GSTR 2014/1EC - Compendium

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Ruling Compendium – GSTR 2014/1

This is a compendium of responses to the issues raised by external parties to draft GSTR 2014/D1 – *motor vehicle incentive payments*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	The draft Ruling provides clarity for dealerships by simplifying the GST treatment, and will assist businesses to navigate through the complex GST treatment of payments.	Noted.
2.	Welcome the number of worked examples, as well as the approach taken by the Commissioner on the interpretation of Division 134.*	Noted.
3.	The introduction of the draft Ruling is a positive step in simplifying the treatment of incentive payments for the automotive industry, which has been a 'grey area' since the introduction of GST.	Noted.
4.	Examples assume that the discount to customer is the same as the amount of the rebate given to the dealer, this is rarely the case. What happens if a rebate is given to the dealer but no discount is provided to the customer?	Examples have been amended to more accurately reflect commercial reality. A rebate may still be third party consideration even if no discount is passed onto the customer – this will depend on the facts and circumstances surrounding the payment.
5.	The draft Ruling needs to discuss whether a combined RCTI/third party adjustment note can be issued by a manufacturer/distributor.	Paragraphs 96 and 314 to 317 have been inserted to discuss the information requirements for a combined RCTI and third party adjustment note.
6.	Need some discussion on when Division 19 adjustments and Division 134 adjustments arise. For example, what happens if the customer purchases the vehicle directly from the manufacturer?	Additional examples have been added to reflect some situations that give rise to Division19 adjustments instead of Division 134 adjustments (see, for example, Worked Example 5).
7.	The draft Ruling should clarify when GST is to be attributed in cases where payments are third party consideration.	Paragraph 286 has been inserted to explain how GST is attributed.

* All legislative references in this compendium are to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) unless otherwise indicated.

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8.	The draft Ruling should include some discussion on the implications where an incentive may be paid to the dealer where the dealer gives the customer an option between, for example, a reduced price or accessories to the same value.	New Worked Example 10 has been inserted to cover this situation.
9.	Concern that reversing Division 134 adjustments where vehicles are swapped by dealers is difficult in practice and will result in significant compliance costs. Commercial reality is that Division 134 adjustments are attributed at time of payment.	Partial change made. For Division 134 adjustments to arise, the dealer must actually acquire the vehicle. If the dealer who received the payment swaps the vehicle with another dealer, then technically, no adjustment would arise. In recognition of the commercial reality and that both dealers and manufacturers attribute the relevant adjustments when the payment is made, paragraph 61 sets out an administrative concession allowing both parties to preserve the status quo.
10.	Like the summary table and worked examples. Note that the ruling is lengthy, but prefer to retain the examples rather than delete to make shorter.	Noted.
11.	Really like the public ruling with all its examples, which are close to the mark practically and allow taxpayers to self-assess.	Noted.
12.	Disagree with Worked Example 5 – a payment for holding a pool of demonstrator vehicles should not be characterised as third party consideration. Compare with Worked Example 13.	Change made. The facts in that example (now Worked Example 7) have been revised to illustrate a situation where a 'run-out' type payment is made for the sale of each ex-demonstrator. This is in contrast to Worked Example 17 (formerly Worked Example 13).
13.	The findings in the *AP Group* case, based on evidence and arguments put before the AAT, are mere findings of fact and should not be extended beyond the parties, transactions and tax periods that were before the AAT.	Disagree. The Full Federal Court decision has greater significance than 'mere findings of fact'. There are a number of legal principles, particularly in relation to the phrase 'supply for consideration' that cannot be ignored or dismissed.† The suggestion to confine the *AP Group* decision to the transactions, parties and tax periods considered in the decision raises significant difficulties, both administrative and practical. For example, this would create an uneven playing field across industry, where equivalent payments made by some manufacturers or distributors would be treated differently to payments made by others, even where the payments are essentially the same.

† For example paragraphs [44], [46], [48] and [53] (also see our Decision Impact Statement for *AP Group*).

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14.	The comments relating to GST liabilities arising from third party consideration are incorrect, inappropriate and counter to the proper interpretation and administration of the GST (and LCT) law. The advancement of the third party consideration argument in *AP Group* might be regarded as unfortunate as it significantly complicates the administration of GST in a franchisee franchisor relationship. To adopt the third party argument will only serve to complicate the efficient and proper operation of the GST system. It seems the ATO agrees through the 'one sided Division 134 adjustment' sought to ameliorate the 'inappropriate GST outcome'.	It would be inappropriate for the Commissioner as administrator of the GST law to take a view or issue a public ruling that is contrary to the Full Federal Court's decision in *AP Group* and contrary to the rule of law. See for example *Indooroopilly*‡, where the Commissioner was criticised for ignoring the decision of the Federal Court. In addition, the concept of third party consideration is not novel – the GST Act is clear that GST liabilities can arise from third party consideration. This is expressly provided for by subsection 9-15(2) and confirmed by the Full Federal Court in *TT-Line*. The 'one sided Division 134 adjustment' is not used to ameliorate any 'inappropriate GST outcomes'. We consider that the terms of section 134-5 do not preclude a decreasing adjustment from arising where the payment is third party consideration for a supply made by the payee – paragraph 134-5(1)(e) only precludes a decreasing adjustment from arising if a supply for consideration has been **made to** the **payer**.
15.	The draft Ruling contends that third party consideration can arise where a payment is made in relation to a 'future' sale of a vehicle to a customer. However, from the payee's perspective, all that may be required is that the vehicle is 'listed' as being sold to a customer (even if there is no identified sale or customer). These payments are simply consideration for the franchisee performing its franchisee services and are not third party consideration. The draft Ruling needs to reconsider how close and likely a sale to a customer needs to be, from the dealer's perspective, for the payment to be third party consideration.	The reference at paragraph 32 of the draft Ruling (now paragraph 26 of the final) notes that the timing of the payment is not determinative, and a payment may be made before, after or at the same time as the supply to the customer. This covers the situation where the vehicle is listed but no sale or customer is identifiable. The critical point is what the payment is for. The payment is not for the performance of franchisee services generally, the payment is for the sale of the car to the customer. Simply performing services generally does not entitle a dealer to the payment of a fleet rebate or run-out model support payment – it is the sale of the car to a customer that the payment is made for.

‡ *Commissioner of Taxation v. Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16.

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16.	Paragraph 18 of the draft Ruling demonstrates that the approach taken in the draft Ruling is inappropriate and does not support the GST system. The approach taken in the draft ruling is inappropriate and does not support the GST system	The Ruling recognises the fact that there are numerous payments made across the industry and the correct GST treatment may turn on one or more factual permutations but still result in an overall GST revenue neutral outcome. Given the evolving nature of the payments, paragraph 18 of the draft ruling was intended to give taxpayers certainty where they have attempted, in good faith, to classify a payment and there is no economic difference. The paragraph should not be construed as saying the Commissioner will not enforce the ruling or in any way lacks confidence in administering the view. This pragmatic approach is now reflected in paragraphs 318 and 321 of the final Ruling.
17.	The draft Ruling fails to provide support to an industry that has complied with the ATO view of the law, which had allowed the B2B transactions to be undertaken in confidence, and which was consistent with the policy and design of the GST law	The Ruling is consistent with the Full Federal Court's decision in *AP Group*. While the previous ATO view did provide for consistent GST treatment of motor vehicle incentive payments and allow B2B transactions to remain confidential, that view was disputed by AP Group and rejected by the Full Federal Court, which held that none of the payments were consideration for supplies made by dealers to manufacturers.[§] The ATO has consulted extensively with key stakeholders in the industry to address implementation issues following the *AP Group* decision, including: ▪ allowing the industry time (until 1 May 2014) to implement the decision, including making changes to their systems and documentation ▪ making a legislative instrument, which in practical terms means that dealers don't need to change their existing invoices or reveal third party incentive payments[**] ▪ ongoing dialogue with industry in developing and finalising the Ruling.
18.	The length of the draft Ruling and the menagerie of examples demonstrate that the Commissioner lacks confidence in the workability of the guidelines in the ruling	These examples were included following discussion with key industry stakeholders, who have welcomed the range of examples and suggested further examples for the final Ruling. The examples are designed to provide industry with a practical way to implement the decision and comply with the law.

[§] *AP Group* at [44], [46], [48] and [53].
[**] A New Tax System (Goods and Services Tax) Waiver of Tax Invoice Requirement (Motor Vehicle Incentive Payment Made to Motor Vehicle Dealer) Legislative Instrument 2014.

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19.	Do not support a 'payment by payment' approach. The commercial arrangements under which franchisor pays franchisee for performing services should not result in the matrix of a variety of outcomes. The incentive by incentive approach seeks to establish a principle and extend that principle to 'groups of payments' based on the findings of fact of the AAT in *AP Group*.	A 'payment by payment' approach and resulting 'variety of outcomes' is natural consequence of the *AP Group* decision. The Full Federal Court stated that 'all aspects of the arrangements between the dealer, the manufacturer and the customer had to be considered should be accepted',[††] and that '[u]ltimately, selection of the appropriate level of generality or particularity at which the assessment is to be carried out is fact-dependent'.[‡‡] It would be impossible to rule exhaustively on every single permutation of facts. The 'groups' identified are factual patterns which would likely point towards one characterisation or another, and are included to assist taxpayers in characterising their own payments.
20.	It is not possible for the Commissioner to make a public ruling for a 'particular scheme' to which 'a relevant provision applies' by adopting mere observations and comments of the AAT and Federal Court in relation to the particular transactions that were before it.	The Ruling is about the GST consequences of motor incentive payments following the *AP Group* decision. The Ruling considers how the GST law, in particular paragraph 9-5(a) and Division 134, applies to the class of entities that make or receive motor vehicle incentive payments.
21.	The correct approach is found in an examination of all of the commercial franchise arrangements between the franchisor and franchisee, which is consistent with the High Court's previous GST decisions and *Saga Holidays*.	*AP Group* is specifically about the GST treatment of motor vehicle incentives and as such is the relevant case to consider. Neither *Saga Holidays* nor any High Court decisions on GST are about the GST treatment of motor vehicle incentives. *Saga Holidays* was referred to by the Full Federal Court in *AP Group* at [42] to support the proposition that 'all aspects of the arrangements between the dealer, the manufacturer and the customer had to be considered'.

[††] At [42].
[‡‡] At [44].

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22.	The distinction sought to be drawn about general and specific obligations in examples 2 and 9 is inconsistent with the observations in *Saga Holidays* that the 'legislation should not be construed in a narrow and technical way, but rather should be construed in a broad and practical way'. The distinction is unlikely to be capable of adoption by the parties. It is likely that the parties will continue the previously accepted practice of treating the payments as taxable to avoid the risk of underpayments.	Example 2 deals with a situation where the dealer has promised to abide by certain standards in return for the payment – that is, the dealer has made a supply of entry into an obligation for the payment. On the other hand, Example 9 dealt with a situation where the dealer has no obligation to build a showroom. The payment was made whether or not the dealer builds the showroom, therefore, the payment cannot be said to be for a supply the dealer makes. As the example did not illustrate the point being discussed in that section of the draft Ruling, the example has been deleted from the final Ruling. Drawing this distinction is not felt to be construing the legislation in a 'narrow and technical way'. The distinction is highlighted by the differences in how and why a payment is made in practice. A payment made for a dealer doing something specific, is not the same as a payment made irrespective of whether a dealer does something specific. In light of the Full Federal Court decision in *AP Group* (and our earlier responses on being bound by it), we do not agree that the parties can continue their previous practice.
23.	In a franchise agreement, the franchisor grants rights to a franchisee but in doing so, engages the franchisee to represent and promote the brand, its products and services for the benefit of the businesses of the franchisor.	The *AP Group* decision was about the incentive payments, and whether the dealer made any supplies to the manufacturer **for** the payments. The Court concluded that the dealer was not making any supplies to the manufacturer **for** the payments.
24.	The distinction between the franchisor doing something specific for the manufacturer and conduct by the dealer that can be characterised as being for its own benefit cannot find support in the commercial character of the relationships between franchisors and franchisees. Performance by the franchisee of its 'services' are of critical importance to the franchisor – failure to represent the franchisor and its products and services in accordance with the franchisor's market strategy and program will impact on the franchisor's reputation and brand for all of its outlets.	Whether a supply is made for consideration is to be determined from the perspective of the entity said to have made it.[§§] Support for the views in the Ruling, including the distinction suggested by the authors, may be found in the text of not only the *AP Group* decision, but also other key GST cases on supply and consideration.

[§§] *AP Group* at [74]. See also [59] of *Commissioner of Taxation v. Secretary to the Department of Transport (Vic)* [2010] FCAFC 84.

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25.	Many 'service' agreements pay amounts only on achievement of specified results, notwithstanding that the performance of a wider range of services is required and measured. It is inappropriate to seek to identify a particular, separate supply for which an incentive payment is made.	Whether there is a supply for consideration requires identifying what, if anything, the dealer is required to do for the payment. There will be a supply for consideration if the dealer does something specific for the manufacturer for that payment. On the other hand, where the dealer's conduct can be characterised as being for its own benefit and thus something the dealer would be likely to do anyway without an incentive payment, the dealer is unlikely to have made a supply to the manufacturer for that payment.
26.	The commercial arrangements contain a number of requirements and obligations in relation to the franchisor's 'brand', including after sales service. The services and performance required of and agreed to by the franchisee are not adequately nor relevantly described by the AAT's reference to the Toyota Agreement. The correct classification of the performance of these requirements is of the 'supply of services', which is a single supply and should not be broken into different aspects of the types of things 'done' to achieve the broad aims of the franchise agreements. Disagree with the draft Ruling seeking to identify particular supplies for different incentive payments.	We acknowledge that the commercial arrangements involve a number of obligations and requirements – this was also acknowledged by the Full Federal Court. However, the legal question to be answered is whether those obligations and requirements gave rise to supplies for consideration. The Court held that despite the 'raft of obligations', there was no supply by the dealer to the manufacturer in complying with those requirements, and the incentive payments were not consideration for any supplies. The Court made many statements of law in its decision that are not confined to nor restricted by the AAT's description of facts. In particular, the Court stated at [33] that 'not every connection between the giving of consideration and the provision satisfy the first condition of making a taxable supply' and ultimately concluded that none of the payments were for any supplies by the manufacturer to the dealer. The Court also specifically noted at [43] that 'selection of the appropriate level of generality or particularity at which the assessment is to be carried out is fact-dependent. The critical facts include the nature of the supply said to be involved.'
27.	Reference to 'supply <u>by</u> the dealer' in paragraph 54(e) should be 'supply <u>from</u> the dealer'. There is nothing in the Division nor the extraneous material, which support a view that Division 134 is <u>not</u> intended to apply where the payee has made the relevant acquisition for a creditable purpose. It is only a payment for a supply from the payee to the payer that negates the adjustments under the Division. If the legislature had intended the word 'by' in paragraph 134-10(1)(e), it would have chosen it. The word 'from' is not used anywhere else in the GST to describe a supply 'by' a supplier.	Agree that paragraph134-10(1)(e) uses the term 'from' and not 'by', However, we do not consider that the use of 'from' rather than 'by' in paragraph 134-10(1)(e) makes any material difference. The word 'from' in the provision is directed at the 'source' of the supply, and not the 'destination'. It is clear from the context of the provision that an increasing adjustment does not arise if the payee has made a supply – so much is clear from the language 'the payment is not consideration for a supply from you'. A supply from an entity can only be a supply made by the entity – we do not consider there being any other available interpretations for this phrase. Further, we do not agree that adjustments under the Division can be generally negated by conflating the words of paragraphs 134-5(1)(e) and 134-10(1)(e), which are two different provisions.

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28.	The requirement in section 134-20 for the mandatory issue of an adjustment note to the payee stands in contrast with the limited requirements for other adjustment notes in section 29-75.	The information requirements for a third party adjustment note are generally the same as the requirements for an adjustment under section 29-75. The Ruling adopts similar views to those set out in GSTR 2013/2: *adjustment notes*. Further, subsections 134-15(2) and 134-20(3) provide that a decreasing adjustment note is **not required** to be issued for an adjustment of an amount lower than provided for under subsection 29-20(2) ($75). The only difference between the two sets of requirements is that an adjustment note under section 29-75 does not need to contain the recipient's identity if the adjustment relates to a tax invoice where the price of the supply is less than $1,000. As third party adjustments under Division 134 do not relate to invoices, there is no need for an equivalent exception.
29.	The distinction is described in such a way that the 'legal obligation' is determinative as a matter of law. European law has recognised that a morally binding obligation is sufficient.	As stated at paragraph 102 of GSTR 2006/9: *supplies*, an agreement that does not bind the parties in some way is not sufficient to establish a supply by one party to the other. The fact that European law recognises morally binding obligations does not mean the same principle applies in Australia. See also paragraph 52 of GSTR 2012/2: *financial assistance payments* which deals with mere expectations not giving rise to a supply
30.	The Division requires an 'identity' between what was supplied by the payer and what was acquired by the payee. Under a typical floor plan arrangement, there are two supplies by the financier and acquisitions by the dealer, being: • the possession, dispositive power and risk over the vehicles; and • the title to the vehicle. There is strong authority that the acquisition referred to in the draft Ruling by the franchisee is not of 'the same thing' that is supplied by the franchisor to the financier.	In the context of Division 134, what is supplied by the manufacturer to the financier, and what is acquired by the dealer, is the vehicle (we accept that there are other things supplied, including possession and risk over the vehicle).
31.	A refund of an overpaid adjustment does not fall within the scope of the limitation of the GST refund provisions.	Noted.

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32.	Example 3 overlooks the characterisation of whether the supply is a single supply or separate supplies. Contend that the supply by the dealer to the customer is a single supply of 'servicing' and includes the free transport to and from the dealership and not 'two supplies'. The franchisee has performed the servicing in accordance with the quality requirements of the franchise agreement and consideration is payable for the franchise services in general.	The supply of servicing by the dealer does not include free transport. On the facts in the example, the obligation to provide free transport to the customer is one that the dealer owes to the manufacturer pursuant to the agreement – it is not an obligation the dealer owes to the customer. In the alternative it could be argued that the free transport is part of the supply of the servicing. In which case, the payment by the manufacturer to the dealer would be third party consideration for a supply by the dealer to the customer. This wouldn't be our preferred view.
33.	If a fundamental revision of the draft Ruling is not possible, we suggest that the draft Ruling be withdrawn and the matter referred to Law Design (or Treasury) to seek a legislative amendment to deal with franchisee / franchisor transactions that is consistent with the broader GST framework.	Representations for legislative change should be made to Treasury or the Government.