

GSTR 2014/2EC - Compendium

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Ruling Compendium – GSTR 2014/2

This is a compendium of responses to the issues raised by external parties to draft GSTR 2014/D2 *Goods and services tax: treatment of ATM service fees, credit card surcharges and debit card surcharges*

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 submission encouraged the Commissioner to include in the draft Ruling a statement of the guiding principles employed to determine the GST treatment of each fee or surcharge addressed in the draft Ruling.	Agreed. Discussion has been included in the final Ruling concerning the principle that a sufficient nexus needs to be established between a payment and a supply for the payment to be characterised as consideration for the supply.
2	A significant body of public rulings, such as GSTR 2000/19, GSTR 2001/6 and GSTD 2002/3 which should be cross-referenced in the draft Ruling.	Agreed. Relevant rulings have now been added and cross-referenced including GSTR 2000/19 GSTR 2001/6, GSTR 2001/8, GSTR 2004/1, and GSTR 2012/2. We do not consider GSTD 2002/3 is required to be referenced.
3	The submission requested an explanation of the process used by the Commissioner to determine whether the surcharge is consideration for the supply of the service of accessing the payment system, or for the underlying supply or not consideration for any supply.	Changes have been made to the final Ruling to clarify the Commissioner's position including additional content on the need to establish a sufficient nexus or connection between a payment and a supply for the payment to be characterised as consideration for the supply. Paragraphs 26 to 28 of GSTR 2014/2 set out the Commissioner's views on weighing up the relevant nexus between the surcharge, a supply of goods or services and the services of accessing the relevant payment system. These paragraphs have been retained in the final Ruling.

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4	<p>It was submitted that the draft Ruling in its current form does not adequately explain the positions taken in relation to credit card and debit card surcharges. Nor does it provide readers with a useful reference tool to apply when determining the treatment of other fees and charges and the supply, if any, to which they are connected.</p>	<p>Changes have been made to the final Ruling to clarify the Commissioner's position including additional content on the need to establish a sufficient nexus or connection between a payment and a supply for the payment to be characterised as consideration for the supply.</p>
5	<p>The explanations in paragraphs 8 and 9 (and 50 and 51) for credit card surcharges and 20 and 21 (and 63 and 64) for debit card surcharges require a more detailed discussion. They in effect state that the surcharge is part of the price of an underlying supply and is therefore part of the consideration for the underlying supply. This is a circular argument which does not explain the process employed to determine that the surcharge is part of the price of the underlying supply.</p> <p>The approach adopted is in stark contrast to the approach followed in earlier rulings, such as GSTD 2002/3 on delivery charges, where full explanations are provided.</p>	<p>Agreed. Changes have been made to clarify the position that the surcharge forms part of the consideration for the supply of goods or services.</p>
6	<p>There needs to be a more thorough analysis of whether the surcharge increases the 'value' or 'price' of the supplies because a 3% surcharge on GST free goods nets the merchant 3%, but in respect of taxable goods, it nets the merchant only 10/11^{ths} of the 3% surcharge. Uncertainty in this matter could lead to significant disputes later.</p>	<p>The focus of the final Ruling concerns whether the surcharge forms consideration for a supply of goods or services. This will then impact the application of subsection 9-75 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (GST Act) concerning determining the both the value of a supply and the price of a supply. The commercial reasoning behind the imposition of the surcharge is outside the scope of this Ruling.</p>
7	<p>Given the vast and growing number of transactions that occur online, there should be some examples of how credit card surcharges for using credit cards to pay for them are treated, including the payment of acquisitions from overseas which are reverse charged.</p>	<p>An additional example has been included in the final Ruling (Example 2) which involves a scenario where a customer acquires a concert ticket over the internet and incurs a credit card surcharge.</p> <p>Paragraphs 10 and 67 have been included to address the scenario where an entity acts as an agent of a third party that supplies goods or services, but makes a supply of processing services to the customer.</p>

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8	<p>A situation which is not addressed in the draft Ruling is where goods or services are supplied on credit terms for an agreed price and the recipient of the supply subsequently decides to pay the outstanding account balance by credit card, in the knowledge that a surcharge will be imposed. The supplier who accepts payment by credit card then imposes a surcharge on the recipient.</p> <p>Consistent with the ATO position in relation to payments into an account, as expressed in paragraphs 49 to 52 of GSTR 2003/5 <i>Vouchers</i>, such a payment of an account is not in respect of any supplies at all, even if the supplies that lead to the account being payable were taxable. That is, a surcharge for the payment of taxable goods is taxable, but if the goods are charged to an account and the account is paid by credit card, the surcharge will not be taxable. Combining that with Division 19 of the GST Act adjustment events, such as a subsequent settlement discount, is complex. The ruling needs to deal with all the matters that arise from acting in accordance with the ruling, or it may lead to more problems than it fixes.</p> <p>The submission requested a consideration of the Commissioner's position on credit card surcharges imposed in these circumstances and the outcome of the Commissioner's deliberations included in the ruling.</p>	<p>We do not consider that the views expressed in paragraphs 49 to 52 of GSTR 2003/5 are relevant to the scenario raised in the submission. Those paragraphs refer to a scenario where a taxpayer allocates a credit to an account, by transferring money to the account, which is to be used for future supplies. In that situation, the Commissioner's view is that the allocation of the credit to the account is not a supply.</p> <p>In the scenario raised, the customer has an outstanding liability with the merchant following the supply of goods or services. The GST treatment of a credit card surcharge will depend upon whether or not the merchant has made an input taxed supply of an interest in a credit arrangement to the customer.</p> <p>The imposition of the credit card surcharge forms additional consideration for the supply of the goods or services from the merchant. This may trigger an increasing adjustment to the merchant under Division 19 of the GST Act depending upon the circumstances. The customer may have a corresponding decreasing adjustment.</p> <p>However, where the merchant imposes a late payment fee or charge which is also paid by the customer using a credit card, the credit card surcharge also forms part of the consideration for an input taxed financial supply of an interest in or under a credit arrangement. The merchant can use any fair and reasonable method to apportion the credit card surcharge between the supplies.</p> <p>This view has been included in the final Ruling at paragraphs 11 to 13, 31 to 32, 68 to 70 and 83 to 85 and is reflected in Example 5 at paragraphs 22 to 25.</p>
9	<p>The submission agrees with apportionment in relation to surcharges at paragraphs 52 and 53. However, it would be helpful if some explanation was made (for example principles arising out of <i>Luxottica</i> and section 9-80), and some references made to other ATO Public Rulings. It would also be helpful if the example at paragraphs 15 and 16 could be extended to show other examples of acceptable (or not acceptable) apportionment methodologies.</p>	<p>GSTR 2001/8 has been referenced in the final Ruling.</p> <p>The Commissioner did not receive any submissions that raised different apportionment methodologies than those referenced in the draft Ruling. The Commissioner has repeated in paragraph 66 of the final Ruling that we will consider any reasonable approaches that reduce compliance costs.</p>

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10	<p>At paragraph 17, the Commissioner treats a credit card surcharge imposed on a customer in respect of a credit card transaction used for a payment, or the discharging of a liability to make a payment, of an Australian tax, fee or charge, as having the same treatment as the underlying payment of the tax, fee or charge.</p> <p>The submission raised difficulties with this blanket assertion, based as it is on the AAT decision in <i>Waverley Council</i>. It was submitted that there was insufficient discussion and analysis of the supply for consideration issue in this unusual case on which to reach and apply broad conclusions, especially when the underlying facts are crucial to determining the correct treatment.</p>	<p>The final Ruling has been amended to clarify that when a person pays an Australian tax, or an Australian fee or charge by credit card and incurs a credit card surcharge, the surcharge is a payment incurred by the person in discharging the liability to pay the Australian tax, or Australian fee or charge. Depending upon the particular factual circumstance, the credit card surcharge may be characterised as forming part of an Australian fee or charge. A credit card surcharge imposed on a person in both circumstances has the same GST treatment under Division 81 of the GST Act as the payment of the tax, fee or charge.</p> <p>We consider that this position is consistent with <i>Waverley Council</i>.</p> <p>We are not suggesting that a credit card surcharge incurred when paying an Australian tax forms part of the Australian tax. Rather, it is a fee incurred in discharging the liability to pay the Australian tax and will therefore be subject to Division 81 of the GST Act.</p>

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11	<p>The submission seriously questions the position taken in the draft Ruling that when a taxpayer pays an assessment of a net amount of GST by credit card, any surcharge imposed on the taxpayer has the character of GST. The broader implication of this view, is that the surcharge may not be deductible for income tax purposes. Furthermore, as an imposition of tax, there would need to be some legislative basis to support the imposition of an additional tax, which amongst other things addressed all constitutional issues.</p> <p>To simply assert that the credit card surcharge increases the consideration 'for' that statutory charge is fraught with difficulties. It could lead to challenges that the authority charging the fee is overcharging. Furthermore, if a person's income tax is paid by credit card, it is unlikely that the ATO would accept the surcharge as constituting the payment of income tax. Finally, the additional surcharge amount might not be a fee, tax or charge under Division 81 of the GST Act at all, and hence, cannot be treated that way.</p>	Please see response to Issue 10.
12	<p>The submission welcomed a more detailed explanation of the treatment of credit card surcharges for the payment of taxes, fees and charges subject to Division 81 of the GST Act. It would also be helpful if the Commissioner could clarify his position in this ruling, with the advice he also provides on payment instructions, that is that the taxpayer may be entitled to a deduction for the tax. In the case of a surcharge placed on the payment of an income tax liability, the position adopted in the draft Ruling read together with the payment instructions would, in effect, allow a taxpayer to claim a tax deduction for a payment of its income tax. Such an outcome is absurd.</p>	Please see response to Issue 10.

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13	It would be useful if the Commissioner could comment on the situation where credit card surcharges are charged where there is no supply at all. This can arise where a payer tops up their account which is used to pay for services by paying with a credit card plus a surcharge and then later decides to withdraw the amount on the account without actually accessing the services that the account is used for. In this circumstance, the credit card surcharge has been imposed without an underlying supply. We query what the GST treatment would be.	The scenario raised in the submission does not provide sufficient factual details to be able to provide a categorical position in the final Ruling. However, we note that it would appear in the scenario raised that the payer is being provided a service of accessing the relevant payment system to authorise the payment.