Case note

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AP GROUP CASE POSTSCRIPT: THE COMMISSIONER'S VIEWS ON THE DECISION

INTRODUCTION

Earlier this year we published a case note on *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 canvassing how the Full Federal Court and, previously, the Administrative Appeals Tribunal, treated the specific motor vehicle incentive payments in question, including an outline of the facts and a discussion of the arguments put to the court and the tribunal by the parties. At that stage, the Commissioner's views on the case and the extent to which he would apply the principles going forward remained to be seen.

This article revisits the case with the benefit of the Commissioner's Decision Impact Statement (DIS),[1] the new public GST ruling, GSTR 2014/1 *Goods and services tax: Motor vehicle incentive payments* (GSTR 2014/1) which was published on 1 October 2014 and a private ruling on a rebate arrangement that was published after the *AP Group* decision was handed down. There will also be a brief discussion of two earlier sales tax cases on rebates that may continue to be helpful to taxpayers in characterising their rebate and discount arrangements. These are the Full Federal Court decisions in *Colgate-Palmolive Pty Ltd v Commissioner of Taxation* [1999] FCA 248 and *Queensland Independent Wholesalers Ltd v Commissioner of Taxation* [1991] FCA 220.

References to the *GST Act* are to the *A New Tax System (Goods and Services Tax) Act 1999*.

SUMMARY OF AP GROUP CASE

The facts and specific arrangements that were in question were the subject of an earlier case note.[2] For present purposes, the arrangements in question and the GST outcomes can be summarised as follows:

Arrangement 1: Toyota Fleet Rebates[3]

Under this arrangement, the taxpayer agreed to sell vehicles to specific classes of customers for a discounted retail price. This price varied, depending on whether the customer belonged to Platinum, Gold or Silver categories.

In most cases, the taxpayer would acquire vehicles from the manufacturer specifically for fleet purposes, and would be compensated for the discounted retail price by acquiring the vehicles at a discounted wholesale price. In such cases, no rebate was provided and no GST issues arise.

In some cases, however, vehicles that were acquired for sale to private customers (ie which were not acquired from the manufacturer at a discount) would be sold to fleet customers at the discounted retail price. In order to compensate for the discount, the manufacturer would pay to the taxpayer a rebate or incentive payment.

Outcome:

The Full Federal Court affirmed the tribunal's decision that the payments were third party consideration paid by the manufacturer in connection with a taxable supply made by the dealer to the customer, consistent with the outcome in *TT-Line Co Pty Ltd v Commissioner of Taxation* (2009) 181 FCR 400 (*TT-Line*). Specifically, the court found that there was no question of law raised on the appeal. Notwithstanding that, the court expressed a view that the tribunal decision was correct.

The Commissioner's primary argument that the payment was made by the manufacturer in

[1] Australian Taxation Office, Legal Database, *Decision Impact Statement: AP Group Ltd v Commissioner of Taxation* (2013), http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/NSD1569of2012/00001.

[2] Lazanas G and Thomas R, "An Evaluation of the New GST Refunds Regime" (2014) 14 AGSTJ 27.

[3] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [22]-[28].

connection with a supply made by the dealer to the manufacturer was rejected on the following basis:

> On analysis, the so-called supplies for consideration identified by the Commissioner are nothing more than the encouragement of an overall business relationship between the manufacturer and the dealer to the mutual benefit of both. The relationship involves a whole raft of obligations from one to the other all, presumably, with the ultimate objective of maximising their respective commercial positions. As the AP Group put it, the overall relationship contemplates a continuing dialogue between wholesaler and retailer in which promises are routinely exchanged, but to characterise this dialogue as involving supply after supply is unrealistic and impractical. To characterise the payment of the incentives intended to encourage the overall relationship to operate efficiently as involving supplies for consideration is equally unpersuasive. A dealer will always wish to sell as many cars as practicable and to move old stock to make way for new stock. So too a dealer will always wish its ordering arrangements to be the most efficient and economically beneficial to it. The manufacturer will have the same objectives. It is this context which underpins the Tribunal's conclusion that the payments are not for the supply of anything by the dealer (at [86]). As the Tribunal said at [86] the dealer (which must be inferred to act in an economically rational manner in the ordinary course) will always want to run the business in this way. The fact that the dealer receives a payment as an incentive when certain thresholds associated with running the business in this way does not mean that the dealer is supplying a service to the manufacturer for consideration. If the incentive payment were not available there is no basis to infer that the dealer would not behave in the same way for free. For these reasons there cannot be said to be any supply for consideration in these arrangements.[4]

However, the court accepted the Commissioner's alternate argument that the amounts were third party consideration for supplies of motor vehicles made by the dealer to its customers. Their Honours rejected the taxpayer's argument that the tribunal had overlooked the requirement in s 9-5 of the GST Act that the supplies must be "supplies for consideration".[5] Further, the court agreed with the tribunal's conclusion that the rebate was consideration for the supply to the customer,[6] though their Honours noted that the issue was not easy to resolve.[7]

Consequently, GST was payable by the dealer in respect of the payments from the manufacturer, as those payments were consideration for a taxable supply for the purposes of s 7-1 of the GST Act. However, in the circumstances, no party was entitled to an input tax credit that corresponded with the GST payable. The manufacturer was not entitled to an input tax credit as it did not make an acquisition for the purposes of s 11-20 of the GST Act, which states:

> You are entitled to the input tax credit for any *creditable acquisition that you make.

In respect of this arrangement, the court determined that the manufacturer did not make any acquisition.

Further, the customer was not entitled to an input tax credit in respect of the payment by the manufacturer because it fell within the ambit of s 11-30(1)(b), which states:

> (1) An acquisition that you make is ***partly creditable*** if it is a *creditable acquisition to which one or both of the following apply:
>
> (a) …
>
> (b) you provide, or are liable to provide, only part of the *consideration for the acquisition.

Here, the customer's acquisition was only "partly creditable" as it was liable to provide only part of the consideration for the acquisition, with the balance payable by the manufacturer. The customer (if otherwise entitled to claim a credit) was only entitled to claim a credit to the extent that it made a creditable acquisition (see ss 11-5 and 11-20); that is, to the extent that it paid or was liable to pay GST on the acquisition.

Arrangement 2: Toyota Run-Out Model Support Payments[8]

[4] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [53].

[5] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [35]-[37].

[6] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [43].

[7] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [41].

[8] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [29]-[38].

The purpose of this arrangement was to assist the taxpayer to reduce its floor stock of older vehicles prior to the introduction of newer model vehicles. Once the taxpayer sold the relevant vehicles, the taxpayer would notify Toyota and Toyota would arrange for payment of the rebate.

There was no requirement, under this arrangement, for the taxpayer to pass on the rebate or any discount to the customer.

Outcome:

The outcome was the same as in respect of Arrangement 1.

Arrangement 3: Ford Retail Target Incentive Payments[9]

Under this program, Ford would pay an incentive to dealers if it met certain monthly or quarterly sales targets. These targets were determined by each dealer's size and past performance. The targets related to the volume of vehicles sold and delivered and not the value of the vehicles. Additionally, only sales to eligible customers, that is "retail" or "business fleet plan" customers, were included.

Following the incentive period, Ford would issue AP Group with a tax invoice plus 10% GST for the payment which shortly followed, if its target had been reached.

Outcome:

The Full Federal Court affirmed the tribunal's finding that the payments were not consideration for any supply. Again the court found that there was no question of law on appeal. However, the court expressed the view that the tribunal's decision was correct, on the basis that, "the so-called supplies for consideration identified by the Commissioner are nothing more than the encouragement of an overall business relationship between the manufacturer and the dealer to the mutual benefit of both" and the dealer would have run its business in the same way, regardless of the payment.[10]

Arrangement 4: Subaru Wholesale Target Incentive Payments[11]

Under this arrangement, Subaru would make an incentive payment to the taxpayer for meeting wholesale ordering targets within a period. It stipulated the target at 70% of the maximum ordering entitlement of the dealer, again based on the size and past performance of each dealer.

Outcome:

The outcome was the same as in respect of Arrangement 3.

Arrangement 5: Transit/Interest Protection Payments

These payments were to reimburse the dealer for finance charges incurred while the vehicle was transported from the manufacturer to the dealer and made ready for display or sale.[12]

Outcome:

The tribunal held that these payments were not consideration for a supply to the wholesaler. The Commissioner did not argue in the alternative that they were consideration for a supply to the customer. Therefore, no GST consequences arose in respect of the payments.

The Commissioner did not appeal to the Full Federal Court in respect of this arrangement and it is not discussed in the Full Federal Court decision.

COMMISSIONER'S RESPONSE TO CASE

The Commissioner's response to the decision, as can be gleaned in particular from the DIS and the recently finalised public ruling GSTR 2014/1, is that:

1) The decision has a significant impact on the way that certain motor vehicle related incentive payments are treated for GST, reversing the view that the Commissioner had previously taken in respect of similar arrangements.

[9] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [49]-[60].

[10] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [53].

[11] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [65]-[73].

[12] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [41]-[42].

2) However, the treatment of similar motor vehicle incentive payments will now be impacted by the operation of Div 134 of the GST Act, which relates to third party payments and applies to payments made on or after 1 July 2010.
3) The outcomes are not inconsistent with the Commissioner's general approach to identifying whether incentive payments or discounts constitute consideration in connection with a supply.

These responses to the decision are discussed in more detail below.

Decision impact statement

Three versions of the DIS have been released. The first version, issued on 15 November 2013, set out the Commissioner's preliminary analysis and the administrative treatment of similar motor vehicle incentive payments and other related matters, including the implications for the luxury car tax (LCT).

Luxury car tax

In respect of the LCT, the DIS indicated that, consistent with the findings of the court, fleet rebates and run-out model support payments would be treated as part of the consideration for the supply to the customer, meaning that payments, including GST, would need to be included in the "price" of the supply for the purposes of determining whether the LCT threshold is exceeded. Consequently, certain vehicles that would not have exceeded the LCT threshold on the Commissioner's previous view would now attract a LCT liability. Dealers must factor in the fleet rebates and run-out support model incentive payments when calculating and remitting LCT.

Input tax credits claimed by manufacturers

The Commissioner also addressed how he would deal with input tax credits that had been previously claimed by manufacturers, consistent with the Commissioner's views that the incentive payments were consideration for a taxable supply made to the manufacturer. On the court's view of the incentive payments, there was no input tax credit entitlement. This led to an exposure for taxpayers as to whether the Commissioner would seek to recover credits claimed in earlier periods.

The DIS indicates that, in respect of tax periods prior to 1 July 2010, manufacturers are protected by industry letters issued by the Australian Taxation Office (ATO) to Federal Chamber of Automotive Industries members, which were public rulings under the former indirect tax rulings regime. This will generally be beyond the statutory time period from 1 July 2014. From 1 July 2010, non-gazetted ATO communications such as industry letters were no longer public rulings and no longer binding on the Commissioner.

In respect of tax periods beginning on or after 1 July 2010, the Commissioner made no undertakings to compromise on any identified amounts recoverable in the form of input tax credits that were incorrectly paid. However, the DIS states that the "Commissioner does not intend to take active compliance action in relation to input tax credits that have already been claimed for motor vehicle incentive payments that are now regarded as out-of-scope or non-creditable in light of this decision". This suggests that input tax credit claims will not be specifically targeted, but if such claims are identified, the Commissioner will seek to recover them. Such an approach to applying the Commissioner's revised view of the law retrospectively is in line with what the Full Federal Court considered permissible in *Macquarie Bank Ltd v Commissioner of Taxation* [2013] FCAFC 119[13] but does not protect affected taxpayers to the extent contemplated by Draft Practice Statement Law Administration PSLA 2011/27 *Matters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively*, which provides a range of circumstances in which the Commissioner will only apply a view of the law prospectively, including where there has been a widespread industry practice endorsed by the ATO.[14]

[13] See *Macquarie Bank Ltd v Commissioner of Taxation* [2013] FCAFC 119 at [11].

[14] See paras 41-53 of the PSLA 2011/27 *Matters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively*.

Implications for rebate arrangements generally

The first iteration of the DIS also indicated that the Commissioner would continue to give consideration to the impact of the decision on other arrangements, including in respect of establishing the "nexus" between supply and consideration generally and, more specifically, when considering other tripartite arrangements and other motor vehicle incentive payments.

Significantly, the following comments were made in the DIS in relation to "Incentive payments in other industries":

> Whether other types of incentive payments will be consideration for a taxable supply by the payee to the payer is fact and circumstance dependant.
>
> The Commissioner notes that the bailment arrangements, which involve an interposed entity, may be an important factual distinction. For example, suppliers may pay rebates to customers who reach certain levels of purchases (such as volume rebates). These rebates are typically expressed as a percentage of the purchases made in a particular period. Where there is no interposed entity, a payment of this type is generally regarded by the Commissioner as a reduction in the consideration for the relevant purchases and so is an adjustment event.
>
> Whether other types of incentive payments are consideration for a supply by the payee to a third party will depend on the specific facts and circumstances.

While it was probably unintentional, it is telling that the Commissioner repeats the proposition that the characterisation of an incentive payment as consideration for a supply depends on the facts. It is indicative of the Commissioner's hesitation in drawing analogies from the *AP Group* case that can be applied in any context other than the motor vehicle industry. Similarly, the comments in respect of bailment only serve to distinguish *AP Group* from other arrangements where there is no interposed entity. It suggests that where the payment is made directly by the supplier of another distinct supply, (eg if there was no interposed entity and the manufacturer supplied the vehicle and paid the rebate), the rebate may be more likely to change the price of that other supply giving rise to an adjustment event and adjustments for the parties.

This guidance was expanded in the first revised version of the DIS, which issued on 13 December 2013. The Commissioner provided additional guidance in relation to those principles emerging from the decision that the Commissioner considers relevant to the establishment of the relevant nexus between a supply and consideration in order to identify a taxable supply. Specifically, the following was inserted into the DIS:

> The Commissioner's preliminary views are that the following propositions are relevant in determining whether there is a "supply for consideration":
>
> a. All aspects of the arrangements between the parties must be taken into account when determining whether a particular act constitutes a supply for consideration. This would include a careful consideration of the specific terms and conditions of the arrangements.
> b. The appropriate level of generality or particularity at which to assess whether a particular act constitutes a supply for consideration is factually dependent. The critical facts include the nature of the supply said to be involved.
> c. How a party characterises the payment is not determinative of whether there has been a supply for consideration.
> d. Whether a supply is made for consideration is to be determined from the perspective of the entity said to have made it.
>
> Conduct that constitutes a supply for consideration may have a range of characteristics, purposes or objectives. The relevant question is not whether the conduct was for consideration but whether the particular supply which arose from the conduct was for consideration.

The guidance is very general and does not address some of the more specific questions arising as a consequence of the *AP Group* case. Significantly, these are principles that had been embraced by the Commissioner prior to the court's decision.

It can be extrapolated that, in the Commissioner's view, there is nothing that arises from *AP Group* that impacts directly or significantly on other incentive payment or discount arrangements. This is expressed more clearly by the Commissioner in edits made to the DIS on 4 April 2014, which indicate the following:

1) No amendments were required to any of the following rulings to take account of the decision:
   - GSTR 2006/9: *Supplies*
   - GSTR 2001/4: *GST consequences of court orders and out-of-court settlements*
   - GSTR 2001/6: *Non monetary consideration*
   - GSTR 2012/2: *Financial assistance payments*
   - GSTD 2005/4: *Are "wholesale holdback" and "retail holdback" payments made by a motor vehicle manufacturer or importer of new motor vehicles to a dealer consideration for a supply?*
2) The Commissioner is not seeking to disturb the GST treatment of incentive payments made in other industries.

Matters not addressed by the DIS

Payments are not discounts

The Commissioner's approach in the DIS does not address certain outcomes of *AP Group* that could potentially impact other rebate arrangements if the same principles underpinning the court's analysis are applied more broadly. In doing so, the Commissioner has quietly avoided outcomes that might have proven to be problematic for taxpayers if adopted. This includes some specific comments made by the court, including as to when, if ever, a payment can be characterised as a discount. In this respect, Edmonds and Jagot JJ stated that:

> At [94] the Tribunal dealt with the evidence of Margaret Knowles, a group fleet manager within the AP Group, in which the Toyota "fleet rebates" were described as "a discount to the purchase price paid" by the AP Group to Toyota. According to the Tribunal (also at [94]):
>
> > the characterisation, even if it is correct, cannot be determinative of the issue before us. This is because the question for us is not "is the payment a discount?" but rather "is the payment consideration?" An answer to the first question, one way or the other, provides no clue to the way the second question might be answered.
>
> *To which it might be added, the characterisation of the Toyota fleet rebate as a "discount to the purchase price paid" is incorrect because a discount is not a payment; it is a reduction or deduction.*[15]
>
> (emphasis added.)

This raises a practical question as to whether an incentive payment can ever have the effect of discounting the price of a supply. This is particularly important when viewed in light of the language in Div 19 of the GST Act. For example, s 19-10 sets out the meaning of an "adjustment event". One example of an adjustment event, in s 19-10(2)(b), is "a change to the previously agreed *consideration for a supply or acquisition, whether due to the offer of a discount or otherwise". This suggests that a price for a supply or acquisition that is previously attributed can change in the event that a discount is paid after the event. It is implicit that, if the previously agreed price was paid, the renegotiated price will involve a partial refund of consideration previously paid for the supply. Treating such a refund as a discount would seem to be a straightforward and intuitive way to deal with the change in price for GST purposes; however, it would not be consistent with the view of the court that a payment can never constitute a discount.

The Commissioner does not deal with these comments but, as discussed above, states in the DIS that the absence of the bailment arrangement may be an important factual distinction, and that when there is a reduction of the price negotiated between the parties, this may result in a change of consideration and an adjustment event. This is tantamount to suggesting that an incentive payment *can* represent a discount to a previously negotiated price. The tension between this view and the comments of the court at [36] is not addressed.

There are various other decisions handed down by the Federal Court in relation to whether the payment of a rebate can reduce the price of another supply in the context of the former sales tax legislation. These include *Queensland Independent Wholesalers Ltd v Commissioner of Taxation* [1991] FCA 220 (*QIW*) and *Colgate-Palmolive Pty Ltd v Commissioner of Taxation* [1999] FCA 248

[15] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [26].

(*Colgate-Palmolive*). Following the *AP Group* decision, the Commissioner considers that those cases are still relevant in determining the GST treatment of rebate arrangements.[16]

Importantly in those cases, the court did not rule out the possibility that the payment of a rebate to a party in connection with that party's acquisitions of other goods could constitute a reduction of the prices of those other goods. In this respect, in the *QIW* case, Davies, Lee and Hill JJ said the following at [39]:

> The fact that rebates were deferred and were discretionary would not prevent them being taken into account in determining the amount for which goods were sold provided that the nature and manner of payment of the rebate remained sufficiently proximate to and connected with the sales transactions to allow them to be accounted for in that way.

In the *Colgate-Palmolive* case, Hill, Lehane and Hely JJ referred to QIW, including the passage extracted above, and stated at [14]:

> The starting point must be that the parties have, by their contract, distinguished between the price payable by Woolworths for the goods sold by Colgate, and sums payable to Woolworths by way of co-operative allowance. Some reason must be shown for departing from that treatment, and for eliding matters which the parties have treated as distinct. In the case of some allowances or rebates, such as volume allowances, or allowances for prompt payment, there is a sufficient connection with the sales transaction to regard them as operating in the diminution of the price.

Underlying these very specific comments about volume allowances and prompt payment allowances reducing the price of goods is the court's acceptance that a payment can be characterised as a discount, which is inconsistent with the comments of the court in *AP Group*. However, it is notable that in both the *QIW* case and the *Colgate-Palmolive* case (which involved a cooperative allowance in return for promotional services), the rebate was taken to be paid to secure different ends and did not reduce the prices of the goods.[17]

Supply v supplies

The tribunal drew a distinction between the fleet rebates and run-out support payments on the one hand, and the retail incentive payment on the other, on the basis that the former had a direct and immediate connection with a particular supply, whereas the latter was made in connection with "supplies generally".[18] In this respect, Deputy Presidents Frost and Deutsch stated:

> The use of the word "supply", in the singular, in section 9-15 (and also in the s 195-1 definition of "consideration") implies that the payment must relate to a supply rather than to supplies in general, or the making of supplies in general. That focus on the singular is found throughout Division 9 – where, although the headings to particular sections (including s 9-5, s 9-25 and each of its subsections, s 9-30, s 9-40, s 9-70, s 9-75, s 9-80 and s 9-85) are in the plural, the text is in the singular. The relevant provisions are directed towards the identification of a supply, and the consideration for it. The identification of global amounts is part of a different enquiry: see, for example, the provisions relating to "net amounts" in Division 17.
>
> In our view, the retail target incentive payment is not a payment "in connection with" a supply, and so it is not consideration. This conclusion is not affected by s 23 of the *Acts Interpretation Act 1901* ("… unless the contrary intention appears … words in the singular number include the plural …") because, in our view, it is a deliberate drafting technique which demonstrates a contrary intention.[19]

The Full Federal Court refers to this analysis at [30] but does not explore the issue in detail.

On one view, it is quite an extraordinary outcome that receipt of a payment made in connection with many supplies can never give rise to a GST liability. This raises significant questions as to the treatment of all volume rebates. At a more fundamental level, it raises questions about any amount of

[16] See GSTR 2000/19, fn 16 and Orme A and Lin J, *Rebates and Incentives, The Road beyond AP Group* (Paper presented at The Tax Institute 2014 National GST Intensive, 4-5 September 2014) p 24.

[17] *Queensland Independent Wholesalers Ltd v Commissioner of Taxation* [1991] FCA 220 at [43] and *Colgate-Palmolive Pty Ltd v Commissioner of Taxation* [1999] FCA 248 at [16].

[18] *AP Group Ltd v Commissioner of Taxation* [2012] AATA 409 at[106].

[19] *AP Group Ltd v Commissioner of Taxation* [2012] AATA 409 at [108].

consideration that is paid in connection with numerous supplies. For example, if a lump sum payment had been made to TT-Line upon discounted transportation having been supplied to a specified number of passengers, the payment would not have been made in connection with any supply.

The Commissioner sets out his views on volume rebates in Goods and Services Tax Ruling GSTR 2000/19 *Making adjustments under Division 19 for adjustment events*. At para 24, the Commissioner states the following:

> Rebates
>
> 24. Under their terms of trade, suppliers may pay rebates to customers who reach certain levels of purchases. The rebates are typically expressed as a percentage of the purchases made in a particular period. A payment of this type is regarded as a reduction in the consideration for the relevant purchases and so is an adjustment event.
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> This view, on its face, is inconsistent with the conclusions drawn by the Tribunal and upheld by the court in respect of incentive payments made in connection with *supplies* and not an individual supply. The Commissioner has not amended GSTR 2000/19 on account of this issue.

Tension between TT-Line and DOT cases

Another issue that is not addressed by the Commissioner in the DIS and that is glossed over in his response to the public rulings is the tension between the outcomes in the *TT-Line* and *DOT* cases. Specifically, the Commissioner does not seem to attribute any significance to the tribunal and, implicitly, the Full Federal Court, having adopted the *TT-Line* analysis over the *DOT* analysis. The following is a quick summation of each of those cases:

- In *TT-Line*, under the Bass Straight Passenger Vehicle Equalisation Scheme, the transportation provider reduced the fare charged for passage and received an equivalent rebate from a Commonwealth department. It was held by the Full Federal Court that the payment was third party consideration for the supply of services by the transport provider to the passenger. It was not argued that the rebate was paid in connection with a supply to the Commonwealth department, which was the analysis subsequently adopted in the *DOT* case and put forward as the Commissioner's primary argument in *AP Group*.
- The *DOT* case involved a scheme whereby taxi drivers would provide subsidised transport to eligible passengers. The passengers would pay 50% of the fee for the journey and the other 50% would be paid by a government department. In that case, the majority of the Full Federal Court found that the subsidy was consideration for a supply made by the taxi operator to the government department of the service of transporting the passenger (an outcome that was not contended for in *TT-Line*). The Commissioner's application to the High Court for special leave to appeal the decision was refused.

One of the aspects of the tribunal's decision in the *AP Group* case that has attracted a great deal of interest is why the tribunal did not follow the analysis in the *DOT* case in accepting the Commissioner's argument that the rebates were paid for a separate supply by the dealer to the manufacturer. On this point, the tribunal stated at [87]-[89]:

> 87. Finally, and also in support of his first argument, the Commissioner refers to the judgment of the Full Federal Court in *Commissioner of Taxation v Secretary to the Department of Transport (Victoria)* [2010] FCAFC 84; (2010) 188 FCR 167. He submits:
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> > Just as the taxi-cab operator […] made a supply to the Department of Transport, so too did AP Group to the manufacturers. There is, in many respects, a logical affinity between "MTPT Payments" considered in the Department of Transport case and incentive payments. One essentially need only substitute one for the other:
> >
> > We accept that, as the Commissioner argued, each MPTP Payment was, in effect, a subsidy for taxi-cab travel for a MPTP Member. Under the MPTP the DOT assumed an obligation to fund in part the use of taxi-cabs by persons unable to take ordinary public transport. This did not mean, however, that there was only one supply, being the supply of transport to the MPTP Member. On the contrary, there were two supplies: the supply of transport to the MPTP Member and the supply to the DOT of the transport of the MPTP Member. That is, in transporting the MPTP Member in conformity with the MPTP, the taxi-cab operator provided the service to the DOT of transporting the MPTP Member. This proposition can be made good in a number of ways. First, having regard

> to what we have said at [47], the taxi-cab operator was doing what the DOT had in effect asked him to do when the Member MPTP Card was validated and the MPTP trip was authorised, upon the basis that the DOT would make a MPTP Payment (ie, that the DOT would pay the MPTP component of the fare). Secondly, the supply of this service of transporting the MPTP Member to the DOT enabled the DOT to fulfil its objects under the Transport Act and to perform its functions.
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> 88. The effect of this submission is that the supply of a vehicle to the Applicant's retail customer is at the same time the supply, by the Applicant to the manufacturer, of the service of supplying the vehicle to the customer. It is difficult, with respect, to imagine a more tortured analysis of what is a fundamentally simple transaction, a sale of goods.
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> The Commissioner's first argument must fail.

The tribunal does not elaborate as to why the approach that was adopted in the *DOT* case would be inappropriate in the circumstances, other than to state that it results in a "tortured analysis". Rather, the tribunal went on to refer to and apply the Full Federal Court's decision in *TT-Line*, stating at [104]:

> [T]he fleet rebate paid by Toyota has a direct and immediate connection with the supply of a vehicle to a fleet customer. That is because the supply of the vehicle is the very act that triggers the payment of the rebate.] Put simply, the consideration that the Applicant received for the supply of a vehicle to a fleet customer comprised two components – the first component is the amount paid by the customer, and the second component is the amount received from Toyota as the "fleet rebate". Both components were paid for that supply, and together they form the consideration for the supply. In that respect, *the fleet rebate arrangement is no different from Edmonds J's description of the arrangement in the TT-Line case, at [50], as referred to above. One need simply substitute "manufacturer" for "Commonwealth", "vehicle" for "transport services" and "customer" for "Mr Egan" to see that this is so*. GST is accordingly payable on the fleet rebate. (emphasis added.)

In the Full Federal Court, the Commissioner argued that the tribunal was wrong to distinguish the *DOT* case in the circumstances. The Full Federal Court disagreed. The majority stated at [50]:

> Analysis of the particular obligations on which the Commissioner relied exposes that the Tribunal's reasoning and conclusions were sound. There is nothing equivalent to the circumstances in the Department of Transport case where there was a supply to the Department of the service of transporting an eligible disabled person in return for the payment of the rebate.

This appears to flow on from the court's conclusion at [53] that:

> On analysis, the so-called supplies for consideration identified by the Commissioner are nothing more than the encouragement of an overall business relationship between the manufacturer and the dealer to the mutual benefit of both … A dealer will always wish to sell as many cars as practicable and to move old stock to make way for new stock. So too a dealer will always wish its ordering arrangements to be the most efficient and economically beneficial to it. The manufacturer will have the same objectives. It is this context which underpins the Tribunal's conclusion that the payments are not for the supply of anything by the dealer (at [86]). As the Tribunal said at [86] the dealer (which must be inferred to act in an economically rational manner in the ordinary course) will always want to run the business in this way. The fact that the dealer receives a payment as an incentive when certain thresholds associated with running the business in this way does not mean that the dealer is supplying a service to the manufacturer for consideration. If the incentive payment were not available there is no basis to infer that the dealer would not behave in the same way for free. For these reasons there cannot be said to be any supply for consideration in these arrangements.

Arguably, the same could be said of the supply that was identified as having been made by the taxi operator to the government department in the *DOT* case. That is, the provision of transport to the passenger was a service that the taxi operator would have provided, in any case, in the ordinary course of its business. The precise nature of the distinction, if any, is not explored in the *AP Group* decision.

In a recent paper, ATO officers argued that the decisions in *TT-Line* and *DOT* might be reconcilable.[20] They suggested that *DOT* may have been distinguishable on the basis that the manufacturer did not receive an immediate, tangible benefit in return for the incentive payments. In this respect, the officers state:

[20] Orme and Lin, n 16.

> It is well known that the manufacturer wants the dealer to sell as many of its vehicles as possible. It is also well-known that a dealer wants to sell as many vehicles as possible. While the manufacturer arguably gets a consequential benefit, it is debatable whether it is immediate and tangible.
>
> The outcome in *AP Group* also appeared to be influenced by the view of Edmonds and Jagot JJ that the target incentive arrangements were "to the mutual benefit of both", and state that "there is no basis to infer that the dealer would not behave in the same way for free". Thus the fact that a particular behaviour is self-interested may point against the characterisation of the arrangements as involving a supply back to the payer.[21]

The fine distinction between behaviours that constitute the making of supplies and behaviours that are not supplies because they are self-interested may prove difficult for taxpayers to draw. Promotional rebates, cooperative advertising allowances, volume rebates and trade incentives generally will often involve the recipients of those payments performing obligations that benefit their own businesses, including increasing turnover and profit margins. It will not always be an easy task to determine, in those circumstances, whether the *TT-Line* and *AP Group* analysis or the *DOT* analysis will apply.

There has been at least one private ruling published after the decision in *AP Group* was handed down, in which the Commissioner has weighed up the application of *TT-Line*, *AP Group* and *DOT* and preferred the *TT-Line* analysis.[22] The ruling was made in respect of a tripartite arrangement involving a myriad of rebates paid by a Minister to two other entities, at least one of which was also a government entity. It should be noted that on the particular facts of that arrangement, the Commissioner was persuaded that in respect of four of the five payments, there was nothing done by the two entities that could be characterised as a supply to the Minister because nothing was done for the Minister's benefit. In respect of the remaining payment, the outcome depended on whether the entity was a government agency as, if it was, s 9-17(3) would apply so as to preclude the amounts from being treated as consideration for the purposes of s 9-5 (meaning that the supply would not be taxable and would not give rise to a creditable acquisition). In short, the *TT-Line* analysis is applied by the Commissioner in the private ruling, but perhaps for different reasons and certainly not on the basis that the *DOT* analysis was open to the Commissioner, but would result in a tortured analysis.

DIVISION 134 AND TREATMENT OF MOTOR VEHICLE INCENTIVE PAYMENTS AFTER 1 JULY 2010

On 13 December 2013 the Commissioner inserted a number of paragraphs into the DIS that relate to the application of Div 134. That division applies to incentive payments that are made by third parties to a transaction (eg by a manufacturer in respect of a sale from a retailer to its customer) made after 1 July 2010. Significantly, it was not in force at the time that the incentive payments were made by the manufacturers to AP Group.

In relation to Div 134, the DIS as at 13 December 2013 stated:

> The Commissioner is currently developing more detailed views about the application of Division 134 to motor vehicle incentive payments.
>
> However, the Commissioner's preliminary but considered view is that *the manufacturer or distributor will have a Division 134 decreasing adjustment in relation to the types of fleet and run out payments considered by the Court*. In these circumstances, the dealer will be liable for GST but not have an increasing adjustment.
>
> In relation to fleet and run out payments that are made to the dealer's customer, the Commissioner's view is that the manufacturer or distributor will also have a Division 134 decreasing adjustment. In these circumstances, a GST registered customer may have a corresponding increasing adjustment. (emphasis added.)

These views ultimately formed the basis of GSTR 2014/1, which is discussed further below.

[21] Orme and Lin, n 16, pp 19-20.

[22] Australian Taxation Office, Edited version of private advice, Authorisation Number: 1012616769361.

GSTR 2014/1

Consistent with the view that the outcomes of the *AP Group* case do not impact the Commissioner's broader views in respect of incentive payment and discount arrangements, GSTR 2014/1, the recently published public ruling that deals with the consequences of the *AP Group* case, deals only with the GST consequences of motor vehicle incentive payments. This approach was, according to ATO officers, consistent with feedback that had been received in response to the DIS that cautioned against applying the outcomes of the decision in other contexts.[23]

GSTR 2014/1 is primarily made up of around 20 worked examples of tripartite arrangements. ATO officers have given the following reasons for approaching the ruling in this way:

> Firstly, different manufacturers often make similar kinds of payments, but the specific facts and circumstances surrounding an individual payment may differ. Where possible, guidance has been provided in respect of broad categories of common payment types, including examples of how a change in facts can result in a different outcome.
>
> Secondly, the evolving nature of these payments also means that it is not possible to rule exhaustively on all payments on the GST consequences of motor vehicle incentive payments. By providing a number of practical examples, the draft ruling seeks to help taxpayers understand how to approach characterising their particular payments.[24]

The ruling demonstrates that the Commissioner is willing to take an expansive view of the application of Div 134 to deal with outcomes that might otherwise be anomalous if the *AP Group* analysis was applied. Specifically, the Commissioner has taken a very broad view of the circumstances in which payments made by a third party (eg the manufacturer) will be taken to be made "in connection with, in response to or for the inducement of the payee's acquisition of the thing" for the purposes of s 134-5(1)(d) and s 134-10(1)(d). The result is that, provided all the other requirements are met, the payments will result in a decreasing adjustment for the manufacturer and an increasing adjustment for the dealer.

This seeks to redress the outcome of *AP Group* referred to above, whereby the characterisation of the payment as third party consideration resulted in GST payable by the dealer with no corresponding input tax credit that could be claimed by the manufacturer or the recipient of the supply (namely, in respect of fleet rebates and run-out model support payments). The increasing adjustment and decreasing adjustment have the effect of reducing the GST payable by the manufacturer while ensuring that the GST payable by the dealer is calculated on all of the consideration received in respect of the supply. This restores symmetry in respect of the GST payable and input tax credits claimable in respect of those incentive payment arrangements.

The Commissioner also published a ruling compendium in respect of GSTR 2014/1 on 1 October 2014. The compendium sets out the views of entities that commented on the contents of the ruling in its draft form (GSTR 2014/D1) and illustrates that there were very diverse opinions on the Commissioner's approach. Some commentators expressly welcomed the approach taken by the Commissioner on the basis that it represented "a positive step in simplifying the treatment of incentive payments for the automotive industry, which has been a 'grey area' since the introduction of the GST".[25] Others argued to the contrary, stating that the approach in the draft ruling was "inappropriate and does not support the GST system,"[26] "fails to provide support to an industry that has complied with the ATO view of the law"[27] and, if "a fundamental revision of the Ruling" was not possible, the draft ruling should have been withdrawn "and the matter referred to Law Design (or Treasury) to seek a legislative amendment … that is consistent with the broader GST framework".[28]

[23] Orme and Lin, n 16, p 21.

[24] Orme and Lin, n 16, p 21.

[25] See Issue No 3 of the compendium to GSTR 2014/1.

[26] See Issue No 16 of the compendium to GSTR 2014/1.

[27] See Issue No 17 of the compendium to GSTR 2014/1.

[28] See Issue No 33 of the compendium to GSTR 2014/1.

The public GST ruling, GSTR 2014/1 was finalised largely in the same form as the draft iteration with some additional guidance, so it is a reality that taxpayers in the motor vehicle industry are going to have to live with for the immediate future. However, given the scope of issues arising from *AP Group* that haven't been addressed by the Commissioner and the tension between the case law handed down in recent years, it seems inevitable that there are going to be further developments in this area. In the meantime, taxpayers can benefit from the Commissioner's arguably concessional treatment in GSTR 2014/1, his views in the DIS as well as the cases that continue to be relevant to the analysis of rebate and discount arrangements, including the *QIW* and the *Colgate-Palmolive* cases.

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