is not sufficient to demonstrate "reliance".

### **Cases**

GST continues to prove to be a highly litigious area. The most notable cases are discussed in the paragraphs below.

#### ***Travelex Limited v Commissioner of Taxation [2010] HCA 33***

In a split decision (3:2), the High Court has allowed an appeal by the taxpayer Travelex against the decision of the Full Federal Court. The case involved the GST treatment of foreign currency sold to a traveller at the international airport.

In a controversial decision, the High Court has concluded that the supply of the foreign currency by Travelex at the airport should be treated as GST-free on the basis that it is a supply "made in relation to rights" for use outside Australia.

Both the Full Federal Court and the trial judge had originally held in favour of the Commissioner, that the supply of the foreign currency could not be treated as GST-free and hence should be treated as an input taxed financial supply.

The decision is a **significant** win for the taxpayer and any business that deals with the sale of foreign currency, as the decision allows the taxpayer to claim GST credits for acquisitions associated with the sale of the foreign currency that otherwise would not be claimable. The benefit to these taxpayers is worth millions of dollars.

The wider ramifications of the decision still need to be considered including the application of the decision to other financial supplies. Further, how a taxpayer should determine whether the intention of the customer is to use the foreign currency overseas has also not been sufficiently addressed in the decision.

### ***Commissioner of Taxation v American Express Wholesale Currency Services Pty Limited [2010] FCAFC 122***

In another split decision (2:1), the Full Federal Court has allowed an appeal by the Commissioner against a decision of the trial judge. Prima facie, the issue for the Court was whether the taxpayer could claim GST credits for acquisitions associated with revenue derived from late payment fees on charge cards and credit cards.

Amex applied a revenue apportionment methodology to determine its entitlement to GST credits and hence the outcome of the case affected how the late payment fee income should be recognised in the revenue-based apportionment formula.

The majority in the Full Federal Court concluded in favour of the Commissioner, that the late payment fees were revenue derived from the making of input taxed financial supplies and hence should have been included in the numerator of the apportionment formula.

Inclusion in the numerator effectively decreases Amex's overall entitlement to GST credits.

### ***Vidler v Commissioner of Taxation [2010] FCAFC 59***

This case involved an appeal by the taxpayer against the trial judge's decision that the sale of vacant land was not an input taxed supply of residential premises.

In an unanimous and uncontroversial decision, the Full Federal Court dismissed the taxpayer's appeal concluding that the vacant land was not "residential premises" as defined as it did not have any shelter or basic living facilities erected on the land. Hence, it was held that the supply of the vacant land was taxable.

### ***Application to the High Court for special leave to appeal re Commissioner of Taxation v Gloxinia Investments (Trustee) [2010] FCAFC 46***

The Commissioner's application for special leave to appeal to the High Court in this matter was dismissed on 1 October 2010.

The case involved the development and sale of residential units on land which was the subject of a lease arrangement. Whilst typically the construction and sale of new residential premises will be treated as taxable, this case was unusual as the land in question had been the subject of a lease arrangement.

Residential premises which have previously been sold as residential premises or been "the subject of a long term lease" will not be new residential premises for the purposes of the GST definition.

As a result of the dismissal of the special leave application, the Full Federal Court's decision stands and the sale of the new residential premises will be treated as input taxed residential premises.

This is a positive result for the developer as no GST will be payable on the supply of the residential properties although the result is arguably contrary to legislative intention. The application of the decision to other developments will depend upon the particular lease arrangements in place.

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