

Refunds of Overpaid GST

The Commissioner's power to withhold GST refunds was challenged by the Court in a recent case regarding overpaid GST on holdback payments by a motor vehicle retailer.

In this case, the dealer mistakenly treated the holdback payments as subject to GST. After realising the mistake, the taxpayer sought a refund from the Tax Office. Although the Tax Office agreed the GST was not payable, it refused to refund the GST on the grounds that it was not required to refund the amounts until it could be shown that the taxpayer would pass the refund to the parties which actually paid the GST (i.e. the motor vehicle distributor or manufacturer).

However, the Court held the Commissioner's authority to withhold refunds did not extend to transactions that were outside the scope of the *GST Act*, such as in this case, and ordered the Tax Office to release the refund to the taxpayer.

Commissioner's Power Expanded

Following the Court decision, the Tax Office announced motor vehicle dealers may now claim their refund of incorrectly paid GST in respect of the holdback payments in the current activity statements for tax periods up to and including 30 June 2008.

Going forward, the Government announced on the budget night, it will amend the law governing refunds of overpaid GST to expand the Commissioner's power to withhold GST refunds. Under the new law (applying from 1 July 2008), businesses must first reimburse the overpaid GST amount to their customers before they can obtain the refund from the Tax Office. This is so, even if the transactions for which the tax was paid are not supplies.

Reference: Re KAP Motors v FTC; Decision Impact Statement (KAP Motors)

GST on Forfeited Deposits

A long-running battle between a taxpayer and the Tax Office regarding the GST status of a forfeited deposit finally ended when the High Court decided the forfeited deposit received by the taxpayer was subject to GST.

A forfeited deposit in relation to a taxable supply is generally subject to GST. However, the questions before the court were whether the taxpayer made a supply and whether the forfeited deposit was a consideration for that supply.

Contents

Refunds of Overpaid GST	1
Commissioner's Power Expanded	1
GST on Forfeited Deposits	1
Margin Scheme and Property Development	1
Ramifications	2
Budget Announcement re Margin Scheme	2
GST and Managed Investment Schemes.....	2

In delivering the decision, the High Court applied a relatively literal reading of the *GST Act* for defining a "supply". In so doing, it has created some challenging questions for the GST experts to mull over, questions such as:

- ▶ What would be the situation if the contract was for a GST-free supply of a going concern? Would the forfeited deposit still be taxable?
- ▶ Would a part payment of a taxable supply be a deposit for GST purposes if the payment was more than a token amount?

No doubt, more questions will emerge as time progresses.
Reference: Re Reliance Carpets v FCT

Margin Scheme and Property Development

An unexpected Court decision has posed threats to property developers who have relied on the ATO rulings and materials for the application of the margin scheme.

In this case, the Court decided that to apply the margin scheme, the interest in the property acquired must be identical to the interest in the property sold. This view implies that property developers would be precluded from using the margin scheme for unit developments. Such interpretation was not expected by the Tax Office.

Ramifications

The impact of this Court decision is currently being reviewed by the Tax Office. In the meantime, to provide certainty to the community, the Tax Office has issued a Decision Impact Statement. In this statement, it is confirmed that property developers relying on current rulings to self assess their GST liabilities under the margin scheme will be protected from any retrospective adjustments.

An appeal has been lodged by the taxpayer to the Full Federal Court. The outcome of the appeal will no doubt be critical for the future development of the margin scheme affecting property developers.

Reference: Re Brady King v FTC; Decision Impact Statement (Brady King)

Budget Announcement re Margin Scheme

In 2005 the then Liberal government proposed changes to the margin scheme that would have had the effect of pegging that proportion of the non-taxable value of real property under the margin scheme at year 2000 values, where the land in question was acquired as part of the sale of a GST-free going concern or GST-free farm land.

This measure was deferred on the understanding that more industry consultation was necessary.

As part of the 2008-2009 Budget the Government has announced that the previous Government's measure will be dropped, but that the GST legislation will be amended to ensure that where the margin scheme is used after a GST-free or non-taxable supply, the value added by the registered entity which made that supply is included in determining the GST subsequently payable under the margin scheme.

It is not immediately clear what Treasury has in mind with this amendment, although one suspects, given the previous attempt to change the law, that the value on which tax will be payable will include the value of any property not previously taxed. If this assumption is correct, the inevitable result will be double taxation as, over time, it will be impossible to track that part of the value of land that has previously been taxed.

This measure is estimated to collect an additional \$90 million in 2008-2009 and an additional \$620 million over the life of the budget estimates. The new law will be operative from the date of royal assent.

GST and Managed Investment Schemes

The Tax Office has provided guidance on the GST treatment of transactions carried out by registered agricultural Managed Investment Schemes (MIS). In the draft ruling, the Tax Office states the individual investor does not carry on the business of the MIS. Instead, the responsible entity of the scheme is carrying on the business for GST purposes. Consequently, the responsible entity is required to be registered for GST not the individual investor.

This ruling also explains the GST treatment of the interests purchased by the individual investors and the GST consequences and obligations of the responsible entity of the scheme.

It is noted that the views expressed in this draft ruling differs significantly from those in the previous ruling. The previous ruling will be withdrawn when this draft ruling is finalised.

Reference: GSTR 2008/D1

Should you require assistance additional information, **contact your PKF tax adviser** or:

Lance Cunningham | Director of Taxation
02 9240 9736 | lance_cunningham@pkf.com.au
Level 10, 1 Margaret Street | Sydney | New South Wales 2000 | Australia

PKF has offices throughout Australia:
ADELAIDE – BRISBANE – CANBERRA – DARWIN – GOLD COAST – HOBART
MELBOURNE – MOUNT BARKER – PERTH – SYDNEY – TOWNSVILLE

Disclaimer: The material contained in this publication is in the nature of general comment and information only and neither purports, nor is intended, to be advice on any particular matter. Readers should not act or rely upon any matter or information contained in or implied by this publication without taking appropriate professional advice. All financial figures are quoted in Australian Dollars unless otherwise indicated. PKF is a national association of independent chartered accounting and consulting firms, each trading as PKF. PKF Australia Ltd is also a member of PKF International, an association of legally independent chartered accounting and consulting firms.

If you prefer not to receive this newsletter, please return your mailing label and advise us that you no longer wish to receive this information. Please address to: National Marketing Department - PKF, Level 10, 1 Margaret Street, Sydney NSW 2000 or fax to: (02) 9240 9821.