MT 2010/1 - Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953

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Miscellaneous Taxation Ruling

Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the *Taxation Administration Act 1953*

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Preamble

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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What this Ruling is about

1. This Ruling sets out the Commissioner's views on section 105-65 of Schedule 1 to the *Taxation Administration Act 1953* (TAA), which provides for a restriction on goods and services tax (GST) refunds that arise from the overpayment of GST.

2. Specifically, this Ruling explains:

- the Commissioner's view of those situations where section 105-65 of Schedule 1 to the TAA applies to restrict refunds;
- whether section 105-65 of Schedule 1 to the TAA applies to overpayments of luxury car tax (LCT), wine equalisation tax (WET) and to taxable importations;
- circumstances under which section 105-65 applies;
- the meaning of 'treated' as a taxable supply;
- the meaning of 'to any extent';

- the operation of section 105-65 where the wrong entity remits the GST;
- the circumstances in which the Commissioner may exercise the discretion to refund where section 105-65 of Schedule 1 to the TAA applies;
- the amount of any refund that is given;
- the ability of the Commissioner to recover amounts refunded without regard to section 105-65 of Schedule 1 to the TAA; and
- whether the operation of section 105-65 of Schedule 1 to the TAA is taken into account in working out an entity's assessed net amount.

3. This Ruling also provides examples on how the Commissioner's discretion in section 105-65 of Schedule 1 to the TAA may be exercised. In providing these examples, there is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion in any particular case. Nor does this Ruling represent a general exercise of the Commissioner's discretion. Rather, the examples are provided to assist in determining when the discretion may be exercised.

4. Any entitlement to a refund may also be affected by section 105-55 of Schedule 1 to the TAA, which provides for a four-year time limit for entitlements to refunds, other payments or credits in relation to GST. This Ruling does not consider the operation of that section.

5. This Ruling does not consider adjustment events and the operation of Division 19 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).[1]

6. All subsequent legislative references in this Ruling are to Schedule 1 to the TAA, except where otherwise indicated.

[1] Adjustment events are explained in GSTR 2000/19 Goods and services tax: making adjustments under Division 19 for adjustment events.

Background

Legislative framework

7. A refund or credit may arise where a taxpayer's assessed net amount[1A] is amended[1B] to:

- include additional input tax credits;
- reduce the GST payable; or
- include a decreasing adjustment.

8. The result of the amendment may be that :

- the assessed net amount the entity paid is reduced;
- the entity becomes entitled to a refund under section 35-5 of the GST Act; or
- the amount of the refund under section 35-5 of the GST Act is increased.

9. The Commissioner is required to give a refund or apply that amount in accordance with the running balance account (RBA) rules.[2]

10. However, subsection 105-65(1) modifies this requirement so that the Commissioner need not give a refund (or apply that amount) where the requirements of the section are met.[3]

11. Appendix 2 of this Ruling provides an illustrative overview of the operation of section 105-65. For the purpose of this Ruling unless otherwise stated a reference to an 'overpaid amount' is a reference to a credit or refund arising from the overpayment of the GST payable in the calculation of the assessed net amount.

12. Prior to tax periods starting on or after 1 July 2008 section 105-65 did not apply to a GST refund where the overpaid amount was for a transaction that did not give rise to a 'supply' as defined in section 9-10 of the GST Act. This was decided by the Federal Court in *Kap Motors Pty Ltd v. Commissioner of Taxation* [2008] FCA 159; 2008 ATC 20-007; (2008) 68 ATR 927 *(Kap Motors)*.

[1A] For tax periods that start before 1 July 2012, section 105-65 applies to a 'net amount'. For these tax periods, a reference to 'assessed net amount' in this Ruling is to be read as 'net amount'.

[1B] For tax periods starting on or after 1 July 2012, the Commissioner is taken to have made an assessment of the net amount on the day the taxpayer lodges its GST return for a tax period. Generally, the Commissioner may amend the assessment 4 years from the day after the day the notice of assessment was given. For tax periods starting before 1 July 2012, the Commissioner is not treated as having made an assessment on lodgment of the GST return. For these tax periods, a reference to 'amend' in this Ruling is to be read as meaning a 'revision' to a taxpayer's GST return.

[2] See section 35-5 of the GST Act and Division 3 and Division 3A of Part IIB of the TAA.

[3] See paragraph 14 of this Ruling.

13. Section 105-65 was amended to overcome this identified deficiency in the law and to cover overpaid amounts involving an arrangement that was treated as giving rise to a taxable supply but which does not give rise to a supply.[4] These amendments apply in respect of refunds relating to tax periods starting on or after 1 July 2008.

13A. In *Naidoo v. Commissioner of Taxation* [2013] AATA 443; 2013 ATC 10-323 *(Naidoo)*, the Tribunal found that section 105-65 is not a provision that allows the Commissioner to alter the net amount worked out under subsection 17-5(1) of the GST Act. The Tribunal therefore found that it did not have jurisdiction to review the Commissioner's decision under section 105-65 to not give a refund of the overpaid GST.

13B. Following the Tribunal's decision in *Naidoo*, section 105-65 was amended[4AA] effective from 30 May 2014 so that a taxpayer who is dissatisfied with a decision made by the Commissioner under section 105-65 may lodge an objection in the manner set out in Part IVC of the TAA.

13C. Section 105-65 only applies to an amount that relates to a tax period starting on or before 30 May 2014[4AB] (the day *Tax Laws Amendment (2014 Measures No. 1) Act 2014* received Royal Assent). Section 105-65 will be repealed on 1 July 2018.

Legislative context

14. Section 105-65[4A] states:

> (1) The Commissioner need not give you a refund of an amount to which this section applies, or apply (under Division 3 or 3A of Part IIB) an amount to which this section applies, if:
>
> (a) you overpaid the amount, or the amount was not refunded to you, because a *supply was treated as a *taxable supply, or an *arrangement was treated as giving rise to a taxable supply, to any extent; and
>
> (b) the supply is not a taxable supply, or the arrangement does not give rise to a taxable supply, to that extent (for example, because it is *GST-free); and

[4] See the *Tax Laws Amendment (2008 Measures No. 3) Act 2008.*
[4AA] *Tax Laws Amendment (2014 Measures No. 1) Act 2014*
[4AB] The treatment of excess GST relating to a tax period starting on or after 31 May 2014 is subject to Division 142 of the GST Act.
[4A] Prior to 1 July 2012, subparagraphs 105-65(2)(a)(i), (a)(ii), (b)(i) and (b)(ii) refer to 'net amount'.

(c) one of the following applies:

(i) the Commissioner is not satisfied that you have reimbursed a corresponding amount to the recipient of the supply or (in the case of an arrangement treated as giving rise to a taxable supply) to an entity treated as the recipient;

(ii) the recipient of the supply, or (in the case of an arrangement treated as giving rise to a taxable supply) the entity treated as the recipient, is *registered or *required to be registered.

(2) This section applies to the following amounts that relate to a *tax period starting on or before the day the *Tax Laws Amendment (2014 Measures No. 1) Act 2014* receives the Royal Assent:

(a) in the case of a *supply:

(i) so much of any *assessed net amount or amount of *GST as you have overpaid (as mentioned in paragraph (1)(a)); or

(ii) so much of any assessed net amount that is payable to you under section 35-5 of the *GST Act as the Commissioner has not refunded to you (as mentioned in paragraph (1)(a)), either by paying it to you or by applying it under Division 3 of Part IIB of this Act;

(b) in the case of an *arrangement:

(i) so much of any assessed net amount or amount of GST to which subparagraph (a)(i) would apply if the arrangement were a supply; or

(ii) so much of any assessed net amount to which subparagraph (a)(ii) would apply if the arrangement were a supply.

(3) The Commissioner must notify you in writing of any decision relating to you made under subsection (1) after the day mentioned in subsection (2).

(4) You may object, in the manner set out in Part IVC, against a decision you are dissatisfied with that was made under subsection (1).

Note: This section will be repealed on 1 July 2018: see Part 3 of Schedule 2 to the *Tax Laws Amendment (2014 Measures No. 1) Act 2014*.

Frequently used terms for the purposes of this Ruling

15. The terms 'supply' or 'taxable supply' also encompass the concept of an arrangement being treated as giving rise to a supply or a taxable supply (where it is appropriate).

16. The term 'refund' also encompasses applying a refund or credit in accordance with the running balance account rules (where the context so requires).

17. The term 'remitted' means that an amount has been reported and paid to the Commissioner.

18. The term 'reimburse' encompasses not only an actual monetary payment but also crediting of the recipient's account such that it reduces the debt owed or offsetting the credit against liabilities.

Ruling

Whether section 105-65 applies to overpayments of LCT and WET and to taxable importations

19. Section 105-65 only applies to an overpayment of an assessed net amount that arises as a result of the amount of GST payable being overpaid and does not apply to an overpayment of the assessed net amount that arises where LCT or WET is overpaid or to taxable importations.

Circumstances under which section 105-65 applies

20. For section 105-65 to apply, there must firstly be an amount of GST taken into account in an entity's assessed net amount which is in excess of what was legally payable on the particular supply in the relevant tax period ('incorrect GST').[5]

20A. Section 105-65 applies to the extent that an entity's assessed net amount for a tax period takes into account an amount of incorrect GST and this resulted in:

- an overpaid amount – because the assessed net amount the entity paid was more than its amended assessed net amount for the tax period, or
- an amount not refunded – because the assessed net amount paid to the entity was less than the amended assessed net amount payable to it.

[5] The incorrect GST must also arise from a supply or arrangement being wrongly treated as a taxable supply to any extent, and it is not taxable to that extent. Refer to the discussion at paragraphs 21 to 25D of this Ruling.

20B. However section 105-65 does not apply to the extent that there is incorrect GST but the assessed net amount itself is not overpaid. That is, the entity's assessed net amount is less than its amended assessed net amount because, for example, the incorrect GST is offset by over claimed input tax credits or other errors.

20C. Where an entity is found not to be carrying on an enterprise (so that its amended assessed net amount for a tax period is zero), section 105-65 will apply, but only to the extent that the entity's assessed net amount for the tax period was greater than zero.[5A]

Meaning of 'treated' as a taxable supply

21. In the context of section 105-65 a supply would be treated as a taxable supply where the supplier has mischaracterised a supply as taxable because they believed the supply to be a taxable supply and remitted an amount as GST to the Commissioner on that supply in the calculation of their net amount. They may also have overtly dealt with the recipient of the supply as if the supply was a taxable supply (for example, by issuing a tax invoice) though this may not always be apparent when the dealings are with unregistered recipients.

22. In most cases it will be the supplier who erroneously treats the supply as taxable (as the supplier is the entity who has the liability for remitting the GST as a component part of the net amount).[6] However, in some situations it may be the Commissioner (or another entity, such as a member of the same GST group) who treats the supply as taxable. In these circumstances section 105-65 can apply.[7]

Meaning of 'to any extent'

23. The Commissioner considers that section 105-65 applies wherever the overpayment arises from a supply or arrangement being wrongly treated as a taxable supply to any extent, and it is not taxable to that extent. This will commonly occur where, for example, a supply that should be treated as GST-free or input taxed is treated as taxable.[8]

24. However, the words 'to any extent' also mean that section 105-65 will apply, for example, to a mixed supply (that is a supply that is partly taxable and partly input-taxed or GST-free), where the taxpayer overpays GST by treating the supply as taxable to a greater extent than required by the GST Act.

[5A] See *Naidoo* at paragraphs 79 and 80.

[6] There are circumstances, such as with the grouping provisions, where the person who makes the supply is not necessarily the entity who has the liability to remit the GST. For example, see Example 12 at paragraphs 173-176 of this Ruling and Example 15 at paragraphs 183 to 185 of this Ruling. Section 105-65 can still apply in these cases.

[7] In such circumstances it may be appropriate for the Commissioner to exercise his discretion to pay the refund. See paragraphs 113 to 132 of this Ruling.

[8] [Omitted.]

25. Other specific examples of where section 105-65 applies include where:

- an entity has remitted an amount as GST for supplies that are subsequently determined to have been made by another entity; or
- supplies are treated as taxable under the margin scheme but are actually GST free or input taxed.

25A. These matters concern the GST payable on a supply that was treated as a taxable supply to some extent and the 'extent' of that treatment as a taxable supply is different to the correct extent of the treatment under the GST Act.

25B. The Commissioner takes the view that section105-65 will **not** apply in cases where the supply is always correctly characterised and treated by the supplier, but an overpayment of GST arises from a mere miscalculation. Examples of such cases include where:

- a supplier correctly characterises a supply as taxable but merely miscalculates the GST for that supply in the calculation of their net amount;
- supplies are treated as taxable under the margin scheme where there was an error in the calculation of the margin;
- GST on supplies of real property has been calculated under the ordinary provisions, when in fact the margin scheme applied;
- Division 72 of the GST Act applies but an overpayment of GST arises from an error in the calculation of the market value;
- a supplier chooses to apply Division 87 of the GST Act to a supply of long term accommodation in commercial residential premises, but the supplier then fails to apply the concessional rate when calculating the value of the supply;
- GST on a taxable supply of a fringe benefit is overpaid as a result of an error in working out the price under subsection 9-75(3) of the GST Act;
- GST is overpaid due to a miscalculation of GST which arises when a taxpayer fails to pay LCT on a luxury car; or
- GST on a taxable supply of an insurance policy is overpaid as a result of an error when working out the value of the taxable supply pursuant to section 78-5 of the GST Act.

25C. In accordance with the decision in *International All Sports v. Commissioner of Taxation* [2011] FCA 824; 2011 ATC 20-268; (2011) 81 ATR 607, *(International All Sports)*[7A] the Commissioner will administer section 105-65 of Schedule 1 to the TAA on the basis that it does not apply where, in tax periods which commenced prior to 24 March 2010[7B] gambling operators have miscalculated their global GST amount under Division 126 of the GST Act by failing to include the value of monetary prizes paid to non-resident customers.

25D. The examples set out at paragraph 25B of this Ruling of where section 105-65 does or does not apply are not intended to be an exhaustive list.

26. [Omitted].[9]

Circumstances in which the Commissioner may exercise the discretion to refund where section 105-65 applies

27. The operation of section 105-65 to deny the requirement to pay refunds that would otherwise be payable is not discretionary. Where the conditions in section 105-65 apply, the Commissioner has no obligation to pay a refund that would otherwise be payable under section 8AAZLF of the TAA. Where the section applies the Commissioner need not give you a refund of the amount or apply the amount under the relevant RBA provisions. However, the words 'need not' indicate the Commissioner may choose to pay a refund in appropriate circumstances, even though the conditions in paragraphs 105-65(1)(a), 105-65(1)(b) and 105-65(1)(c) are satisfied. It is to that limited extent that the Commissioner has a discretion.

28. The guiding principles the Commissioner will take into account in exercising the discretion are explained at paragraphs 113 to 132 of this Ruling.

What is the amount of any refund given

29. The words 'so much if any' indicate that subsection 105-65(1) can apply to an amount that is less than the whole amount that has been overpaid (or not refunded).

30. Accordingly, if a supplier reimburses (in a later tax period) a lesser amount to an entity that is not registered (or required to be registered), section 105-65 does not apply to restrict the payment of a refund of that reimbursed amount.

31. [Omitted].

[7A] *International All Sports* is further discussed at paragraphs 72 to 81 of this Ruling.
[7B] For tax periods commencing on or after 24 March 2010, monetary prizes paid to non-residents are excluded from the calculation of the global GST amount.
[9] [Omitted].

Where an administration fee is charged by the supplier

31A. A supplier may charge the recipient an 'administration fee' and reduce the amount reimbursed to the recipient by the amount of that fee.

31B. An administration fee is one charged to cover the reasonable costs of making the reimbursement. Costs will be considered reasonable when they closely reflect the actual costs incurred by the supplier in making the reimbursement.

31C. Section 105-65 does not apply to restrict the payment of a refund of the full amount that has been overpaid (or not refunded) where:

- the administration fee is based on the reasonable administration costs incurred by the supplier in making the reimbursement, and
- the recipient agrees to pay the administration fee.

31D. However, section 105-65 may apply to restrict the payment of the refund where the recipient is registered (or required to be registered) for GST.

Recovery of amounts refunded without regard to section 105-65

32. Section 8AAZN of the TAA may be used to recover a refund where the Australian Taxation Office's (ATO's) automated system processes that refund without regard to section 105-65. The Commissioner considers that the payment of such a refund constitutes a mistake and is therefore an 'administrative overpayment' for purposes of section 8AAZN of the TAA.

33. Where the refund is paid as a result of the actions of a taxpayer that amount to the making of a false or misleading statement under Subdivision 2B of Part III of the TAA and the Criminal Code, the Commissioner depending on the particular facts may initiate prosecution action and also seek an order from the Court under section 21 B of the *Crimes Act 1914* for an amount equal to the amount refunded.

Section 105-65 is not taken into account in determining assessed net amount

34. Section 105-65 is not taken into account in determining an entity's net amount for a tax period. It operates **after** the net amount for a tax period is worked out under the GST Act.[9A]

[9A] [2013] AATA 433 at paragraph 95.

Date of effect

35. This Ruling applies both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

35A. The Addendum to this Ruling that issued on 19 September 2012, explains our view of the law as it applied both before and after its date of issue. However, if prior to the issue of this Addendum, you relied on the public ruling that the Addendum amends, you are protected in respect of what you have done up to the date of issue of the Addendum.

35B. The Addendum to this Ruling that issued on 26 February 2014 applies both before and after its date of issue. To the extent that it relates to the introduction of self assessment for indirect tax, the Ruling applies to tax periods commencing on or after 1 July 2012.

35C. The Addendum to this Ruling that issued on 8 July 2015 applies before and after its date of issue. To the extent that it relates to enactment of *Tax Laws Amendment (2014 Measures No. 1) Act 2014,* the Ruling applies to tax periods commencing on or before 30 May 2014.

Commissioner of Taxation
15 December 2010

Appendix 1 - Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

36. In interpreting any provision of an Act it is important to consider the context in which it appears, the evident purpose of the provision and, where appropriate, the legislative history of similar provisions in the same Act or other Acts.

37. With this in mind there are two important policy reasons behind the operation of section 105-65:

- GST charged on a taxable supply is intended to be borne by the unregistered end consumer,[10] and
- there should not be a refund of overpaid GST to a supplier where it may result in a windfall gain to the supplier.[11]

38. The scheme of the GST Act,[12] on which the section 105-65 policy is based, is premised on the following principles:

- it is the supplier that determines if the supply it makes is taxable in the first instance. By determining that its supply is a taxable supply, an amount for GST is included in the price.
- double taxation is avoided by the registered recipient being entitled to claim an input tax credit for that taxable supply where it is acquired for a creditable purpose and the supplier, in the relevant circumstances, provided a tax invoice. In this way the Act envisages symmetry between the GST payable and the input tax credit which may be claimed.
- it is the unregistered end consumer that bears the cost of the GST.

39. The GST regime, like the former sales tax regime, is an indirect tax regime with a central characteristic being that the entity liable to remit the tax is not intended to be the entity that actually bears the cost of the tax.

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[10] See Chapter 1 of the Explanatory Memorandum of the A New Tax System (Goods and Services Tax) Bill 1998 – in particular: 'GST is effectively borne by consumers when they acquire anything to consume.' See also Edmonds J in *Federal Commissioner of Taxation v. DB Rreef Funds Management Limited* 2006 ATC 4282 at 4285; (2006) 62 ATR 699 at 702.

[11] See paragraphs 3.40 and 3.41 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1998 and paragraph 2.2 of the Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008.

[12] See paragraphs 3.15, 3.24 and 5.4 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

40. The High Court in *Avon Products Pty Ltd v. Commissioner of Taxation* [2006] HCA 29 (*Avon*) noted that 'The central feature informing this character of the sales tax is that the economic burden of the impost is generally not intended to be borne by the person liable to remit it; it is passed on.' In this regard the GST and sales tax regimes are very similar though the manner in which double taxation is avoided differs between the two regimes. GST avoids double taxation through symmetry by generally allowing an equal and offsetting input tax credit for the GST payable on business to business transactions, whilst the sales tax system relied on a system of quoting.

41. The *Sales Tax Assessment Act 1992* (STAA 92) and its predecessor Acts contained a similar provision to section 105-65, which restricted the payment of a refund for overpaid sales tax.[13] In *Avon* the High Court stated, in regard to subsection 51(1) of STAA 92 'In this way, the Act evinces a stance against automatic recovery of sales tax merely upon proof that it has been overpaid'. The reason behind the stance of not automatically paying refunds in an indirect tax system is the underlying premise that the supplier who remits the tax is not bearing the cost of the tax, and would receive a windfall gain if permitted to automatically receive a refund of an overpaid amount.

42. Section 105-65 is based on provisions such as subsection 26(1) of the *Sales Tax Assessment Act (No.1) 1930* and subsection 51(1) of the STAA 92. Although section 105-65 makes no specific mention of 'passing on', it proceeds on the basis that the whole structure of the GST Act is based on the principle that the tax is passed on when a supply is treated as a taxable supply.

43. The Explanatory Memorandum that accompanied the Bill[14] that introduced the GST Act summarised this approach in the following manner:

> GST is effectively borne by consumers when they acquire anything to consume.
>
> *and remitted by suppliers.*
>
> GST is remitted by suppliers who make supplies in carrying on their enterprise. Suppliers do not bear the GST because the tax is included in the price of what they supply.

44. Within this framework the reasoning in *Avon*, albeit in a sales tax context, equally applies in the GST context. In that case the High Court stated, at paragraphs 9 and 14:

> 9. That sales tax is expected to be passed on depends upon the circumstance that sales of goods occur within an economy geared to making profit…In a profit-making structure, businesses will set prices so as to ensure at least that all foreseeable costs are recovered…it forms part of the cost structure of doing business…There is nothing extraordinary in the proposition that in the usual course of things sales tax will be passed on…..

[13] Table 3 in section 51 of the STAA 92.
[14] See Executive Summary of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

> 14. Additionally, once it is appreciated that it is in the nature of sales tax to be passed on, there is nothing remarkable in the consequences that proof to the contrary will occur comparatively seldom.

45. Accordingly, section 105-65 evinces a stance that ordinarily overpaid GST need not be refunded.

Whether section 105-65 applies to overpayments of LCT and WET and to taxable importations

46. Subsection 105-65(2) refers to 'assessed net amount', which is relevantly defined in section 195-1 of the GST Act and means, for a tax period, the net amount assessed for that period.[15] 'Net amount' is also defined in section 195-1 and refers to sections 17-5, 123-15, 126-5 and 162-105 of the GST Act. It is clear that GST is included in the meaning of 'net amount'.

47. Subsection 17-5(2) of the GST Act provides that the net amount may be increased or decreased under Subdivision 13-A of the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act)[16] and under Subdivision 21-A of the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act).[17]

48. However, this does not mean that section 105-65 applies to overpayments of LCT or WET.

49. LCT applies to a 'taxable supply of a luxury car' (as defined in section 5-10 of the LCT Act) rather than a 'taxable supply' as relevantly defined[18] in section 195-1 of the GST Act (as having the meaning given by sections 9-5, 78-50, 84-5 and 105-5 of the GST Act). Therefore, an overpayment of LCT is not covered by section 105-65.[19]

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[15] Under subsection 3AA(2) of the TAA an expression has the same meaning in Schedule 1 to the TAA as in the *Income Tax Assessment Act 1997* (ITAA 1997). Under subsection 995-1(1) of the ITAA 1997 'net amount' has the same meaning as in section 195-1 of the GST Act.

[16] The definition of 'net amount' in section 17-5 of the GST Act was amended, effective 1 July 2012, to clarify that 'net amount' includes an amount of luxury car tax (LCT) refundable or payable. However, before this amendment, amounts of LCT payable or LCT adjustments are included in the net amount pursuant to subsection 2-10(1), section 2-25 and section 13-5 of the LCT Act.

[17] The definition of 'net amount' in section 17-5 of the GST Act was amended, effective 1 July 2012, to clarify that 'net amount' includes an amount of wine equalisation tax (WET) refundable or payable. However, before this amendment, amounts of WET payable or refunded are included in the net amount pursuant to sections 2-20, 2-25, 21-1 and 21-5 of the WET Act.

[18] Under subsection 3AA(2) of the TAA an expression has the same meaning in Schedule 1 to the TAA as in the ITAA 1997. Under subsection 995-1 of the ITAA 1997 'taxable supply' has the same meaning as in section 195-1 of the GST.

[19] Overpayments of LCT are specifically covered by section 17-5 of the LCT Act.

50. WET applies to 'assessable dealings'[20] rather than taxable supplies. Therefore, an overpayment of WET also is not covered by section 105-65.[21]

51. An importation is not a supply and therefore is not subject to the restrictions in section 105-65.[22]

52. Accordingly, section 105-65 only applies to overpayments of GST on taxable supplies and cannot be applied where LCT or WET is overpaid or to overpayments of GST on taxable importations.

53. The *Tax Laws Amendment (2008 Measures No. 3) Act 2008* amended paragraph 105-65(2)(a) to recognise this by removing a reference to 'an amount of indirect tax' and inserting a reference to 'amount of GST'.

Circumstances under which section 105-65 applies

54. For section 105-65 to apply, there must firstly be an amount of incorrect GST (arising from a supply or arrangement being wrongly treated as a taxable supply to any extent). The incorrect GST must result in:

- an overpaid amount – because the assessed net amount the entity paid was more than its amended assessed net amount for the tax period, or
- an amount not refunded – because the assessed net amount paid to the entity was less than the amended assessed net amount payable to it.

55. The word 'overpaid' as used in paragraph 105-65(1)(a) is not a defined term so it takes its normal meaning. The Macquarie Dictionary[23] relevantly defines 'overpay' as: '1. to pay more than (an amount due).'

56. In *Chippendale Printing Co Pty Ltd v. FC of T & Anor* 96 ATC 4175; (1996) 32 ATR 128 (*Chippendale*), the Full Federal Court made some observations on the meaning of 'overpaid' in the context of the sales tax regime. Lehane J considered that the concept of overpayment includes both a payment exceeding an amount of tax actually due and a payment, as tax, where no amount of tax was actually due.

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[20] See sections 5-1 and 5-5 of the WET Act.
[21] Overpayments of WET are specifically covered by CR1 in the Wine Credit Table in section 17-5 of the WET Act.
[22] See section 7-1 of the GST Act where it states that GST is payable on 'taxable supplies' and 'taxable importations'. Taxable importations are not supplies and are dealt with under Part 2-3 of the GST Act.
[23] The *Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

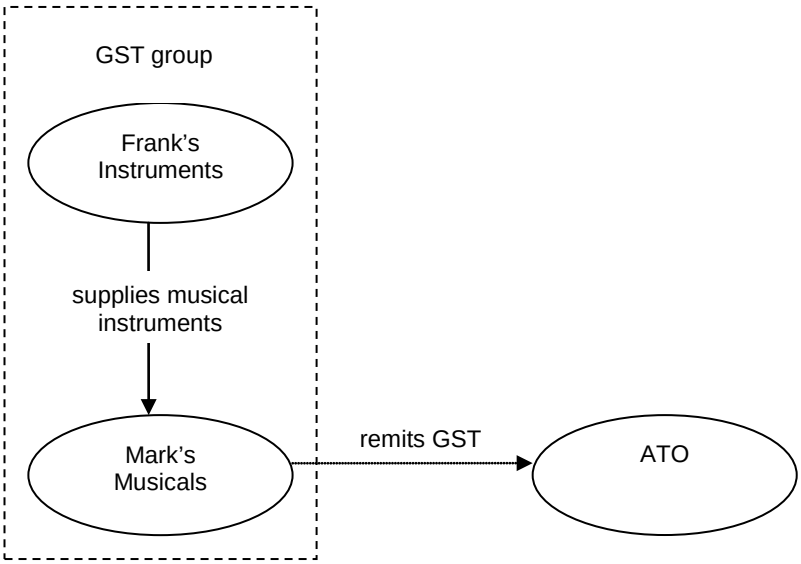
57. Tamberlin J compared the previous sales tax legislation with the then relevant current sales tax legislation. Neither legislation defined the term 'overpaid' but a schedule to the new legislation referred to 'overpaid' as an amount paid as sales tax that was not legally payable. Tamberlin J thought this expression would also cover the concept of 'overpaid' in the previous legislation and, furthermore, held that this meaning accords with 'the ordinary meaning of the expression which is '…a sum of money paid in excess of what is due.'[24]

58. Applying the reasoning in *Chippendale* in the context of section 105-65, the incorrect GST must either result in the assessed net amount that the entity paid being more than its amended assessed net amount for the tax period or the assessed net amount that was paid to the entity being less than the amended assessed net amount payable to it.

Example 1 - overpaid GST

59. *Frank's Instruments Pty Ltd and Mark's Musicals Pty Ltd are part of the same GST group that sells musical instruments. Frank's Instruments supplies Mark's Musicals with a number of trumpets. Frank's Instruments issues Mark's Musicals with tax invoices however no consideration is provided by Mark's Musicals and no input tax credits are claimed in respect of the supply. Mark's Musicals (the group representative member) lodges the activity statement for the group and mistakenly accounts for the GST on the intra-group supply of the trumpets from Frank's Instruments.*

60. *Some months later Mark's Musicals realises that it has remitted GST on the intra-group supply of trumpets and requests a refund from the Commissioner.*



[24] 96 ATC 4175 at 4179; (1996) 32 ATR 128 at 131.

61. In this example, there has been an overpayment because a payment, as tax, occurred 'where no amount of tax was actually due'. The payment occurred because the supply was initially treated as taxable by Frank's Instruments[25] but subsequently it is ascertained that the supply was not taxable (because it is treated as if it were not a taxable supply under paragraph 48-40(2)(a) of the GST Act). The transaction is covered by section 105-65.[26]

Example 1A - assessed net amount payable to the entity not refunded

61A. *Greg Sports Pty Ltd carries on an enterprise of selling sports equipment. Its assessed net amount for the tax period ending 30 June 2013 was a refund of $3,000 consisting of GST payable on taxable supplies of $5,000 and input tax credits of $8,000. Greg Sports was refunded the $3,000.*

61B. *Later Greg Sports realises that it incorrectly treated a GST-free supply as taxable, resulting in GST of $500 being incorrectly included in the assessed net amount in that tax period. His amended assessed net amount is therefore a refund of $3,500.*

61C. *Section 105-65 will apply to potentially restrict the additional refund of $500, because it is so much of the assessed net amount payable to Greg Sports that was not refunded.*

61D. Section 105-65 does not apply to the extent that the incorrect GST is taken into account in the entity's assessed net amount but the assessed net amount itself is not overpaid because, for example, the incorrect GST is offset by over claimed input tax credits or other errors.

Example 1B - incorrect GST offset by over claimed input tax credits – amount to which section 105-65 applies

61E. *Tony Enterprises Pty Ltd's assessed net amount for the tax period ending 31 March 2013 was a refund of $5,000 consisting of GST payable on taxable supplies of $45,000 and input tax credits of $50,000. Tony Enterprises was refunded this amount.*

61F. *Tony Enterprises incorrectly treated a supply that is input taxed as taxable, resulting in GST of $3,000 being incorrectly included in the assessed net amount for the tax period. In addition, Tony Enterprises also over claimed its input tax credits by $2,000. Tony Enterprises' amended assessed net amount is therefore a refund payable to it of $6,000.*

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[25] See paragraphs 59 and 60 of this Ruling – paragraph 105-65(1)(a) does not require that the supply is treated as taxable by a particular entity (in this case it does not matter that the supply was treated as taxable by Frank's Instruments but that, due to the particular grouping provisions, the GST was remitted by Mark's Musicals).

[26] In such circumstances the Commissioner may exercise the discretion to pay the refund. See paragraphs 113 to 132 of this Ruling.

61G. *Section 105-65 will apply to potentially restrict the further refund of $1,000, because it is so much of the assessed net amount payable to Tony Enterprises that was not refunded to it.*

Example 1C - incorrect GST entirely offset by over claimed input tax credits – no amount to which section 105-65 applies

61H. *Jeannette Shoes' assessed net amount for the tax period ending 30 September 2013 is $1,000 payable, consisting of GST payable on taxable supplies of $3,000 and input tax credits of $2,000. It pays the $1,000 to the Commissioner.*

61I. *Jeannette Shoes incorrectly treated a supply that is GST-free as taxable, resulting in an amount of incorrect GST of $300. In addition, Jeannette Shoes over claimed its input tax credits by $500.*

61J. *These two errors mean Jeannette Shoes' amended assessed net amount for the September 2013 tax period is $1,200 payable. Since it only paid $1,000 to the Commissioner, it is liable to pay an additional $200 to the Commissioner.*

61K. *In this example, section 105-65 does not apply because Jeannette Shoes has not overpaid an amount. That is, although its assessed net amount included incorrect GST of $300, it was offset by the over claimed input tax credits, resulting in Jeannette Shoes having an amount payable.*

Entity not carrying on an enterprise

61L. Where an entity is found not to be carrying on an enterprise, section 105-65 will apply to potentially restrict a refund of the incorrect GST, but only to the extent that the entity's assessed net amount for the tax period was greater than zero. [26A]

Example 1D - taxpayer not carrying on an enterprise and section 105-65 applies

61M. *Matthew is registered for GST. He lodged an activity statement for the tax period ending 31 March 2013 reporting a net amount of $1,000 consisting of GST payable of $1,500 and input tax credits of $500. Matthew pays the assessed net amount of $1,000 to the Commissioner.*

61N. *The Commissioner later determines that Matthew is not carrying on an enterprise. Therefore, his amended assessed net amount for the March 2013 tax period is nil. As Matthew has paid $1,000 for this tax period, section 105-65 will apply to potentially restrict any refund of that amount. This is because it is so much of his assessed net amount that he overpaid.*

[26A] [2013] AATA 433 at paragraphs 79 and 80.

61O. Where an entity's assessed net amount resulted in a refund to which it is no longer entitled to following an amendment to its assessed net amount, section 105-65 does not apply. However, the overpaid refund is payable to the Commissioner under subsection 35-5(2) of the GST Act.

Example 1E - application of subsection 35-5(2) of the GST Act

61P. *Tess is registered for GST. She lodged an activity statement for the tax period ending 30 June 2013, resulting in a refund of her assessed net amount of $300 being paid to her consisting of GST payable of $1,500 and input tax credits of $1,800.*

61Q. *The Commissioner later determines that Tess is not carrying on an enterprise. Therefore, her amended assessed net amount for the June 2013 tax period is nil.*

61R. *Section 105-65 does not apply to Tess because the refund of $300 paid to her is greater than the amended assessed net amount payable to her (ie nil). That is, although her assessed net amount included an amount of incorrect GST of $1,500, it is offset by the over claimed input tax credits of $1,800.The overpaid refund of $300 is payable to the Commissioner under subsection 35-5(2) of the GST Act.*

Meaning of 'treated' as a taxable supply

62. For section 105-65 to apply, the relevant supply must be 'treated' as a taxable supply. In the context of section 105-65, a supply would be treated as a taxable supply where the supplier mischaracterised a supply as taxable (to any extent) because they believed the supply to be a taxable supply (to that extent), and an amount of GST is taken into account in their assessed net amount. They may also have dealt with the recipient of the supply as if the supply was a taxable supply (for example, by issuing a tax invoice) though this may not always be obvious when the dealings are with unregistered recipients.

63. In most cases it will be the supplier who incorrectly treats the supply as taxable (as the supplier is the entity that has the liability for remitting the GST).[27] However, in some situations it may be the Commissioner who incorrectly treats the supply as taxable. In these circumstances section 105-65 is not precluded from applying.[28]

[27] There are circumstances, such as with the grouping provisions, where the person who makes the supply is not necessarily the entity who has the liability to remit the GST. For example, see Example 12 at paragraphs 173-176 of this Ruling. Section 105-65 can still apply in these cases.

[28] In such circumstances it may be appropriate for the Commissioner to exercise the discretion to pay the refund. See paragraphs 113 to 132 of this Ruling.

64. Nothing in section 105-65 limits its application to circumstances where it was the supplier who treated the supply as taxable. If the legislative intention had been to restrict the provision only to the supplier's misclassification of the supply it may have been expected that more restrictive words would have been used. Furthermore there is nothing in the relevant Explanatory Memoranda or other extrinsic material which would support restricting section 105-65 to situations where the supplier treated the supply as a taxable supply.

Example 2 – Commissioner treats a supply

65. *Rehka treats a particular supply as GST-free. Subsequently she is audited by the ATO, which determines that she should have remitted GST on that supply. An assessment is raised and Rehka remits the outstanding GST.*

66. *Rehka subsequently objects to the assessment on the basis that the supply was not taxable. The Commissioner reverses the audit decision and gives a favourable objection decision. Rehka seeks a refund of the overpaid GST.*

67. In this case paragraphs105-65(1)(a) and 105-65(1)(b) are satisfied, that is, Rehka overpaid GST and a supply was treated as taxable but was subsequently determined not to be taxable. The fact that the Commissioner initially treated the supply as taxable, when in fact it was not, does not preclude the operation of the section.[29]

Meaning of 'to any extent'

68. Paragraph 105-65(1)(a) uses the expression 'a supply was treated as a taxable supply, or an arrangement was treated as giving rise to a taxable supply, **to any extent**' and paragraph 105-65(1)(b) uses the expression 'the supply is not a taxable supply, or the arrangement does not give rise to a taxable supply, '**to that extent**' (emphasis added).

69. Section 105-65 is concerned with supplies that have been treated as taxable supplies (or arrangements giving rise to taxable supplies). Therefore, the section is not concerned with input tax credits or tax on importations. Nor is the section concerned with a GST-free supply that was incorrectly treated as input taxed. None of these matters concerns the GST payable on a taxable supply.

70. In interpreting any provisions of an Act it is important to consider the context in which it appears, the evident purpose of the provision and, where appropriate, the legislative history of similar provisions in the same Act or other Acts.

[29] In this case it may be appropriate for the Commissioner to exercise the discretion to pay the refund. See Example 14 at paragraphs 181 to 183 of this Ruling.

71. The Commissioner previously took the view that section 105-65 should be construed as applying where a supply was treated as a taxable supply to the extent that a certain amount of GST was considered to be payable, but the supply was not a taxable supply to that extent because a lesser amount is in fact payable. The Commissioner considered that the phrase 'to any extent' was an expression of wide import[29A] and that the provision was intended to apply to all amounts of overpaid GST whether the overpayment occurred from a miscalculation in the amount of GST payable or a mischaracterisation as to the nature of the supply. This interpretation was viewed as consistent with the broad purpose of the provision to prevent windfall gains where GST has been incorrectly imposed, as indicated in the Explanatory Memorandum that accompanied the Bill that introduced the original provisions. [29B]

72. The meaning of the words 'to any extent' was considered by the Federal Court in *International All Sports*.

73. In *International All Sports*, the taxpayers operated bookmaking services, providing wagering opportunities to customers situated both in Australia and overseas.[30]

74. The issue which arose concerned how the taxpayers ought to calculate their global GST amount for the purposes of Division 126 of the GST Act. Section 126-10 of the GST Act contains a formula for determining the global GST amount ((total amounts wagered – total monetary prizes) x 1/11).[31][32]

75. The taxpayers submitted that they had originally incorrectly calculated their global GST amount and overpaid GST because their calculation of the total monetary prizes did not include monetary prizes paid to non-residents.

76. Also at issue was whether section 105-65 would apply such that the Commissioner 'need not' make a refund of any overpaid amounts. The Commissioner had argued that the words 'to any extent' were words of wide import, and meant that section 105-65 would apply whether the overpayment of GST arises from a miscalculation or a mischaracterisation.[33]

77. The Court held that, when calculating the global GST amount under section 126-10 of the GST Act, 'total monetary prizes' includes monetary prizes paid to non-resident customers.

[29A] See *Commissioner of Taxation v. Hornibrook* (2006) 156 FCR 313; 2006 ATC 4761; (2006) 65 ATR 1 where Young J held at paragraph 85 that the words 'to any extent' (as used in the context of subsection 14ZR(2) of the TAA) are 'words of extension'.

[29B] See paragraphs 3.40 and 3.41 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1998.

[30] [Omitted.]

[31] [Omitted.]

[32] [Omitted.]

[33] [Omitted.]

78. The Court also held that section 105-65 did not apply because it could not be said that the overpayments made by the taxpayers arose because supplies were treated as taxable supplies, or arrangements were treated as giving rise to taxable supplies, to any extent.

79. The Court further observed that:

> the words 'to any extent' at the end of the paragraph, and the corresponding words 'to that extent' in paragraph (b), address the situation in which a particular supply might have been treated as a taxable one to some extent only. It is not concerned to expand beyond its sensible meaning the wording of the main operative part of the paragraph.

80. Following the reasoning of the Court in *International All Sports*, the Commissioner takes the view that section 105-65 will apply where an overpayment of GST arises from a mischaracterisation of a supply as taxable to some extent and it is not taxable to that extent (and the other requirements of the section are satisfied).[34]

81. The Commissioner also takes the view that section 105-65 does **not** apply where the supply is always correctly treated as a taxable supply but an overpayment of GST arises from a mere miscalculation.[35]

82. Some particular scenarios are further discussed at paragraphs 83 to 98Q of this Ruling.

Margin scheme cases

83. Under Division 75 of the GST Act the amount of GST payable on taxable supplies of real property may be calculated (using the margin scheme) on the margin for the supply. There may be circumstances where the margin for a supply is less than the amount reflected in the activity statement lodged by the taxpayer. For example, a more favourable valuation method may apply.

84. The Commissioner takes the view that section 105-65 will not apply in cases where:

- supplies are treated as taxable under the margin scheme where there was an error in the calculation of the margin; or
- GST on supplies of real property has been calculated under the ordinary provisions when in fact the margin scheme applied.

[34] [Omitted.]
[35] [Omitted.]

85. However, section 105-65 will apply where supplies are treated as taxable under the margin scheme but are actually GST-free (for example, as a GST-free going concern) or input taxed.[36]

Mixed supply cases

86. A mixed supply is a supply that is partly taxable and partly GST-free or input taxed.[37]

87. In some situations a supplier may incorrectly apportion a mixed supply and overpay its GST liability (that is the supplier pays more at this point than was legally due on the supply). In these circumstances the extent to which a supply is treated as taxable is greater than the correct treatment. Accordingly, there has been an overpayment to which section 105-65 applies.

88. The case *of Luxottica Retail Australia v. FC of T* [2010] AATA 22; 2010 ATC 10-119; (2010) 75 ATR 169 (*Luxottica*) provides support for this approach. In that case the applicant had argued that, because the supply was taxable to the extent of the frames and was always treated as taxable to that extent, section 105-65 did not apply. However the Tribunal preferred the Commissioner's argument that, since the applicant had originally calculated a higher taxable proportion than was correct, the supply had been treated as taxable to a greater extent than it should have been.[37A] Therefore section 105-65 did apply.

Example 3 – application to mixed supplies

89. *Amie supplies grocery items to end consumers. As part of a promotional activity, Amie packaged some GST-free food items with taxable items (such as promotional calculators and watches) and sold them as a single package (that is, the promotional items could only be acquired in packages with the food products).*

90. *Amie initially calculated the taxable component as forming 70% of the value of the supply. However, after an internal review by the company accountant, it was determined that the taxable component of the supply was only 50% of the total value.*

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[36] [Omitted.]

[37] The Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008 expressly considers that these types of situations would be covered by section 105-65. For example, paragraph 2.14 states that an 'overpayment of GST may occur, for example, if a transaction is treated as a taxable supply when it is a mixed supply that is partly a taxable supply and partly a GST-free supply'. Furthermore, example 2.2 expressly covers a mixed supply scenario. See also *Luxottica Retail Australia v. FC of T* 2010 ATC 10-119 where it was determined that section 105-65 did apply to mixed supplies.

[37A] *Luxottica* at paragraph 56.

91. In this case there has been an overpayment of GST because the supply was treated as a taxable supply to the extent of 70% but was only taxable to the extent of 50%. Accordingly section 105-65 will apply to these circumstances.[38]

Gambling supplies

92. Under Division 126 of the GST Act a gambling operator's net amount is the sum of the global GST amount and other GST less input tax credits (that relate to amounts other than prize money). The global GST amount for a tax period is one-eleventh of the total amount wagered less the total monetary prizes (the gambling operator's margin). The total amount wagered is the sum of the consideration for all of the gambling supplies[38A] made by the gambling operator that are attributable to that tax period. The total monetary prizes are:

- the prize money that the gambling operator is liable to pay in that tax period on the outcome of gambling events, disregarding monetary prizes that relate to supplies that are GST-free (the gambling event or the gambling supplies do not have to take place during that tax period); and
- any refunds of losses, whole or in part, that the gambling operator is required to make in that tax period (the refunds do not have to relate to gambling supplies in that tax period).

93. In accordance with the decision in *International All Sports*, the Commissioner takes the view that section 105-65 of Schedule 1 to the TAA does not apply where, in tax periods which commenced prior to 24 March 2010,[38B] gambling operators have miscalculated their global GST amount under Division 126 of the GST Act by failing to include the value of monetary prizes paid to non-resident customers.

93A. Other cases which involve an error in calculating the global GST amount will need to be considered on their own facts.

Effect where the wrong entity remits the GST

94. In some instances an entity may in error remit GST on a supply that was not made by that entity.

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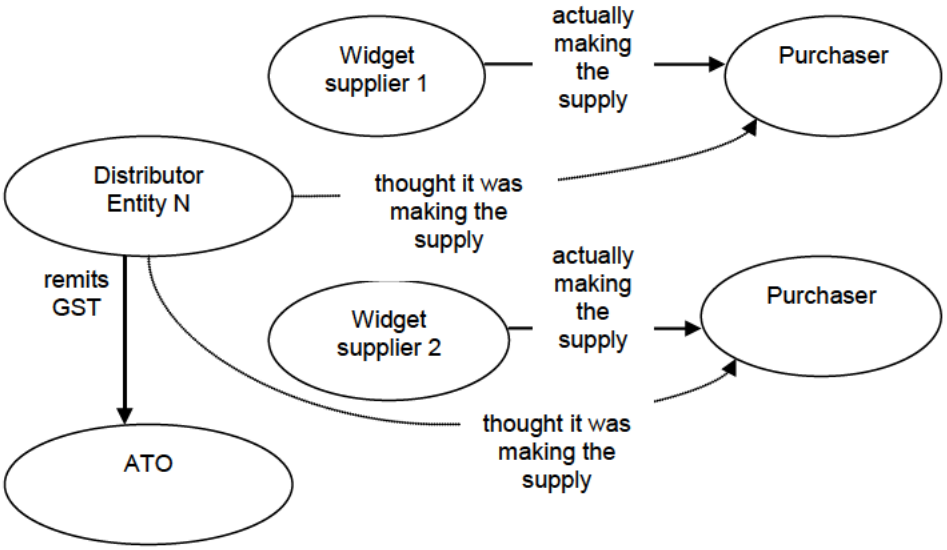
[38] See paragraphs 113 to 132 of this Ruling regarding the Commissioner's discretion to give a refund where a corresponding amount has not been reimbursed to the recipient and the recipient is not registered nor required to be registered.

[38A] A gambling supply is a taxable supply, see section 126-35 of the GST Act.

[38B] For tax periods commencing on or after 24 March 2010, monetary prizes paid to non-residents are excluded from the calculation of the global GST amount.

Example 4 – wrong entity remits GST

95. *Entity N is acting as a distributor for a collective of individual registered entities that make and supply widgets. The individual widget suppliers are making the supplies but Entity N thought it was the supplier and hence remitted the GST on its own behalf. Entity N subsequently ascertains that it was not the supplier and seeks a refund.*



96. A question arises as to whether section 105-65 operates to preclude an entity from obtaining a refund of GST paid by that entity for supplies that are subsequently determined to have been made by another registered entity. The Commissioner considers that section 105-65 applies in these circumstances.

97. In Example 4 at paragraph 95 of this Ruling Entity N has 'overpaid' GST because, as it was not the supplier, it had no legal obligation to remit GST. Furthermore, Entity N made the overpayment because it erroneously treated an arrangement as giving rise to a taxable supply to the extent of 100%.[39] In this sense paragraph 105-65(1)(a) is satisfied.

98. Paragraph 105-65(1)(b), however, must also be satisfied in order for the restriction on refunds to apply to this type of situation. It is the Commissioner's view that paragraph 105-65(1)(b) is satisfied since the arrangement did not give rise to a taxable supply by Entity N. That is, from Entity N's perspective, the arrangement is taxable to the extent of 0%.

[39] See paragraphs 63 to 67 of this Ruling in which the view is taken that it need not be the supplier who 'treats' a supply as taxable.

Associates

98A. Under Division 72 of the GST Act, special rules apply if an entity makes a supply to an associate without consideration or for inadequate consideration. These rules effectively mean that the supplies are treated as having been made for market value, unless the associate would have been entitled to a full input tax credit.

98B. If the market value rules apply to a taxable supply, and an overpayment of GST occurs merely because the supplier makes an error in the calculation of the market value, this will not involve any change in the characterisation of the supply itself. Therefore, section 105-65 will not apply to restrict a refund of the overpaid GST to the supplier.[39A]

Long-term accommodation in commercial residential premises

98C. Under Division 87 of the GST Act, the GST payable on supplies of long term commercial accommodation in commercial residential premises may be calculated on a reduced value.[39B]

98D. Where premises are predominantly for long term accommodation, the value of the supply of accommodation for 28 days or more is reduced for GST purposes to 50% of its price.

98E. Where premises are not predominantly for long term accommodation, the value of the part of a long term stay that is for the 28th day and any additional days, is reduced for GST purposes to 50% of its price.

98F. If a supplier of long-term accommodation in commercial residential premises chooses to apply the concessional treatment,[39C] but makes an error in calculating the value of the supply, for example by failing to take the 50% concession into account when calculating the GST, this would in turn lead to an error in calculating the GST payable. Such an error would not involve any change in the characterisation of the supply itself. Therefore, section 105-65 would not apply to an overpayment of GST that arose from such an error.[39D]

[39A] In the event that the acquisition was partly creditable, the amount of input tax credit available to the associate recipient would be reduced by the operation of section 11-25 of the GST Act.

[39B] For the concessions to apply, several conditions must be met: see Division 87 of the GST Act.

[39C] Under section 87-25 of the GST Act, suppliers may choose whether to apply the special rules. If a taxpayer chooses not to apply Division 87 of the GST Act, their supplies of long term accommodation are input taxed. (Any supplies of accommodation of 27 days or less will be taxable under the basic rules).

[39D] However, in the event that the acquisition of long-term accommodation was a creditable or partly creditable acquisition, the amount of input tax credit available to the recipient would be reduced by the operation of section 11-25 of the GST Act.

GST payable on supplies of fringe benefits

98G. The provision of a fringe benefit can be a supply.[39E]

98H. The services of an employee can be consideration for the supply of a fringe benefit to that employee. Consideration for the supply of a fringe benefit may also take the form of a payment or contribution made by the recipient of the benefit. It is only this consideration that is taken into account in working out the amount of GST on the supply of a fringe benefit.

98I. Subsection 9-75(3) of the GST Act states that, in working out the value of a taxable supply that is a fringe benefit, the price of a supply of a fringe benefit is the amount of consideration in the form of the recipient's payment or the recipient's contribution.

98J. An error in calculating the price in accordance with subsection 9-75(3) of the GST Act would lead to a miscalculation of the value of a taxable supply that is a fringe benefit. Where such an error leads to an overpayment of GST, this would not involve any change in the characterisation of the supply itself. Therefore, in such an instance, section 105-65 of Schedule 1 to the TAA will not apply to prevent a refund of the overpaid GST to the supplier

Miscalculation of GST which arises when a taxpayer fails to pay LCT on a luxury car

98K. GST is overpaid in situations where a taxpayer fails to pay LCT on a luxury car because the GST is incorrectly remitted on the LCT component of the price.

Example 4A

98L. In March 2012, Barry sells a non fuel-efficient motor vehicle for $88,000 including GST, but excluding compulsory third party insurance, registration charges and stamp duty. On his activity statement he reports and pays GST of $8,000, but does not report and pay an amount for LCT because he believes the vehicle that he has supplied is a commercial vehicle that is not designed for the principal purpose of carrying passengers.

98M. Barry learns that the motor vehicle he has supplied is considered to be a luxury car. To correct the mistake he has made, Barry completes the following steps:

(i) Barry takes out the GST and LCT payable (43% in all) from the amount above the luxury car tax threshold:

('all-up price' – LCT threshold for the 2011-12 financial year) ÷ 1.43

($88,000 – $57,466) ÷ 1.43 = $21,352.45

[39E] Refer to Goods and Services Tax Ruling GSTR 2001/3 *Goods and Services Tax: GST and how it applies to supplies of fringe benefits* for more detailed discussion.

(ii) Barry then multiplies this by the LCT rate of 33% to get the LCT payable:

$21,352.45 x 33/100 = $7,046.31

(iii) Barry then calculates the GST included in the 'all-up price'.

First work out the LCT value:

'all up price' – LCT payable on the sale = LCT value

$88,000 – $7,046.31 = $80,953.69

Then work out the GST payable:

The GST payable should have been reported as 1/11th of this amount:

$80,953.69 x 1/11 = $7,359.43

98N. To correct this mistake, Barry needs to lodge a revised activity statement that shows the amount of GST payable reduced by $640.57 and LCT of $7,046.31 payable.

98O. Barry originally paid $8,000 GST but should have paid $7,359.43 GST plus $7,046.31 LCT. In relation to the overpaid GST, Barry's error does not involve any change in the characterisation of the supply itself. Therefore, section 105-65 would not apply to an overpayment of GST that arose from such an error.[39F]

GST on insurance premiums

98P. Under section 78-5 of the GST Act, the value of a supply of an insurance policy is worked out as if the price of the supply were reduced by the amount of any stamp duty payable under a State or Territory law in respect of the supply.[39G]

98Q. A failure to deduct stamp duty in the correct amount would lead to a miscalculation of the value of a taxable supply of an insurance policy. Where such an error leads to an overpayment of GST, this would not involve any change in the characterisation of the supply itself. Therefore, in such an instance, section 105-65 will not apply to prevent a refund of the overpaid GST to the supplier.[39H]

99. [Omitted].

100. [Omitted].

[39F] However, in the event that the acquisition of the luxury car was a creditable or partly creditable acquisition, the amount of input tax credit available to the recipient would be reduced by the operation of section 11-25 of the GST Act.

[39G] See also section 78-95 of the GST Act in relation to GST on premiums under statutory compensation schemes.

[39H] However, in the event that the acquisition of the insurance policy was a creditable or partly creditable acquisition, the amount of input tax credit available to the recipient would be reduced by the operation of section 11-25 of the GST Act.

101. [Omitted].[40]

102. [Omitted].

103. [Omitted].[41]

104. [Omitted].

105. [Omitted].

106. [Omitted].

107. [Omitted].[42]

108. [Omitted].

109. [Omitted].

110. [Omitted].

111. [Omitted].

112. [Omitted].

Circumstances in which the Commissioner may exercise the discretion to refund where section 105-65 applies

113. The GST Act and the TAA specify when a taxpayer has an obligation to pay and when they have an entitlement to a refund. The payment of refunds or credits arising from the operation of the GST Act and the TAA are authorised by Divisions 3 and 3A of Part IIB of the TAA, in particular section 8AAZLF. That section provides that the Commissioner must, where the relevant conditions are present, pay any amount of any RBA surplus remaining after the allocation of primary tax debts and any credits where there are no other tax debts to which the surplus may be applied.[43]

114. Upon the introduction of section 8AAZLF of the TAA it was not necessary to have a specific provision to permit a refund of overpaid GST. Accordingly, former section 39 of the TAA (the predecessor to section 105-65) was enacted on a basis that it placed a restriction on a refund of overpaid GST.[44] The obligation imposed on the Commissioner by section 8AAZLF to refund a RBA surplus is qualified by the operation of section 105-65. In this regard section 105-65 places a restriction on the payment of a refund of overpaid GST.

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[40] [Omitted].
[41] [Omitted].
[42] [Omitted].
[43] Refer Explanatory Memorandum accompanying the introduction of A New Tax System (Pay As You Go) Bill 1999 paragraphs 3.27 – 3.29
[44] Refer to Explanatory Memorandum accompanying the introduction of A New Tax System (Tax Administration) Bill 1999 paragraphs 7.49 – 7.56. We note on this point that section 39 was originally drafted on the basis to permit a credit for a refund of overpaid GST. The enactment of section 8AAZLF obviated the need for a specific provision entitling a supplier to a refund.

115. However if the supplier satisfies the Commissioner that it has reimbursed the recipient of the supply and the recipient of the supply is not registered or required to be registered the Commissioner has a prima facie obligation to pay the refund of overpaid GST under section 8AAZLF provided the supplier satisfies any other legislative conditions (for instance, the time limits contained in section 105-55). In all other cases section 105-65 provides that the Commissioner 'need not' give a refund.

115A. In cases where the recipient is not registered or required to be registered, taxpayers can consider (that is self-assess) that the Commissioner will be satisfied that the recipient has been appropriately reimbursed (and that therefore section 105-65 will not apply) where:

- the recipient can be specifically identified;
- the amount of the reimbursement corresponds exactly to the amount of the GST overcharged to the recipient and the method of reimbursement ensures this is achieved;
- the reimbursement is in money, or if made under an agreement through a journal entry, to the extent that the journal entry offsets the recipient's pre-existing liability to the taxpayer; and
- the reimbursement or journal entry has actually been made, and is not merely planned to be made.

115B. In all other cases, taxpayers should seek guidance from the Commissioner[44A] as to whether he is satisfied that the recipient of the supply has been reimbursed.

116. The operation of section 105-65 to deny the requirement to pay refunds that would otherwise be payable is not discretionary. Where the conditions in section 105-65 apply, the Commissioner has no obligation to pay a refund that would otherwise be payable. The words of the provision say that where the section applies the Commissioner need not give you a refund of the amount or apply the amount under the relevant RBA provisions. However, the words 'need not' indicate the Commissioner may choose to pay a refund in appropriate circumstances, even though the conditions in paragraphs 105-65(1)(a), 105-65(1)(b) and 105-65(1)(c) are satisfied. It is to that limited extent that the Commissioner has a discretion

117. The Commissioner considers that the words 'need not', in the context of section 105-65, do not prohibit the giving of a refund and accordingly the Commissioner has a discretion to pay a refund in appropriate circumstances. It is noted that this view is supported by the decision in *Luxottica*.[45]

[44A] For example, by seeking a private ruling.
[45] See paragraph 57 where the Tribunal refers to the 'residual discretion'.

118. Given the scheme of the GST Act[46] and the context in which section 105-65 appears, the starting point[47] is that the Commissioner is under no obligation to pay a refund. It may be noted that subparagraph 105-65(c)(i) is expressed in the terms of a state of satisfaction by the Commissioner. The provision will apply unless the Commissioner is satisfied that the taxpayer has reimbursed the recipient of the supply. Therefore, the supplier needs to demonstrate that its circumstances make it appropriate for the Commissioner to give a refund.

119. The relevant principles for making administrative decisions were set out by Mason J in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24, where his Honour said at 39-40:

> What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion… **where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard** …By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act. [Emphasis added.]

120. It is therefore important to consider the subject matter, scope and purpose of section 105-65.

121. The Explanatory Memorandum to the A New Tax System (Goods and Services Tax Administration) Bill 1998 (which introduced section 39 of the TAA, the predecessor to section 105-65) states:

> 3.40 However, if GST is overpaid in a situation where supplies were incorrectly treated as taxable supplies in a GST return or assessment, a refund will have to be paid only if the Commissioner is satisfied that the recipients of the supplies on which the GST was overpaid have been reimbursed. The recipients of the supplies must not be registered or required to be registered for GST purposes. [New subsection 39(3)]
>
> 3.41 Because GST is payable by suppliers but is ultimately borne by the consumers of goods and services, a refund of overpaid GST would ordinarily result in a windfall gain to the supplier. A supplier will need to satisfy the Commissioner that an amount corresponding to the refund will be passed on to the persons who ultimately bore the cost of the overpaid GST.

[46] Where a supplier treats a supply as taxable, the price of that supply includes GST. See for example paragraph 3.15 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998, which states that 'The price paid for a taxable supply always includes the GST.'

[47] When the conditions in paragraphs 105-65(1)(a), 105-65(1)(b) and 105-65(1)(c) have been met.

122. The Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008 (which amended section 105-65 in 2008) at paragraph 2.2 states:

> Without the restriction on refund requirement, there is a potential for a windfall gain to arise to businesses that receive the refund of GST but have not borne the incidence of the tax.

123. The GST Act presumes GST is ultimately borne by end consumers. A key design feature of the GST system to ensure this occurs and to avoid double taxation is to generally allow a corresponding input tax credit to a recipient of a supply in business to business transactions. The GST Act envisages a degree of symmetry between the GST payable and the input tax credit which may be claimed in business to business transactions.

124. Further, where a business cannot fully claim an input tax credit this cost will ultimately be covered as a foreseeable cost of business and borne by the end consumer in the price paid for the good or service. The Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 states at paragraph 5.4

> You do not charge GST on supplies that are input taxed. However, you are not entitled to input tax credits on acquisitions relating to the supplies. The effect is that you have borne GST on those acquisitions and will pass on that cost in the price of the supply.

125. It is these factors that underlie the position that the Commissioner need not, that is, is under no obligation to, pay a refund where the condition in subparagraph 105-65(c)(ii) is satisfied. That condition is satisfied when the recipient of the supply is registered or required to be registered or, in other words, broadly, in business to business transactions.

126. The discretion contained in section 105-65 must be exercised within a framework that the GST Act is structured on a basis that GST is generally passed on when a supply is treated as a taxable supply. As such, factors outlined in *Avon* at paragraphs 9 to 12, albeit in a sales tax context, would equally apply in a GST context:

- in an economy geared to making a profit GST is expected to be passed on;
- businesses set prices to cover foreseeable costs;
- GST is a foreseeable cost that forms part of the cost recovery and pricing structure of doing business;
- GST will be passed on in the usual course of doing business;
- as it is inherent in an indirect system that GST will be passed on, proof to the contrary will comparatively seldom occur;
- it is for the taxpayer to establish a circumstance out of the ordinary, namely that the amount of the overpayment has not been passed on; and
- the fact that GST is presumed to be passed on forms the basis for permitting the corresponding input tax credit in business to business transactions.

127. It is clear from the scope and purpose of section 105-65 that the provision is designed to prevent windfall gains to suppliers and to require the supplier to ensure that any refund ultimately compensates the person or entity who ultimately bore the cost. In relation to a refund of overpaid GST, the potential or otherwise for a windfall gain, the requirement to ensure the refund compensates the person or entity that ultimately bore the cost and the potential to disturb the symmetry envisaged by the GST system, are factors that must be taken into account in relation to the exercise of the discretion.

Guiding principles to consider in exercising the discretion

128. Section 105-65 does not specify what factors are relevant to the exercise of this discretion. In exercising the discretion, the Commissioner will have regard to the following guiding principles:[48]

(a) The Commissioner must consider each case based on all the relevant facts and circumstances.

(b) The Commissioner needs to follow administrative law principles such as not fettering the discretion or taking into account irrelevant considerations.

(c) The Commissioner must have regard to the subject matter, scope and purpose of section 105-65. As explained in paragraph 127 of this Ruling, it is clear from the scope and purpose of section 105-65 that the provision is designed to prevent windfall gains to suppliers and to maintain the inherent symmetry in the GST system and is based on the underlying design feature and presumption of the GST system that the cost of the GST is ultimately borne by the non registered end consumer.

(d) The discretion should be exercised where it is fair and reasonable to do so and must not be exercised arbitrarily. The circumstances in which the Commissioner considers it may be fair and reasonable to exercise the discretion include, but are not limited to, the following:

    (i) The overpayment of GST arises as a direct result of the actions of the Commissioner and the taxpayer has not had the opportunity to factor in the cost of the GST or otherwise pass on the GST, for instance through a gross up clause.

[48] In providing these guiding principles there is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion. A decision to exercise the discretion will be made by having regard to the particular facts and circumstances of each case. Taxpayers cannot self-assess the discretion, and cannot assume that the Commissioner will always exercise the discretion in the circumstances described in these guiding principles. For this reason taxpayers should seek clarification from the Commissioner, for example by requesting a private ruling.

For instance, an entity had treated its supply as GST-free, the Commissioner subsequently treats the supply as taxable, the entity pays an amount for GST on the supply, but the Commissioner later reverses that decision. In such circumstances it would not be necessary for the supplier to refund the recipient of the supply whether the recipient is registered or unregistered.

(ii) The taxpayer can demonstrate that, for other reasons, they did not otherwise pass on the GST. As mentioned in *Avon*, 'it is for the taxpayer to establish a circumstance out of the ordinary, namely that the amount of the overpayment … has not been passed on'.

(iii) The supplier is able to satisfy the Commissioner that an amount corresponding to the refund will be, or has been, passed on to the party that ultimately bore the cost of the overpaid GST.

In a business to business transaction it is generally not enough simply to show that the supplier refunded the immediate business recipient. A supplier must be able to prove that an unregistered end consumer is the one ultimately compensated.

Where the registered recipient is unable to claim input tax credits or is only allowed to partially claim input tax credits, then, before the Commissioner would pay a refund to the supplier, the supplier would have to refund the registered recipient and the registered recipient would have to show it either did not pass the foreseeable cost (that is denied input tax credits) to the next recipient or that they have also refunded that amount to the next recipient and the entity that ultimately has borne the cost is compensated.

(e) The discretion would generally not be exercised where it produces an unreasonable result, for example an asymmetrical revenue outcome. This could occur where, for example, a supplier reimburses a registered recipient for the overpaid GST but the Commissioner is unable to reclaim the overclaimed input tax credit from the recipient.[49]

[49] The Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008 provides further support for the proposition that reimbursement on its own does not necessary lead to a refund. At paragraph 2.4 it states that 'A discretion exists so that, for example, in business-to-business transactions, the Commissioner *may* refund overpaid amounts if the supplier can demonstrate that they have first reimbursed the registered recipient…*and the Commissioner considers it reasonable in the circumstances*'. (emphasis added)

129. Generally, the Commissioner will not exercise the discretion in cases where the supplier has not reimbursed the unregistered recipients a corresponding amount of the overpaid GST, unless there are other countervailing reasons for doing so.

130. It is noted that in *Luxottica* the Tribunal thought it appropriate to exercise the discretion to refund the supplier although unregistered recipients had not been reimbursed. The Tribunal stated that, if reimbursement occurred, the customer would 'walk away from the transaction having paid, in net terms, less than he or she contracted to pay'.[50] The Tribunal further reasoned that any reimbursement would mean that the amount reimbursed would then need to be allocated to the separate components of the supply and this, in turn, would lead to a need for a further reimbursement. The Tribunal opined that such a process of reiterating prices, values and GST did not accord with GST as a practical business tax.

131. In reviewing the Tribunal's decision, the Commissioner accepted that on the evidence before the Tribunal the overpaid amount was not borne by customers. However, the Commissioner does not consider that a reimbursement to an unregistered recipient would ordinarily result in ongoing downward adjustments to the consideration. It is only the GST component of the supply that is reduced by a reimbursement and the GST exclusive value of the supply remains unchanged.

132. Appendix 3 of this Ruling provides examples of circumstances illustrating the exercise of the Commissioner's discretion.

What is the amount of any refund given

133. A refund given by the Commissioner is usually equivalent to the amount of GST that has been overpaid (or not refunded). Subsection 105-65(1) provides that the Commissioner need not refund an amount to which the section applies if the supplier overpaid the amount (or the amount was not refunded to the supplier).

134. However, subsection 105-65(2) provides that the section applies to 'so much of any assessed net amount or amount of GST' as the entity has overpaid (or 'so much of any assessed net amount' that has not been refunded to the entity). The Commissioner considers that the use of words 'so much of any' indicates that subsection 105-65(1) can apply to an amount that is less than the whole amount that has been overpaid (or not refunded).

135. Accordingly, if a supplier reimburses (in a later tax period) a lesser amount to an entity that is not registered (or required to be registered), then section 105-65 does not apply to that reimbursed amount because neither of the conditions in paragraph 105-65(1)(c) are satisfied.[51]

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[50] At paragraph 58.

[51] Subparagraph 105-65(1)(c)(i) does not apply to the amount reimbursed because the Commissioner is satisfied that a reimbursement of that amount has occurred

136. The lesser amount will be refunded under the RBA rules and the restrictions on refunds in section 105-65 will not apply to this amount. However, the restriction on refunds will still apply to the amount not reimbursed.

Example 7 – reimbursement to recipient of supply

137. *Laurren treats a supply made to Hoa (who is not registered or required to be registered) as a taxable supply for $1,100. After Laurren lodges her activity statement, she realises that the supply should have been treated as GST-free. Laurren and Hoa agree that only $70 of the total $100 overpaid GST should be reimbursed. Laurren reimburses $70 to Hoa.*

138. *As Laurren has reimbursed Hoa $70, this amount can be refunded to Laurren (see paragraph 105-65(1)(c)). However, section 105-65 applies to restrict the refund of the remaining $30.*

Where an administration fee is charged by the supplier

138A. In some circumstances, a supplier may charge an 'administration fee' to the recipient and reduce the reimbursement to the recipient by the amount of that fee.

138B. In this situation, one requirement for the supplier to obtain a refund of the full amount that has been overpaid (or not refunded) is that the fee is based on the reasonable administration costs incurred by the supplier in making the reimbursement. The other requirement is that the customer agrees to pay the administration fee.

138C. Administration costs will be considered reasonable when they closely reflect the actual costs incurred by the supplier in making the reimbursement.

138D. It is recognised that the actual costs in making the reimbursement will vary from case to case. For instance, where the tasks associated with the reimbursement are quick and straightforward, the costs may be immaterial or low. However, where those tasks are time consuming or onerous, the costs may be higher. When the costs are higher and the supplier charges an administration fee accordingly, it should ensure that the administration fee charged is reasonable and the costs can be substantiated.

Example 7A – administration fee charged to recipient of supply

138E. *John Co is registered for GST and treats a supply made to Christyne (who is not registered or required to be registered) as a taxable supply for $1,100.*

---

and subparagraph 105-65(1)(c)(ii) does not apply because the entity is not registered.

138F. *In its quarterly GST return, John Co includes GST payable of $100 for the supply to Christyne. John Co later realises that the supply is GST-free and decides to reimburse Christyne for the overpaid GST less an administration fee of $10. The fee closely reflects the actual costs incurred in making the reimbursement and Christyne agrees to pay the fee.*

138G. *John Co obtains a refund for the full amount of GST that was overpaid, being $100.*

139. [Omitted].

140. [Omitted].[52]

141. [Omitted].

142. [Omitted].[53]

Recovery of amounts refunded without regard to section 105-65

143. There are cases where the Commissioner may inadvertently refund amounts without regard to the operation of section 105-65. For example an entity applies for an amendment to its assessment using a revised activity statement, which results in a refund of an amount to which section 105-65 applies. The revised activity statement is processed and paid automatically by ATO systems without regard being had to section 105-65. Later the Commissioner discovers that the refund was one to which section 105-65 applied.

144. In this situation section 8AAZN of the TAA may be used to recover a refund that was paid without regard to section 105-65.

145. Section 8AAZN of the TAA relevantly states:

> **8AAZN(1) [Overpayments are court recoverable as debts due]**
>
> An administrative overpayment (the overpaid amount):
>
> (a) is a debt due to the Commonwealth by the person to whom the overpayment was made (the recipient); and
>
> (b) is payable to the Commissioner; and
>
> (c) may be recovered in a court of competent jurisdiction by the Commissioner, or by a Deputy Commissioner, suing in his or her official name.
>
> …
>
> **8AAZN(3) [Administrative overpayment]**
>
> In this section:
>
> *administrative overpayment* means an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled.

[52] [Omitted].
[53] [Omitted].

146. If section 105-65 applies so that the Commissioner need not pay a refund, and the ATO processes a refund without regard to that section, the Commissioner considers that the payment of that refund constitutes a mistake and therefore an 'administrative overpayment' for purposes of section 8AAZN of the TAA.

147. GST operates in a self-assessment system and, due to the sheer volume of revised activity statements that are required to be processed, relies necessarily on a degree of automation and risk assessment in the processing of these amendment applications. To attempt to check all revised activity statements pre-issue would be counter productive and inconsistent with a self assessment system. It would lead to unnecessary delays in the processing of other refund requests where section 105-65 has no application.

148. Section 8AAZN must be read in the context of such a system. A refund that is effected without any consideration of the facts and without knowledge that the recipient of the supply has been reimbursed (or that the recipient was registered) can, if section 105-65 applies, be seen as an amount to which the person is not entitled.

149. Where the refund is paid as result of the actions of a taxpayer that amounts to the making a false or misleading statement under Subdivision 2B of Part III of the TAA and the Criminal Code, the Commissioner depending on the particular facts may initiate prosecution action and also seek an order from the Court under section 21 B of the *Crimes Act 1914* for an amount equal to the amount refunded

Section 105-65 is not taken into account in determining assessed net amount

150. [54]The Commissioner previously took the view that section 105-65 is taken into account in determining the net amount for a tax period. The Commissioner considered that, in determining the net amount that a taxpayer is legally required to pay or is entitled to as a refund, all sections of all relevant Acts that may bear on that legal obligation or legal entitlement must be taken into consideration.

151. Contrary to the Commissioner's previous view, the Administrative Appeals Tribunal in *Naidoo v Commissioner of Taxation* [2013] AATA 443 determined that section 105-65 is not a provision that allows the Commissioner to alter the net amount worked out under subsection 17-5(1) of the GST Act. The Tribunal found that section 105-65 operates after the net amount for a tax period is worked out under the GST Act .[55]

[54] [Omitted].
[55] [2013] AATA 433 at paragraph 95..

152. The Tribunal therefore found that it did not have jurisdiction to review the Commissioner's decision under section 105-65 to not give a refund of the overpaid GST. It noted that the taxpayer's review rights are limited to judicial review in proceedings brought in the Federal Court under section 39B of the *Judiciary Act 1903* or under the *Administrative Decisions (Judicial Review) Act 1977*.[55A]

152A. Following the Tribunal's decision in *Naidoo*, section 105-65 was amended effective 30 May 2014 so that a taxpayer who is dissatisfied with a decision made by the Commissioner under section 105-65 may lodge an objection in the manner set out in Part IVC of the TAA.

153. [Omitted].

154. [Omitted].

155. [Omitted].

156. [Omitted].

157. [Omitted].

158. [Omitted].

159. [Omitted].

Example 9 – section 105-65 not taken into account in determining assessed net amount

160. *Sheree's assessed net amount for the tax period ending 31 March 2014 is $2,000 payable to the Commissioner. In September 2014, Sheree realises that some of the transactions in the tax period ending 31 March 2014 were actually GST-free instead of taxable. Consequently her assessed net amount should have been $1,700 payable to the Commissioner. Sheree does not refund any amounts to her customers. She requests the Commissioner to amend the assessment of her net amount for the tax period ending 31 March 2014.*

161. *In this situation, the Commissioner will amend Sheree's assessed net amount to $1,700 as section 105-65 is not taken into account in determining her assessed net amount for that tax period. However, the Commissioner need not refund the overpaid amount of $300 because Sheree has not reimbursed a corresponding amount to the recipients of the supplies. If Sheree is dissatisfied with the Commissioner's decision to not pay the GST refund, she can object against that decision under Part IVC of the TAA.*

[55A] [2013] AATA 433 at paragraph 103.

Appendix 2 – Overview of the GST refund rules

This Appendix sets out an illustrative diagram. It does not form part of the binding public ruling.

162. The following diagram provides a simplified illustration of the GST refund rules in the context of section 105-65.

The general rule…	***However…***	***Unless…***
The Commissioner must refund (or apply an amount) in accordance with the running balance account rules (Division 3A of Part II of the TAA).	The Commissioner need not give a refund (or apply that amount) if the conditions in section 105-65 apply.	The Commissioner exercises the discretion under section 105-65 to give the refund (or apply that amount).

Appendix 3 – Examples: exercise of the discretion

This Appendix sets out examples. It does not form part of the binding public ruling.

163. The operation of the discretion in section 105-65 depends on the facts and circumstances of each case. The following examples are not intended to fetter the exercise of the Commissioner's discretion, but are for illustrative purposes only.

Example 10

164. *Kasey carries on an enterprise and made a series of supplies to Anita between July 2000 and July 2002. Both parties were registered for GST from July 2000. Kasey charged GST on the supplies and Anita claimed input tax credits. After the case of Federal Commissioner of Taxation v. DB Rreef Funds Management Limited* 2006 ATC 4282; (2006) 62 ATR 699 *(DB Rreef), it was established that the supplies to Anita should have been treated as GST-free under section 13 of the A New Tax System (Goods and Services Tax Transition) Act 1999* (*Transition Act). The contractual terms contained in Kasey's contract had the practical effect that the price could not have been increased for the first six months.*

165. *The evidence in relation to 2001 and 2002 is ambiguous. However, Kasey contends that she sought informal advice from the ATO in August 2000 and was told that her supplies would not be GST-free under section 13 of the Transition Act.*

166. *Kasey is a sole trader who prepared her own activity statement and did not keep up to date on tax developments. She did not become aware of the DB Rreef case until hearing about refund opportunities in relation to section 13 of the Transition Act in June 2008. She put in a section 105-55 notification for a refund at that time for the supplies that occurred in 2000 to 2002.*

167. This may be an appropriate case for the exercise of the Commissioner's discretion in relation to the first six month period when Kasey can establish that she bore the cost of the GST. In this transitional period, Kasey was contractually unable to increase her price to take GST into account in setting her prices. The exercise of the discretion also takes into account the ATO's informal advice that encouraged Kasey to remit the GST and there is a reasonable explanation for the lengthy delay in claiming the refund.

168. A factor weighing against the exercise of the discretion is that there is a loss to the revenue in respect of a transaction that is intended by the GST system to be revenue neutral. Nevertheless, on balance this may be an appropriate case to exercise the Commissioner's discretion.

Example 11

169. This example illustrates a situation where the Commissioner is unlikely to exercise the discretion.

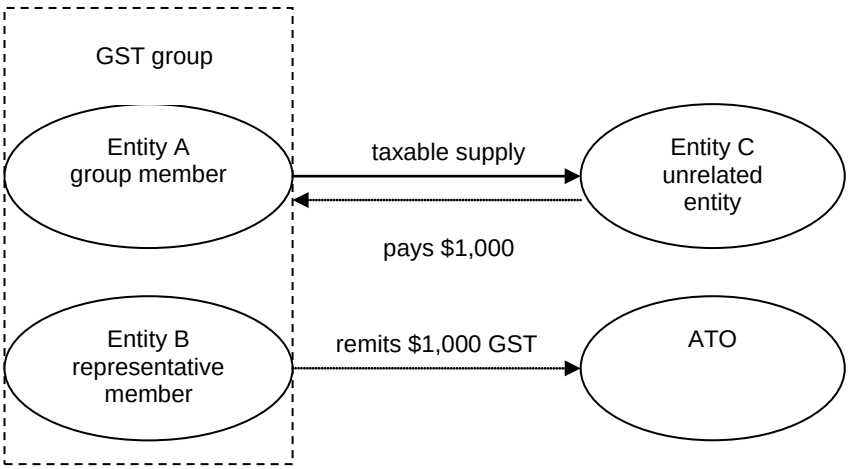
170. *A management company (MC) supplies consulting services to a financial supply provider (FS). Both parties are registered for GST. The supplies were treated as taxable and MC remitted GST equivalent to the full amount charged while FS claimed a reduced input tax credit of 75% of the GST included in the price.*

171. *It is subsequently ascertained that the supply of services should have been GST-free (under the transitional rules). Therefore, MC has overpaid its net amount. MC requests a refund of 25% of the incorrect GST on the basis that it will refund this amount to FS since FS was not able to obtain an input tax credit in respect of this component.*

172. On balance, the Commissioner is unlikely to exercise the discretion to refund an amount equivalent to the 25% unclaimed input tax credit amount. The transaction occurred between registered entities and paragraph 105-65(1)(c) expressly contemplates that refunds need not be given in these circumstances. The fact that FS only claimed a reduced input tax credit is not exceptional, particularly since many entities in this position will pass on the unclaimed cost of GST to their customers.[56]

Example 12

173. *Entity A is a member of a GST group and the representative member is Entity B. Entity A makes a supply to an unrelated party, Entity C, who is not registered for GST. GST of $1,000 is charged on the supply. Entity B, as the representative member, remits the $1,000 of GST to the ATO.*



[56] GST is effectively borne by consumers when they acquire anything to consume. See paragraphs 37 and 38 of this Ruling which outline the policy behind section 105-65.

174. *It is subsequently determined that the supply by Entity A to Entity C was in fact GST-free. Section 105-65 applies to the incorrect GST of $1,000 because Entity B overpaid the amount on a supply that was treated as taxable (by Entity A) but was not in fact taxable and this resulted in Entity B's net amount being overpaid. Entity B, as the representative member who remitted the GST, seeks a refund from the Commissioner of the overpaid amount.*

175. *Paragraph 105-65(1)(c) requires that Entity B provide a reimbursement to Entity C before a refund can be given. However, since in this case Entity A had the contract with Entity C, Entity A is the entity that makes the reimbursement to Entity C.*

176. This may be an appropriate case for the exercise of the Commissioner's discretion in relation to the overpayment of $1,000. Although Entity B did not make the reimbursement, a reimbursement was in fact made and for this reason no windfall gain occurs to either Entity A or B. The recipient of the supply, who bore the cost of GST on a supply that was not subject to GST, has been effectively compensated. In this type of case it may be fair and reasonable for the Commissioner to exercise his discretion to refund the amount.

Example 13

177. *At 1 July 2000 Heavy Industries Ltd was considering whether the supply of certain goods would be taxable or GST-free. It decided that its supplies were all taxable. After taking all factors into consideration Heavy Industries Ltd decided that a uniform 7% increase in prices was sufficient to cover the cost of implementing the new GST.*

178. *In June 2007 Heavy Industries Ltd's accountants advise that they believe that certain supplies made by the company should be treated as GST-free. Heavy Industries Ltd lodges a section 105-55 notice seeking to notify the Commissioner of its entitlement to a refund in relation to the relevant GST-free supplies incorrectly treated as taxable supplies, which resulted in its net amount being overpaid. All of Heavy Industries Ltd customers are registered taxpayers. Heavy Industries Ltd seeks to argue that it bore the cost of the GST.*

179. In this case the factors weighing against the refund are that Heavy Industries Ltd has taken the GST into account in determining the price that it considered necessary to cover the cost of the GST under the new regime. This cost has been embedded in the price. Another factor weighing against exercising the discretion is that the recipients are registered for GST.

180. On balance this is a case where it is not appropriate to refund the overpaid amount.

Example 14

181. *Rehka treats a particular supply as GST-free. Subsequently she is audited by the ATO, which determines that she should have remitted GST on that supply. An assessment is raised and Rehka remits the outstanding amount assessed as GST. Contractually Rehka cannot seek to recover the GST from the recipient of the supply.*

182. *Rehka subsequently objects to the assessment on the basis that the supply was not taxable. The Commissioner reverses the audit decision and gives a favourable objection decision. Rehka has overpaid an amount because Rehka's assessed net amount was more than the amended assessed net amount. Rehka seeks a refund of the overpaid amount.*

183. In this case, Rehka overpaid the amount as GST because the Commissioner incorrectly treated the supply as taxable. It is fair and reasonable for the Commissioner to exercise the discretion to refund the overpaid amount.

Example 15

184. *George introduces a new product and initially treats it as GST-free, including setting a GST-free price. He then becomes unsure of the correct GST classification. He continues to treat it as GST-free, at the same price, in the hands of his customers and requests a ruling from the ATO. There are no other changes to the circumstances surrounding the supply.*

185. *While waiting for the ruling, he needs to lodge his BAS for the current quarter. To avoid any risk of penalties or interest charges, George decides to account for GST on the supply in his activity statement. George has overpaid an amount because his assessed net amount was more than his amended assessed net amount. George seeks a refund of the overpaid amount.*

186. In this case, George has treated the product as taxable when he included it in his activity statement. However, he is able to demonstrate that he did not pass on the GST to his customers. It is fair and reasonable for the Commissioner to exercise the discretion to refund the overpaid amount.

187. [Omitted.]

188. [Omitted.]

189. [Omitted.]

190. [Omitted.]

191. [Omitted.]

192. [Omitted.]

193. [Omitted.]

194. [Omitted.]

Appendix 4 - Detailed contents list

195. Below is a detailed contents list for this Miscellaneous Taxation Ruling:

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