


# ***MT 2010/1A1 - Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953***

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## Addendum

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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*

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Miscellaneous Taxation Ruling MT 2010/1 to reflect the Federal Court decision in *International All Sports v. Commissioner of Taxation* [2011] FCA 824; 2011 ATC 20-268; 81 ATR 607.

The Addendum also updates the Date of Effect section of the Ruling.

#### **MT 2010/1 is amended as follows:**

##### **1. Paragraph 2**

Before the first dot point; insert:

- the Commissioner's view of those situations where section 105-65 of Schedule 1 to the TAA applies to restrict refunds;

##### **2. Paragraph 19**

Omit the paragraph; substitute:

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

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## 3. Paragraph 21

Omit the paragraph; substitute:

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.

## 4. Paragraphs 23 to 25

Omit the paragraphs; substitute:

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.

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.

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 section 105-65 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*)<sup>7A</sup> 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<sup>7B</sup> 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 in paragraph 25B of this Ruling of where section 105-65 does or does not apply are not intended to be an exhaustive list.

<sup>7A</sup> *International All Sports* is further discussed at paragraphs 72 to 81 of this Ruling.

<sup>7B</sup> 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.

## 5. Paragraph 35

Omit the paragraph; substitute:

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.

## 6. Paragraph 62

Omit the paragraph; substitute:

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 has remitted GST to the Commissioner on that supply in the calculation of their 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.

## 7. Footnote 29

Omit the second sentence; substitute: 'See Example 14 at paragraphs 181 to 183 of this Ruling.'

**8. Paragraphs 71 to 82**

Omit the paragraphs; substitute:

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<sup>29A</sup> 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.<sup>29B</sup>

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.

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).

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.

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.

<sup>29A</sup> 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'.

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

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 para (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).

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.

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

## 9. Paragraphs 84 and 85

Omit the paragraphs; substitute:

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.

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.

**10. Paragraph 88**

Omit the paragraph; substitute:

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.<sup>37A</sup> Therefore section 105-65 did apply.

**11. Paragraph 92**

Omit: 'all of the gambling supplies'; substitute: 'all of the gambling supplies'<sup>38A</sup>,

**12. Paragraph 93**

Omit the paragraph; substitute:

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,<sup>38B</sup> 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.

**13. Paragraph 98**

After the paragraph; insert:

**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.

<sup>37A</sup> *Luxottica* at paragraph 56.

<sup>38A</sup> A gambling supply is a taxable supply, see section 126-35 of the GST Act.

<sup>38B</sup> 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.



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.<sup>39A</sup>

## **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.<sup>39B</sup>

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,<sup>39C</sup> 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.<sup>39D</sup>

## **GST payable on supplies of fringe benefits**

98G. The provision of a fringe benefit can be a supply.<sup>39E</sup>

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<sup>39A</sup> 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.

<sup>39B</sup> For the concessions to apply, several conditions must be met: see Division 87 of the GST Act.

<sup>39C</sup> 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).

<sup>39D</sup> 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.

<sup>39E</sup> 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.

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*

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

$$\$21,352.45 \times 33/100 = \$7,046.31$$

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

*First work out the LCT value:*

$$\begin{aligned} &\text{'all up price' - LCT payable on the sale} \\ &= \text{LCT value} \end{aligned}$$

$$\$88,000 - \$7,046.31 = \$80,953.69$$

*Then work out the GST payable:*

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

$$\$80,953.69 \times 1/11 = \$7,359.43$$

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.<sup>39F</sup>

## **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.<sup>39G</sup>

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.<sup>39H</sup>

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<sup>39F</sup> 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.

<sup>39G</sup> See also section 78-95 of the GST Act in relation to GST on premiums under statutory compensation schemes.

<sup>39H</sup> 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.

**14. Paragraph 115**

After the paragraph; insert:

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; and
- the reimbursement has actually been made, and is not merely planned to be made.

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

**15. Paragraph 126**

- (a) After 'on a basis that GST is'; insert 'generally'
- (b) In the fifth dot point, after 'to the contrary will'; insert 'comparatively'
- (c) After the fifth dot point; insert:
  - 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

**16. Paragraph 128**

Omit subparagraphs 128(d)(i) and (d)(ii); substitute:

- (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.

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<sup>44A</sup> For example, by seeking 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'.

## 17. Paragraphs 181 to 194

Omit the paragraphs; substitute:

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 seeks a refund of the overpaid GST.*

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 GST.

### *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. Subsequently, the private ruling states that the supply is GST-free. George seeks a refund of the overpaid GST.*

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 GST.

## **18. Detailed contents list**

(a)	Omit	
	Effect where the wrong entity remits the GST	25
	<i>Example 16</i>	186
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(b)	Omit and substitute:	
	<i>Example 15</i>	184
(c)	Insert:	
	Associates	98A
	Long-term accommodation in commercial residential premises	98C
	GST payable on supplies of fringe benefits	98G
	Miscalculation of GST which arises when a taxpayer fails to pay LCT on a luxury car	98K
	<i>Example 4A</i>	98L
	GST on insurance premiums	98P

## **19. Case references**

Insert:

- International All Sports v. Commissioner of Taxation [2011] FCA 824; 2011 ATC 20-268; 81 ATR 607

Omit:

- Cooper Brooks (Wollongong) Pty Ltd v. Federal Commissioner of Taxation (1981) 147 CLR 297; 81 ATC 4292; (1981) 11 ATR 949

## **Date of effect**

This Addendum applies both before and after its date of issue.

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## Commissioner of Taxation

19 September 2012

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### ATO references

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