GSTD 2003/D4 - Goods and services tax: when will the requirement to hold a tax invoice or adjustment note be waived as a result of a court or tribunal decision?

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This document has been finalised.

Draft Goods and Services Tax Determination

Goods and services tax: when will the requirement to hold a tax invoice or adjustment note be waived as a result of a court or tribunal decision?

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling or advice for the purposes of section 37 of the ***Taxation Administration Act 1953.*** *The final Ruling will be a public ruling for the purposes of section 37 and may be relied upon by any entity to which it applies.*

1. The requirement for a tax invoice will be waived in the circumstances described in a proposed legislative determination to be made by the Commissioner under subsection 29-10(3) of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act). The requirement for an adjustment note will be waived in the circumstances described in a proposed legislative determination to be made by the Commissioner under subsection 29-20(3) of the GST Act. These determinations, when finalised, will be the *A New Tax System (Goods and Services Tax) Act 1999 Waiver of Tax Invoice Requirement Determination* [number and date to be determined] – *Decision of a Court or Tribunal* and the *A New Tax System (Goods and Services Tax) Act 1999 Waiver of Adjustment Note Requirement Determination* [number and date to be determined] – *Decision of a Court or Tribunal.* Copies of the proposed determinations are attached as Schedules to this Ruling.

2. Tax invoices and adjustment notes are key integrity measures under the GST system. In a transaction based tax such as the GST, tax invoices and adjustment notes form an essential part of the audit trail and are important indicators that taxable supplies and adjustment events have occurred. For this reason, subject to specific exceptions,[1] a recipient entitled to an input tax credit in relation to a taxable supply is required to hold a tax invoice to claim the input tax credit.[2] Also for this reason, subject to specific

[1] Apart from circumstances of a kind for which the Commissioner has made a legislative determination under subsection 29-10(3), a recipient is not required to hold a tax invoice for low value ($50 or less) acquisitions (subsection 29-80(1)). See also exceptions for second hand goods in section 66-17 of the GST Act and the exception for 'reverse charged' supplies in subsection 83-35(3) of the GST Act. In the case of a creditable acquisition made through an agent, the principal is not required to hold a tax invoice if it is held by the agent (section 153-5 of the GST Act). The tax invoice requirements do not apply in relation to creditable importations (section 29-15 of the GST Act).

[2] Subsection 29-10(3) of the GST Act.

exceptions,[3] a supplier or a recipient of a supply entitled to a decreasing adjustment will have to hold an adjustment note to be able to claim the decreasing adjustment.[4] Thus it is important that those documents contain the required information[5] and are issued in a timely manner.

3. A supplier is obliged to issue a tax invoice or adjustment note within 28 days after a request by the recipient.[6] If a tax invoice or adjustment note has not been provided by the supplier, the recipient should make an attempt to obtain one by contacting the supplier and requesting the tax invoice or adjustment note. A written request made to the supplier, while not required by the GST Act, would provide clear evidence of the attempt. Where a recipient claims an input tax credit or decreasing adjustment, and a tax invoice or adjustment note was not held at the time of lodging the relevant Business Activity Statement (the 'BAS'), the recipient may be making a statement that is false or misleading in a material particular and be liable to an administrative penalty.[7]

4. There may be reasons for the supplier refusing to give a tax invoice. For instance the supplier may have a genuine belief that a taxable supply has not been made and there is no obligation to issue a tax invoice or adjustment note. This may occur where the supplier believes the supply is GST-free,[8] input taxed,[9] or not taxable because the supplier is not registered and is not required to be registered.[10] In other cases the supplier may not be contactable, may have ceased business or will not give the tax invoice or adjustment note for some other reason.

5. Where the recipient believes that a creditable acquisition has been made, or a decreasing adjustment arises from an adjustment event, and is unable to obtain a tax invoice or adjustment note, as appropriate, the recipient should request that the Commissioner exercise the discretion in subsection 29-70(1) or subsection 29-75(1) to treat as a tax invoice or adjustment note an existing document that is not a tax invoice or adjustment note respectively.

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[3] Apart from circumstances of a kind for which the Commissioner has made a legislative determination under subsection 29-20(3), an adjustment note is not required for a decreasing adjustment that does not exceed $50 (subsection 29-80(2)). See also exceptions for second hand goods in section 66-17 of the GST Act. In the case of supplies made by or to a principal through an agent, the principal is not required to hold an adjustment note if it is held by the agent (section 153-10 of the GST Act).

[4] Subsection 29-20(3) of the GST Act.

[5] For tax invoices see subsection 29-70(1) of the GST Act and regulation 29-70.01 of the *A New Tax System (Goods and Services Tax) Regulations 1999*. For adjustment notes see subsection 29-75(1) of the GST Act and *A New Tax System (Goods and Services Tax) Adjustment Note Information Requirements Determination (No. 1) 2000*.

[6] Subsections 29-70(2) and 29-75(2) of the GST Act. Even if the recipient has not requested an adjustment note, suppliers are required to issue one within 28 days after becoming aware of the adjustment if they had issued a tax invoice (or one had been requested). See exceptions for low value transactions in subsections 29-80(1) and 29-80(2), for supplies under the margin scheme in subsection 75-30(1) and for reverse charged supplies in subsection 83-35(1). Under section 288-45 of Schedule 1 to the *Taxation Administration Act 1953* (the TAA), a supplier who fails to issue a tax invoice or adjustment note as required by sections 29-70 and 29-75 respectively is liable to an administrative penalty.

[7] Subdivision 284-B of Schedule 1 to the TAA.

[8] For example, under the transitional provisions (section 13 of the *A New Tax System (Goods and Services Tax Transition) Act 1999)* or the going concern provisions (section 38-325 of the GST Act).

[9] For example, a sale of residential premises under subsection 40-65(1) of the GST Act.

[10] Section 23-5 of the GST Act.

6. In certain cases the Commissioner will not exercise the discretion in subsection 29-70(1) or subsection 29-75(1) because he believes the supplier has not made a taxable supply, that the recipient has not made a creditable acquisition or that an adjustment event has not arisen. In other cases a recipient may have claimed an input tax credit or decreasing adjustment without a valid tax invoice or adjustment note and an assessment has been made disallowing the claim. The *Taxation Administration Act 1953* (the TAA) provides a mechanism for the recipient to challenge the Commissioner's view. If an assessment of net amount for the relevant tax period has not already been made, the recipient will need to request the assessment be made.[11] The recipient can object against the assessment in accordance with the provisions of Part IVC of the TAA.[12]

7. Where the Commissioner disallows the objection, the recipient can, under Part IVC of the TAA, apply to the Administrative Appeals Tribunal (including the Small Taxation Claims Tribunal if eligible) (the Tribunal) for review of the objection decision or appeal to the Federal Court against the decision.

8. The recipient may attempt to challenge the Commissioner's view by way of declaratory proceedings rather than under Part IVC of the TAA. However, where an assessment of net amount has been made, the Commissioner will oppose an application for declaratory relief on the basis that section 59 of the TAA applies. The effect of section 59 is that where an assessment of net amount has been made, and the notice of assessment is produced by the Commissioner, the only avenue for challenging the correctness of the assessment is by the procedures under Part IVC of the TAA.[13]

9. As mentioned in paragraph 2 above, tax invoices and adjustment notes are vital documents for the integrity of the GST system. However, where the Commissioner, in making the objection decision, decided that the recipient has not made a creditable acquisition or does not have a decreasing adjustment but the Court or Tribunal later decides the recipient is entitled to an input tax credit or a decreasing adjustment, it would be unnecessarily onerous to insist on the recipient seeking a tax invoice or adjustment note from the supplier where one is not already held by the recipient. Also in these circumstances the Commissioner should not refuse to exercise the discretions in subsections 29-70(1) or 29-75(1).

10. Therefore, under the attached proposed determinations, where the Commissioner, in making the objection decision, decided that the recipient has not made a creditable acquisition or does not have a decreasing adjustment but the Court or Tribunal finds that the recipient is entitled to the input tax credit, or that a decreasing adjustment has arisen from an adjustment event, the recipient will not be required to have held a tax invoice or adjustment note respectively at the time the BAS was lodged. For the attached proposed determinations to apply the matter must have been finally decided. That is, the period in which an appeal may be lodged must have expired without an appeal being lodged.

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[11] Section 23 of the TAA requires the Commissioner to make an assessment if requested, subject to the request being made within the time limits in subsection 23(2).

[12] The making of an assessment under section 22 is a reviewable indirect tax decision under subsection 62(3) of the TAA and can be objected against under subsection 62(1) of the TAA.

[13] Section 59 of the TAA is equivalent to subsection 177(1) of the *Income Tax Assessment Act 1936* which was considered in *F J Bloemen Pty Ltd v. FCT* (1981) 147 CLR 360 at 373 - 375. See also *McAndrew v. FCT* (1956) 98 CLR 263; *FCT v. Dalco* (1990) 168 CLR 614 and *DCT v. Richard Walter Pty Ltd* (1995) 183 CLR 168.

11. Where the proposed determinations apply, the input tax credit or the decreasing adjustment will be attributable in accordance with subsection 29-10(1) or (2) or in accordance with subsection 29-20(1) or (2), respectively.

12. The attached proposed determinations will not apply where an order has been made by the Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJRA). The ADJRA does not permit the Court to make a finding as to whether the recipient has made a creditable acquisition and is entitled to an input tax credit, or has a deceasing adjustment. In ADJRA proceedings the Court is judicially reviewing an administrative decision by the Commissioner made under an enactment. A decision by the Commissioner that a creditable acquisition has not been made or that the recipient is not entitled to an input tax credit, or to a decreasing adjustment, is not able to be reviewed on its merits in such a review. The proposed determinations, when finalised, will only apply where the Court or Tribunal has found that the recipient made a creditable acquisition and is entitled to an input tax credit, or to a decreasing adjustment.

13. A tax invoice or adjustment note will still be required where the Commissioner reaches a settlement with the recipient and as a result consent orders are made by the Court, or the Tribunal makes a decision in accordance with terms agreed to by the parties, without the Court or Tribunal having yet made a finding that the recipient has made a creditable acquisition and is entitled to an input tax credit or to a decreasing adjustment. When negotiating the terms of the proposed consent orders the parties will need to consider:

- whether the Commissioner will need to exercise the discretion under subsections 29-70(1) or 29-75(1);
- if the Commissioner will need to exercise the discretion, the operation of paragraphs 29-10(3)(b) or 29-20(3)(d), that is, whether the document to be treated as a tax invoice or adjustment note was held at the time the BAS for the tax period under review was lodged; and
- the operation of subsection 29-10(4), that is, whether a revised BAS will need to be lodged if the input tax credit was not previously claimed.

It may be that the effect of the consent order will be that the input tax credit or decreasing adjustment is attributed to a later tax period than the period relevant to the matter before the Court or Tribunal.

Example

14. *Jiesi acquired equipment from Alex, a sole trader, for use in her GST-registered business. Jiesi requested a tax invoice from Alex but he did not provide one. Jiesi has learnt that Alex travelled overseas shortly after supplying the equipment and has not returned.*

15. *Had Jiesi held a tax invoice, the input tax credit would have been attributed to the tax period in which payment for the equipment occurred. She requested that the Commissioner exercise the discretion in subsection 29-70(1) in respect of another document held at the time she lodged her BAS. The Commissioner refused to exercise the discretion, taking the view that the supply was not taxable. Alex was not registered for GST and the Commissioner is not satisfied that he was required to be registered.*

16. *Under section 23 of the TAA Jiesi requested that an assessment be made of her net amount for the tax period in which payment for the equipment occurred. The Commissioner made an assessment for the relevant tax period and Jiesi objected against the assessment under Part IVC of the TAA. The Commissioner disallowed the objection and Jiesi appealed to the Federal Court.*

17. *The Court found that Alex had made a taxable supply and accordingly that Jiesi had made a creditable acquisition and is entitled to the input tax credit. In view of the Court's decision, Jiesi does not need to obtain a tax invoice from Alex or request that the Commissioner exercise the discretion in subsection 29-70(1) because of the Commissioner's determination under subsection 29-10(3); 'A New Tax System (Goods and Services Tax) Act 1999 Waiver of Tax Invoice Requirement Determination* [number and date to be determined] *– Decision of a Court or Tribunal'.*

18. *If no appeal is lodged, the Commissioner will amend Jiesi's assessment for the tax period to give effect to the Court's decision.*

Date of effect

19. This draft Ruling represents the preliminary, though considered view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

20. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

21. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of effect of the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Your comments

22. We invite you to comment on this draft Goods and Services Tax Determination. Please forward your comments to the contact officer by the due date.

Due date: **14 January 2004**

Contact officer: **Neil Jewell, GST Review & Litigation**

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Commissioner of Taxation
10 December 2003

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
GSTR 1999/1; GSTR 2000/1; GSTR 2000/3; GSTR 2000/17

Subject references:
- adjustment notes
- discretions
- Goods and services tax
- GST Objections
- objection against GST assessment
- reviewable decisions
- tax invoices

Legislative references:
- GSTA 1999 Div 19
- GSTA 1999 23-5
- GSTA 1999 29-10(1)
- GSTA 1999 29-10(2)
- GSTA 1999 29-10(3)
- GSTA 1999 29-10(3)(a)
- GSTA 1999 29-10(3)(b)
- GSTA 1999 29-10(4)
- GSTA 1999 29-15
- GSTA 1999 29-20(1)
- GSTA 1999 29-20(2)
- GSTA 1999 29-20(3)
- GSTA 1999 29-20(3)(c)
- GSTA 1999 29-20(3)(d)

- GSTA 1999 29-70
- GSTA 1999 29-70(1)
- GSTA 1999 29-70(2)
- GSTA 1999 29-75
- GSTA 1999 29-75(1)
- GSTA 1999 29-75(2)
- GSTA 1999 29-80(1)
- GSTA 1999 29-80(2)
- GSTA 1999 38-325
- GSTA 1999 40-65(1)
- GSTA 1999 66-17
- GSTA 1999 75-30(1)
- GSTA 1999 83-35(1)
- GSTA 1999 83-35(3)
- GSTA 1999 153-5
- GSTA 1999 153-10
- GSTR 1999 29-70.01
- GSTTA 1999 13
- ITAA 1936 177(1)
- TAA 1953 Pt IVC
- TAA 1953 22
- TAA 1953 23
- TAA 1953 23(2)
- TAA 1953 37
- TAA 1953 59
- TAA 1953 62(1)
- TAA 1953 62(3)
- TAA 1953 Sch 1 284-B
- TAA 1953 Sch 1 288-45
- ANTS (GST) Adjustment Note Information Requirements Determination (No. 1) 2000
- Administrative Decisions (Judicial Review) Act 1977

Case references:

- F J Bloemen Pty Ltd v. FCT (1981) 147 CLR 360
- FCT v. Dalco (1990) 168 CLR 614
- McAndrew v. FCT (1956) 98 CLR 263
- DCT v. Richard Walter Pty Ltd (1995) 183 CLR 168

ATO references

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Schedule 1

COMMONWEALTH OF AUSTRALIA

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999

DETERMINATION

Under subsection 29-10(3) of the *A New Tax System (Goods and Services Tax) Act 1999* I make the following determination:

Citation

1. This determination is the *A New Tax System (Goods and Services Tax) Act 1999 Waiver of Tax Invoice Requirement Determination* [Number and date to be determined] – *Decision of a Court or Tribunal.*

Commencement

2. This determination commences on the date the *A New Tax System (Goods and Services Tax) Act 1999* commenced.

Circumstances where the requirement for a tax invoice does not apply

3. The circumstances set out in clause 4 are circumstances in which the requirement for a tax invoice under subsection 29-10(3) of the Act does not apply.

4. The circumstances are that all the following requirements are satisfied:

(a) (i) under Part IVC of the *Taxation Administration Act 1953* you have applied to the Tribunal for review of an objection decision or appealed against an objection decision to a Court, and in making the objection decision the Commissioner decided that you have not made a creditable acquisition, and the grounds of the objection include that you have made a creditable acquisition and are entitled to an input tax credit; or

(ii) you have sought declaratory orders from a Court that you have made a creditable acquisition and are entitled to an input tax credit; or

(iii) you or the Commissioner has appealed against a decision of the Tribunal or Court that resulted from a proceeding covered by clause 4(a)(i) or appealed against a decision of the Court that resulted from a proceeding covered by clause 4(a)(ii); and

(b) the Court or Tribunal has found that you have made a creditable acquisition and are entitled to an input tax credit.

Situations where a tax invoice is still required

5. However, clause 3 does not apply in any of the following circumstances:

   (a) a settlement occurs before the Court or Tribunal gives a decision; or

   (b) the Court or Tribunal dismisses the application without proceeding to determine the matter; or

   (c) the Court or Tribunal makes a decision in accordance with terms agreed to by the parties without making a finding that you have made a creditable acquisition and are entitled to an input tax credit; or

   (d) the Court remits the decision to the Tribunal, or the Court or Tribunal remits the decision to the Commissioner, for reconsideration; or

   (e) the Court makes an order under the *Administrative Decisions (Judicial Review) Act 1977*; or

   (f) any other circumstance in which the Court or Tribunal does not make a finding as to whether you have made a creditable acquisition and are entitled to an input tax credit; or

   (g) the period within which an appeal against the Court or Tribunal decision may be lodged has not expired or an appeal has been lodged and the Court has not found that you have made a creditable acquisition and are entitled to an input tax credit.

Definitions

6. In this determination:

   the Act means the *A New Tax System (Goods and Services Tax) Act 1999*.

   Tribunal means the Administrative Appeals Tribunal, including the Small Taxation Claims Tribunal.

   Other expressions in this determination have the same meaning as in the Act.

Dated this xxth day of [month] [year].

Delegate of the Commissioner

Schedule 2

COMMONWEALTH OF AUSTRALIA

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999

DETERMINATION

Under subsection 29-20(3) of the *A New Tax System (Goods and Services Tax) Act 1999* I make the following determination:

Citation

1. This determination is the *A New Tax System (Goods and Services Tax) Act 1999 Waiver of Adjustment Note Requirement Determination* [Number and date to be determined] – *Decision of a Court or Tribunal.*

Commencement

2. This determination commences on the date the *A New Tax System (Goods and Services Tax) Act 1999* commenced.

Circumstances where the requirement for an adjustment note does not apply

3. The circumstances set out in clause 4 are circumstances in which the requirement for an adjustment note under subsection 29-20(3) of the Act does not apply.

4. The circumstances are that all of the following requirements are satisfied:

(a) (i) under Part IVC of the *Taxation Administration Act 1953* you have applied to the Tribunal for review of an objection decision or appealed against an objection decision to a Court, and in making the objection decision the Commissioner decided that you did not have a decreasing adjustment arising from an adjustment event that has occurred in respect of an acquisition, and the grounds of the objection include that you have a decreasing adjustment arising from an adjustment event that has occurred in respect of an acquisition; or

(ii) you have sought declaratory orders from a Court that you have a decreasing adjustment arising from an adjustment event that has occurred in respect of an acquisition; or

(iii) you or the Commissioner has appealed against a decision of the Tribunal or Court that resulted from a proceeding covered by clause 4(a)(i) or appealed against a decision of the Court that resulted from a proceeding covered by clause 4(a)(ii); and

(b) the Court or Tribunal has found that you have a decreasing adjustment arising from an adjustment event that has occurred in respect of an acquisition.

Situations where an adjustment note is still required

5. However, clause 3 does not apply in any of the following circumstances:

(a) a settlement occurs before the Court or Tribunal gives a decision; or

(b) the Court or Tribunal dismisses the application without proceeding to determine the matter; or

(c) the Court or Tribunal makes a decision in accordance with terms agreed to by the parties without making a finding that you have a decreasing adjustment arising from an adjustment event that has occurred in respect of an acquisition; or

(d) the Court remits the decision to the Tribunal, or the Court or Tribunal remits the decision to the Commissioner, for reconsideration; or

(e) the Court makes an order under the *Administrative Decisions (Judicial Review) Act* 1977; or

(f) any other circumstance in which the Court or Tribunal does not make a finding as to whether you have a decreasing adjustment arising from an adjustment event that has occurred in respect of an acquisition; or

(g) the period within which an appeal against the Court or Tribunal decision may be lodged has not expired or an appeal has been lodged and the Court has not found that you have a decreasing adjustment arising from an adjustment event that has occurred in respect of an acquisition.

Definitions

6. In this determination:

the Act means the *A New Tax System (Goods and Services Tax) Act 1999*.

Tribunal means the Administrative Appeals Tribunal, including the Small Taxation Claims Tribunal.

Other expressions in this determination have the same meaning as in the Act.

Dated this th day of [month] [year].

Delegate of the Commissioner