GST – THE CHANGES OPERATING FROM 1 JULY 2010

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1 INTRODUCTION

This paper discusses the significant legislative amendments in the GST law that will, in the main, operate from 1 July 2010. It also provides an overview of the amendments that are proposed to be implemented with effect from 1 July 2011 and 1 July 2012. The vast number and wide gamut of the amendments to the GST law are a result of the Government's announcements made in the May 2009 and May 2010 Budgets[1] following the recommendations of the Board of Taxation after its review of the legal administration of the GST[2].

The amendments are grouped under the respective Acts and Bills, as appropriate. Where the proposed amendments are not yet the subject of draft legislation, the relevant source documents are referred to. References to sections are to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("GST Act"), unless otherwise indicated.

2 TAX LAWS AMENDMENT (2009 GST ADMINISTRATION MEASURES) ACT 2010[3]

2.1 Four year time limit on entitlement to input tax credits

The following amendments (four year time limit on credit claims and decreasing adjustments for additional consideration) apply retrospectively to GST returns and assessments for GST lodged or issued from 7:30pm Eastern Standard Time on 12 May 2009 (2009 Budget night).

2.1.1 Four year time limit

Generally, under the attribution rules in the GST Act, input tax credits are attributable to the first tax period in which consideration is paid in relation to a supply, or when a tax invoice is issued in relation to a supply. However, there are certain exceptions to this rule.

Section 29-10(3) relevantly states the following:

> (3) If you do not hold a *tax invoice for a *creditable acquisition when you give to the Commissioner a *GST return for the tax period....
>
> (a) ...
>
> (b) the input tax credit (or part) is attributable to the first tax period for which you give to the Commissioner a GST return at a time when you hold that tax invoice. …"

Section 29-10(4) states:

> (4) If the GST return for the tax period referred to in paragraph (3)(b) states a *net amount that does not take into account an input tax credit attributable to that period:
>
> (a) ...

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[1] See Assistant Treasurer Press Release No. 042, '*Government Response to Board of Taxation Review of GST Administration*', 12 May 2009 and Assistant Treasurer Press Release No. 095, '*Further Reductions in GST Compliance Costs for Business*', 11 May 2010.

[2] See Board of Taxation, '*Review of the Legal Framework for the Administration of the Goods and Services Tax*', December 2008 and Board of Taxation, '*Review of the Application of GST to Cross-Border Transactions*', May 2010.

[3] *Tax Laws Amendment (2009 GST Administration Measures) Bill 2009* introduced to House of Representatives on 25 November 2009, introduced to Senate on 24 February 2010 and received Royal Assent on 24 March 2010.

(b) the input tax credit is attributable to the first tax period for which you give the Commissioner a GST return that does take it into account."

Consequently, in circumstances where a taxpayer has not held a tax invoice (notwithstanding that one may have been issued), or where the GST returns filed by a taxpayer have not taken into account an otherwise attributable input tax credit, there was no effective limitation period for the claiming of the input tax credit by the taxpayer. The spectre of unlimited claims for GST refunds was undoubtedly of some concern to the Commissioner of Taxation and Treasury, particularly, after a spate of claims lodged at the end of June 2008[4].

Under the amendments, s. 93-5 is inserted into the GST Act to impose a time limit of four years on the claiming of input tax credits. The four year period will commence on the due date of the GST return for the period in which input tax credits were attributable under s. 29-10(1) or (2) (the period in which consideration was paid or a tax invoice issued by the supplier).

First exception

There will be an important exception to the four year time limit to the extent that the entitlement arises from the Commissioner having taken steps to keep the period open by issuing a notice or requiring the taxpayer to pay an amount in respect of the period (e.g. by issuing an amended assessment). Specifically, s. 93-10(1) states:

Commissioner has notified you of excess or refund etc.

(1) You do not cease under section 93-5 to be entitled to an input tax credit to the extent that:

(a) the input tax credit arises out of circumstances that also gave rise to the whole or a part of:

(i) an amount, or an amount of an excess, in relation to which paragraph 105-50(3)(a) in Schedule 1 to the Taxation Administration Act 1953 applies; or

(ii) a refund, other payment or credit in relation to which paragraph 105-55(1)(b) in Schedule 1 to that Act applies; and

(b) the Commissioner gave to you the notice referred to in that paragraph not later than 4 years after the end of the tax period to which the credit would be attributable under subsection 29-10(1) or (2) of this Act.

Various explanations of how this first exception will work are provided in the Explanatory Memorandum, as follows (bolding is my emphasis):

1.10 However, entitlements will not cease where:

the Commissioner has issued a notice under section 105-50 or 105-55 of Schedule 1 to the TAA 1953 concerning refunds or additional liability and a credit arises from the circumstances of the taxpayer's refund or liability;

...

unless the taxpayer has not borne tax on the acquisition to which the credit relates.

And further:

1.12 ....Taxpayer's entitlements will also be preserved where the Commissioner has provided notice extending the claim for an amount and the input tax credit or fuel tax credit arises directly from the same circumstances.

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[4] Taxpayer Alert TA 2008/17, '*Claims for GST refunds beyond four years arising from the reclassification of a previously taxable supply as GST free*', 27 August 2008.

1. 23 For an input tax credit or fuel tax credit to meet this test it is not sufficient that the credit arise from the same business activity or the same tax period. Instead, it is necessary for the credit to arise from the same circumstances — that is, the same events and for the same reason — for which the additional payment is sought by the Commissioner from the taxpayer (see paragraphs 1.36 to 1.43 for more details). This would include where an input tax credit for an acquisition relating to a supply was treated as a financial supply despite being a taxable supply and the Commissioner has provided notice requiring payment of GST on the supply.

1.24 Input tax credits and fuel tax credits may fall within this exception even where they arise in different periods to the liability for which the Commissioner provides notice. However, where the notice is provided after entitlement to a credit has already ceased, the entitlement to the credit will not be restored.

Interesting issues arise for consideration with respect to the meaning of the expression in s. 93-10(1) of "the ... credit arises out of circumstances that also gave rise to the whole or a part of ... an amount., or an amount of an excess, in relation which paragraph 105-50(3)(a) ...applies". The expression apparently attempts to combine two kinds of relationships or interactions, in the one case with respect to the input tax credit, as it has to arise out of certain circumstances and, secondly, those circumstances must also give rise to the relevant amount. The use of the phrases "arises out of" and "gave rise to" suggest some causation with the circumstances being the central point of reference. The word "arise" is defined in *The Macquarie Dictionary*, 3rd edition, as "to come into being or action, originate or appear". The critical issue will be the proper characterisation and or parameters of the circumstances as the credit has to arise out of the circumstances, however broadly or narrowly described. Further, those same circumstances must also give rise to the relevant amount. It would appear that it may be easiest to start with the circumstances that give rise to the relevant amount (as the Commissioner will be issuing the notice requiring payment of an amount etc) and work backwards, to determine if the credit arises out of those circumstances.

The following two examples, also in the Explanatory Memorandum, provide some helpful insights as to how the first exception may be applied.

Example 1.1.

Sophie operates a business that is registered for GST, reporting monthly. In October 2006, she changed accountants and due to a mix up failed to provide a GST return or remit tax for that tax period. In May 2010, this omission was identified during an Australian Taxation Office (ATO) audit of Sophie's business. The Commissioner then provided Sophie with a notice requiring payment for the October 2006 tax period meeting the requirements of section 105-50 of Schedule 1 to the TAA 1953.

Following further discussions with the ATO, Sophie determines her net amount for the relevant tax period and lodges a return for the October 2006 tax period in November 2010. Sophie holds a tax invoice to establish her entitlement to input tax credits and is able to include the input tax credits that were attributable to this tax period in this net amount, despite entitlement typically ceasing after four years. This reflects that these input tax credits arise directly from the same circumstances as the notice — the failure to lodge. As Sophie had made significant acquisitions in this period, the relevant input tax credits exceeded her GST liabilities, making her net amount negative. Following lodgement, Sophie receives a refund from the Commissioner.

Example 1.2

LLE P/L is a property investment company that is registered for GST, reporting on a monthly basis. In January 2006, it sold a motel complex, treating the sale as an input taxed supply of residential premises. LLE P/L made a number of acquisitions related to this sale, including legal services attributable to the month of sale and valuation services in August 2005. LLE P/L also made a creditable acquisition related to a sale of commercial residential premises for which it did not claim any input tax credits.

In September 2009, LLE P/L is audited by the ATO. The auditors identify that the motel complex was a taxable supply of commercial residential premises. The Commissioner provides LLE P/L with a notice meeting the requirements of section 105-50 of Schedule 1 to the TAA 1953 in relation to the underpayment in January 2006 due to the treatment of the sale as input taxed.

> In November 2009, the Commissioner makes an assessment of LLE P/L's net amount for the November 2006 tax period. In working out the new net amount for this period, the input tax credits related to the legal costs may be taken into account. LLE P/L however, may not claim the credit for the valuation, as while it did arise from the relevant circumstances, more than four years had passed since the credit was attributable when the notice was issued. LLE P/L is also not entitled to the unrelated credit. This credit does not arise directly out of the matter for which the notice was issued.

In the first example, the circumstances are described as "the failure to lodge". Those circumstances gave rise to the Commissioner providing a notice requiring Sophie to lodge the GST return for the tax period that was overlooked. The input tax credits for the acquisitions in that period are treated as arising out of the same circumstances, being the failure to lodge and Sophie is allowed under the first exception to claim her credits, despite entitlement typically ceasing after four years.

In the second example, the relevant circumstances are the auditors treating the sale of the hotel complex as a taxable supply of commercial residential premises while LLE P/L had earlier treated the sale as input taxed. Note that the example also addresses the position with respect to a credit for an unrelated acquisition by stating that that does not arise directly out of the matter for which the notice was issued, as that credit related to a sale of commercial residential premises in respect of which the taxpayer did not claim any credits. In so doing, the example shows that the only credits that can be claimed under this first exception are quarantined to those specifically arising from the circumstances underpinning the notice. Undoubtedly, this boundary line will be tested in cases where taxpayers apportion their input tax credits, for example, in relation to overhead expenses and the issue may well turn on the extent to which the input tax credit arises out of the relevant circumstances.

The second example also reinforces the point that if more than four years has passed since the credit was attributable when the Commissioner issued the notice, then the credit cannot be claimed, notwithstanding that the credit arises out of the same circumstances. Effectively, therefore, the exception to the four year limitation only applies to the four year period prior to the date the Commissioner gives the notice.

The application of the first exception and in particular the effective four year limitation leading up to the date that the Commissioner gives the notice is likely to adversely impact taxpayers which make acquisitions several years in advance but overlook claiming those credits such as in long-term property development or mining and exploration projects. This is because the Commissioner may be in time to issue a notice for recovery of GST but the credits will not be able to be claimed where they are for acquisitions exceeding four years from the date of the Commissioner's notice. It is also likely to be an issue where the Commissioner takes considerable time to finalise an audit such that a notice for recovery of GST is, for example, issued just before the expiry of the four year statutory time period for recovery, but the acquisitions in respect of which the credits would want to be claimed under this exception are outside the four years from the date of the notice.

Second exception

There will also be an exception in circumstances where the Commissioner is satisfied there has been fraud or evasion. The second exception is intended to ensure there is some equity for the taxpayer, in light of the Commissioner's unlimited capacity to pursue liabilities that arise from fraudulent or evasive conduct. Accordingly, the input tax credit entitlement must arise out of circumstances that also gave rise to that conduct for the exception to apply. Curiously, taxpayers that, for example, receive an amended assessment for a GST amount due to fraud or evasion fare better, at least in terms of unlimited recovery of input tax credits, as there is no time limit referable to the date of issue of the Commissioner's notice.

Third exception

The third exception applies where the taxpayer provides a valid notice to the Commissioner to keep the period open under s. 105-55(1) of Schedule 1 to the *Taxation Administration Act 1953 (Cth)* ("TAA").

Taxpayers should be cautious, as the requirements for a valid notice have been applied strictly by the Commissioner in recent times[5].

2.1.2 Providing additional consideration under gross-up clauses

A new Division 133 was inserted to cover circumstances where a recipient of a supply is required to pay a supplier an additional amount of GST in respect of a supply under a contractual 'gross-up' clause, after the recipient ceases to be eligible to claim a corresponding input tax credit. Under the previous law, the payment would not necessarily give rise to an adjustment under Division 19, and after the introduction of the four year limit on claiming input tax credits (see above), would result in the recipient bearing the burden of the tax in this scenario. As such, a variation on the GST payable is likely to arise when the supplier has not correctly accounted for the GST or has engaged in fraud or evasion. Treasury considered the burden on the recipient in these circumstances to be inappropriate.

Under Division 133, when a recipient is required to pay additional GST under a gross-up clause, and is no longer entitled to an input tax credit in respect of the supply, a decreasing adjustment will be triggered that reduces the recipient's GST liability. The decreasing adjustment will be for the difference between the input tax credit entitlement that would have been claimed had the entire amount been included on the relevant tax invoice and the input tax credit actually claimed.

It should be noted that the decreasing adjustment will not be triggered where:

- the supplier is no longer required to remit the GST on the supply (i.e. if the Commissioner is outside the time limit for recovery of the tax); or

- the recipient underpaid the supplier for a reason that was not related to tax.

Where an adjustment is available under Division 19 or the new Division 133, the latter will apply.

As a practical matter, the new Division 133 requires taxpayers (and their advisors) to review their standard GST gross-up clauses and those of their respective suppliers to check when additional consideration on account of GST is required to be paid by the recipient to the supplier. This is because if there is a contractual obligation on the recipient to pay the supplier an amount of GST if the supply under an agreement is a *taxable supply*, but the supplier does not have to remit the GST to the ATO because the four year time period has expired, then the recipient is not able to claim a decreasing adjustment under Division 133. On the other hand, GST gross-up clauses drafted along the lines that a recipient is only required to pay the GST amount to a supplier if the supplier is *liable to pay* GST on a taxable supply under an agreement are compatible with the new Division 133.

It is noted that there is a definition of "additional consideration" in s.133-5(3). Relevantly, it states that to avoid doubt, additional consideration for an acquisition includes a part of the consideration for the acquisition that relates to the amount of GST payable on the taxable supply and at the time of the acquisition, the parties to the transaction under which the acquisition was made assumed was not payable. There may be difficulties surrounding the satisfaction of the latter part of the test, namely, what is the time of the acquisition, what is the position if more than two parties are involved in a transaction, how does one test that "the parties ... *assumed* [GST] was not payable" and, moreover, whether all the parties adopted the same assumption? Further, "assume" is defined in *The Macquarie Dictionary* to mean "to take for granted or without proof; suppose as a fact". It is not clear that this is the approach that most taxpayers take towards their GST compliance obligations.

2.2 Agency provisions

Under the current laws, common law agents are entitled to adopt simplified accounting practices under Sub-div 153-B of the GST Act. In particular, the subdivision provides that all taxable supplies and

[5] See MT 2009/1 Miscellaneous taxes: notification requirements for an entity under section 105-55 of Schedule 1 to the *Taxation Administration Act 1953.*

creditable acquisitions made by the principal to and from third parties will be treated as having been made by the intermediary. This allows the intermediary to issue tax invoices, remit GST and claim input tax credits in relation to the supplies and acquisitions it is taken to have made with third parties. The principal is, in turn, taken to have made supplies to, and acquisitions from, the intermediary.

The GST laws are limited by the fact that they only apply to common law agents; i.e. agents who have an authority to create legal relations between a principal and third parties[6]. This excludes a number of common commercial relationships between agents and other representatives, such as paying agents, billing agents and commission agents. The function of the amendments is to expand the simplified accounting procedures in Sub-div 153-B of the GST Act so as to make them available to all intermediaries who make or facilitate supplies and acquisitions to and from third parties on behalf of the principal. The intention of Treasury is to "reduce the compliance costs of GST accounting where paying agents, billing agents and other transaction facilitators are used by an entity"[7].

The Explanatory Memorandum provides examples of how the new law will apply to intermediaries at [3.16]:

> If a principal makes a taxable supply to a third party that is covered by a Subdivision 153-B arrangement, and the intermediary bills an amount to the third party customer on behalf of the principal, then the provision of the goods or services to the customer is taken as a taxable supply by the intermediary to the customer. Additionally, the principal is taken to make a taxable supply to the intermediary of the same thing. Any commission payable by the principal to the intermediary for the intermediary's services is accounted for in the value of the taxable supply made by the principal to the intermediary. GST is payable by the principal on 1/11th of this (reduced) value. The intermediary will be entitled to an input tax credit of an equivalent amount.

The amendments apply to taxable supplies and creditable acquisitions made by and to intermediaries that are attributable to tax periods commencing on or after 1 July 2010.

2.3 Gambling supplies to entities outside Australia

Special rules apply in relation to calculating the GST on gambling supplies. Broadly, rather than GST being applied in respect of each individual supply, it is applied on the gambling operator's margin – that is, the total amount wagered, less the 'total monetary prizes'. The total amount wagered excludes bets that are GST-free.

Under the current law, bets placed (or in GST terminology, "enjoyed") by entities outside Australia are usually GST-free[8]. Therefore, the monetary amount of those bets is deducted from the 'total amount wagered' when calculating the GST payable. On the Commissioner's view of the law, the amount of money paid out to entities outside Australia should be deducted from 'total monetary prizes', and the input tax credit entitlement of the gambling operator should be reduced accordingly.

However, there is a variation between the Commissioner's view and the literal reading of the relevant statute. The latter does not state specifically that prize money paid to entities outside Australia must be excluded from 'total monetary prizes' (though it does refer to other specific exceptions under s. 38-270 of the GST Act). The amendments will make this explicit. The re-drafting of s. 126-10(3) removes the reference to specific exceptions, so that the section states:

> (3) in working out the total monetary prizes for a tax period, disregard any monetary prize you are liable to pay, during the tax period, that relate to supplies that are GST-free.

These amendments come into force in respect of the tax period that commences on or after the April 2010 quarter.

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[6] *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644.
[7] Explanatory Memorandum [3.12].
[8] Under s.38-190(1) of the GST Act, item 2 or 3.

2.4 Recovering overpaid refunds

These amendments to s. 35-5 of the GST Act and equivalent provisions in the luxury car tax and fuel tax laws will apply in circumstances where the taxpayer incorrectly assesses its net amount at an amount less than zero and the taxpayer subsequently receives an overpaid refund from the Commissioner.

Under the previous GST law as set out in the TAA, the Commissioner treated overpaid GST refunds of a net amount as administrative overpayments and allocated the overpayment to the taxpayer's running balance account (RBA). A general interest charge (GIC) was then calculated on the taxpayer's deficit debt, as it appeared in the RBA.

The amendments modify this treatment so that if a refund is incorrectly paid to the taxpayer, it will be treated as an amount of GST that became due and payable at the time that it was paid to the taxpayer or applied against a tax debt. The overpayments will be subject to GIC from the date of overpayment. Set out below is the example illustrating the intended operation of these changes extracted from the Explanatory Memorandum:

> Example 5.1
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> Sarah lodges a BAS for the September 2008 quarter. The net amount for the tax period is –$700. As the net amount is less than zero the Commissioner pays her a refund of $700 under section 35-5 of the GST Act.
>
> Subsequently, the Commissioner makes a reassessment of Sarah's net amount for the tax period. The reassessed net amount is –$500.
>
> The Commissioner's reassessment results in an excess amount paid under subsection 35-5(1) of $200. The $200:
>
> - will be treated as if it were GST that became due and payable from the time the original refund was paid or applied;
> - is the relevant amount for which the Commissioner can demand payment under section 255-5 of Schedule 1 to the TAA 1953; and
> - is subject to the GIC under paragraph 105-80(2)(b) of Schedule 1 to the TAA 1953.

The changes apply from the start of the April 2010 quarter.

2.5 Interaction of associate provisions

No consideration

The GST treatment for supplies between associates had the effect of deeming a value of a supply for no consideration to be equal to the GST-inclusive market value of the supply, with the supplier liable to calculate the GST on that value and remit GST accordingly. What the provisions did not take into account is that the supply for no consideration may have been characterised as an input taxed supply or a GST-free supply, if consideration had been payable.

The new s. 72-25 will apply so that if a supply will be input taxed or GST-free under Division 72, that is how the supply would have been characterised had consideration been payable.

Further, the new s. 72-20 will apply to supplies between associates to ensure that:

- a supply for no consideration will be characterised as a sale or some other kind of supply, in the same way it would have been characterised had consideration been payable for the supply (s. 72-20(1)); and

- an acquisition will be characterised as having been made by sale or some other means, in the same way it would have been characterised had consideration been payable for the acquisition (s. 72-20(2)).

Exporting goods from Australia to an associate

Generally, exports from Australia are GST-free under subdivision 38-E of the GST Act if the supplier exports the goods from Australia within 60 days of the earlier of:

- the day on which the supplier receives any of the consideration for the supply; or

- the day that the supplier issues a tax invoice for the supply.

Where a supplier in Australia exported goods to an associate for no consideration, no consideration will be received and no invoice will be issued within a 60 day period. Consequently, the fact that no consideration was paid may, under the previous rules, have resulted in a supply being taxable, in circumstances where the supply would have otherwise been characterised GST-free.

Section 38-185(1) of the GST Act is amended to provide that an export of goods from Australia to an associate is GST-free. The current attribution rules in respect of associates will apply.

The associate amendments commenced on the date of Royal Assent (24 March 2010).

3 TAX LAWS AMENDMENT (2010 GST ADMINISTRATION MEASURES NO.1) ACT 2010[9]

3.1 GST adjustments for third party payments

A new Div 134 is inserted into the GST Act to specify the GST treatment where an entity that supplies things for resale (Payer) makes a payment to a third party who subsequently acquired those things (Payee). This arrangement is sometimes referred to as a third party rebate.

Under the previous GST law, a third party rebate did not give rise to an increasing or decreasing adjustment, as it did not affect the amount of consideration payable either between the payer and the recipient of its supply (Reseller) or the consideration payable by the Payee to the Reseller. If the Payee is registered, it will not be precluded from claiming a full input tax credit in relation to the amount paid to the Reseller (if it was a creditable acquisition), notwithstanding that it received a rebate from the Payer.

The amendments:

- assist the Payer by allowing it to make a decreasing adjustment where it has indirectly reduced the amount received from the Reseller in respect of a taxable supply by paying out a rebate further down the supply chain in respect of the same supply;

- require the Payee who makes a creditable acquisition of a thing from the Reseller, and then receives a third party rebate from the Payer, to make an increasing adjustment to reflect a reduced input tax credit entitlement; and

- require the Payer to issue a third party adjustment note within 28 days of becoming aware of the adjustment note or of having received a request from the Payee.

The amendments also apply where there is more than one Reseller interposed between the Payer and the Payee in the supply chain.

The amendments will come into effect on 1 July 2010.

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[9] *Tax Laws Amendment (2010 GST Administration Measures No.1) Bill 2010* introduced to House of Representatives on 10 February 2010, introduced to Senate on 10 March 2010 and received Royal Assent on 24 March 2010.

3.2 Attribution of input tax credits

Under s. 29-10(4) of the GST Act, input tax credits ceased to become attributable to a tax period where they are not taken into account in the GST return for that tax period[10]. The input tax credits were attributable to the first tax period in which they are taken into account by a taxpayer in a GST return, and a tax invoice was held by the taxpayer.

There will be no substantive amendments to the attribution of input tax credits under the GST Act, but certain ambiguities in the drafting that have caused concern for some taxpayers have been addressed.

It should be noted that these provisions interact with the four year limit on the claiming of input tax credits, discussed above.

4 TAX LAWS AMENDMENT (2010 GST ADMINISTRATION MEASURES NO.2) BILL 2010[11]

4.1 GST groups and GST joint ventures

One of the most promising areas of improvement announced by the Government in the 2009-10 Budget was in respect of GST groups and GST joint ventures, in terms of both grouping and de-grouping provisions and the introduction of indirect tax sharing agreements that will allow entities to minimise their ongoing GST and other indirect tax exposures when they leave a GST group or GST joint venture.

4.1.1 Amendments to rules on grouping

Under the current law, members of a GST group are unable to leave the group on any day but the first day of the tax period in which the entity ceases to be eligible for membership in the GST group. For an entity being sold out of a group, this rule applies regardless of when the transfer of ownership of the entity is actually effected. Consequently, entities that intend to leave a group in the midst of a tax period have to effect their GST departure early, giving rise to an interim period in which the entity has left the group for GST purposes, but may still enter transactions with the other members in the same way. As the GST consequences of those transactions are no longer disregarded during that interim period, this administrative limitation can give rise to significant GST exposures. It also gives rise to an added compliance burden, as an entity that has previously allocated its GST reporting obligations to the representative member of the group is required to lodge business activity statements on its own account.

Similarly, under the current rules, an entity cannot join a GST group until the first day of an entire tax period in which that entity is eligible to be a member. This gives rise to the same GST exposures and compliance burdens in circumstances where legal ownership of the entity has been transferred into the group, but the administrative limitation prevents the immediate forming of a GST group or joint venture.

The new rules amend Div 48 of the GST Act so that entities can form, change and dissolve a GST group at any time during a period. In addition, rather than being required to apply to the Commissioner, entities will be permitted to self-assess their grouping status. The representative member will be required to notify the Commissioner in an approved form by a prescribed date. (If notification isn’t received by the prescribed date, express approval from the Commissioner is required.)

Analogous amendments will be made to allow entities to self-assess their eligibility to form, change and dissolve a GST joint venture at any time during a tax period.

The amendments will apply in relation to net amounts for tax periods starting on or after 1 July 2010.

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[10] Where those input tax credits would otherwise be attributable to the period; i.e. consideration has been received or a tax invoice issued by the supplier.
[11] Introduced to House of Representatives on 18 March 2010.

4.1.2 Indirect tax sharing agreements

The current law provides that each member of a GST group is jointly and severally liable to the Commissioner for any amount of GST payable by the representative members (including amounts that are referable to the activities of other members of the group)[12].

Under amendments to the TAA, a member of a GST group will be permitted to enter into an indirect tax sharing agreement (ITSA) with a representative member. The function of the ITSA will be to limit the GST and other indirect tax liabilities of the parties to the ITSA for tax periods in which they are members of the group to a specified "contribution amount". It will also allow an entity to leave a GST group clear of any GST liabilities for the period in which it departs the group.

Specifically, a new s. 444-90(1A) will be inserted into Schedule 1 of the TAA and will state:

> *Indirect tax sharing agreements*
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> (1A) Despite subsection (1), if:
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> (a) before the *representative member of the group is required to give to the Commissioner a *GST return for a *tax period, an agreement (the indirect tax sharing agreement) has been entered into between:
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> (i) the representative member; and
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> (ii) one or more other *members of the group (the contributing member); and
>
> (b) a particular amount (the contribution amount) could be determined under the indirect tax sharing agreement for each contributing member in relation to that tax period; and
>
> (c) the contribution amounts for each of the contributing members under the indirect tax sharing agreement represent a reasonable allocation among:
>
> (i) the representative member; and
>
> (ii) the contributing members;
>
> of the total amount payable, under *indirect tax laws, for which the members of the group would be jointly or severally liable under subsection (1) in relation to that tax period;
>
> then:
>
> (d) if the contributing member leaves the group before the representative member of the group is required to give to the Commissioner a GST return for that tax period, and subsection (1B) applies—the contributing member is not liable under subsection (1) in relation to an indirect tax amount relating to that tax period; or
>
> (e) otherwise—the contributing member's liability under subsection (1) in relation to that tax period is not to exceed that contribution amount.

There are numerous qualifications to the above provision. These include a further provision as to when the subsection above applies (see proposed s. 444-90(1B)) and, in addition, numerous provisions as to when the above subsection does not apply. For example, s. 444-90 (1C) states that subsection (1A) does not apply if the ITSA was entered into as part of an arrangement and a purpose of the arrangement was to prejudice the recovery by the Commissioner of the indirect tax amount. Another significant qualification to the validity of an ITSA is s. 444-90(1D) which broadly states that subsection (1A) does not apply if the Commissioner gives the representative member of the GST group written notice requiring the production

[12] Refer to s. 444-90(1) of Schedule 1 to the *Taxation Administration Act 1953*.

by the representative member of a copy of the agreement in the approved form within 14 days after the notice is given, and the Commissioner does not receive a copy of the agreement by the time required.

The following are some important features of ITSAs contemplated by the amendments:

- In order to rely on the ITSA in respect of a GST liability, it must have been "entered into" prior to the date on which the GST becomes payable.

- The contributing amounts for each of the members of a GST group must "represent a reasonable allocation of their share of the representative member's total liabilities under each *indirect tax law in relation to that period". Treasury has flagged that the ATO will publish guidelines in relation to what constitutes a "reasonable allocation".

- The ITSA will not apply if it was entered into for the purpose of prejudicing the Commissioner's ability to recover an amount of tax. Again, it is expected that the ATO will publish guidelines as to this test, namely, the kinds of arrangements that are contemplated and the factors that may be taken into account in determining whether an arrangement had a purpose of prejudicing recovery. The entering into of an ITSA in itself would not be seen as an arrangement to prejudice recovery by the Commissioner.

- An entity leaving a GST group must "pay" its contribution amount for the period in which it leaves to the representative member, in order to discharge its GST liability for that period. The leaving entity will continue to be responsible for amounts payable in respect of the earlier periods in which it was a member of the group, to the extent of its contribution amount. It will also be responsible for any increasing or decreasing adjustments that arise after it has left the GST group, provided it made the supplies or acquisitions that led to the adjustments.

It is expected that the ATO guidance for ITSAs will be similar to that provided in the *ATO Receivables Policy*[13] with respect to direct tax sharing agreements. Based on that ATO guidance, it is unlikely that the ITSA would have to specify a particular amount for each contributing member when it is entered into. It could show each contributing member's contribution amount as a fixed or variable percentage of the group liability or an amount based on notional contributions to net amounts or some other formula. While it is unclear from the terms of the proposed legislation, the contribution amounts are likely to be based on net amounts that are calculated to be greater than zero to reflect liabilities owing to the Commissioner, not refunds and credits owing by the Commissioner to the contributing member. Analogous to the position regarding direct tax sharing agreements, it is also expected that the approved form of the ITSA that would have to be provided by the representative member if the Commissioner issued a notice requiring a copy of the ITSA would have to specify the exact contribution amount for each contributing member for the relevant liability[14] payable under indirect tax laws. In this regard, "indirect tax law" in the TAA is defined by reference to s.995-1 of the *Income Tax Assessment Act 1997* (Cth) which in turn refers to, amongst other things, "GST law". That expression is defined in s. 195-1 of the GST Act to relevantly mean the GST Act and the TAA. It follows that any applicable general interest charge ("GIC") and administrative penalty (which are imposed under the TAA) should also be covered in the ITSA.

Some of the concerns with respect to the provisions in the Bill for ITSAs, which are still outstanding from the submissions made to Treasury, include:

- whether the representative member can also be a contributing member under the ITSA so as to secure a clean exit if it were to leave the GST group?

- whether an entity leaving the group must actually pay an amount, to satisfy s. 444-90(1B)(b), even though its contribution amount may be nil because it, for example, is in a net refund position? It is noted that the ATO has definite views about the meaning of "pay" in the context of direct tax

[13] ATO Receivables Policy, Chapter 35 Collection of Consolidated Group Liabilities, 24 July 2008.
[14] ATO Receivables Policy, Chapter 35 Collection of Consolidated Group Liabilities, 24 July 2008, paragraph 74.

sharing agreements (a ‘mere book entry’ is not considered a form of payment)[15] and, further, again in the context of direct tax sharing agreements, the ATO considers that the leaving entity (not the purchaser entity) must be the payer and the payee must be the head company (not the vendor)[16].

Analogous rules for ITSAs will apply in respect of GST joint ventures. Because the parties are not necessarily related entities in GST joint ventures, as is the case for members of a GST group, there is likely to be even a greater take up of ITSAs by GST joint ventures. It is anticipated that over time, ITSAs will become a standard commercial agreement and inevitably find their way into many data rooms for significant M&A transactions.

4.2 Simplification of tax invoice requirements

The Commissioner will take a more principle based approach to tax invoice requirements. Rather than being required to adhere to the strict criteria currently in force, it is proposed that a tax invoice will be a document that “contains enough information to enable the following to be clearly ascertained”:

- the supplier’s identity and ABN;
- the recipient’s identity or ABN – applies only if the supply is $1,000 or more (or a higher amount if specified in the regulations);
- what is being supplied, including the quantity;
- the price of the supply;
- the extent to which each supply is a taxable supply;
- the date of issue;
- any GST payable in respect of each supply;
- any other matters specified in the regulations; and
- that the entity that issued the document clearly intended it to be a tax invoice.

Under s. 29-70(1A), if a recipient has received two documents from the supplier and:

- one of the documents is an invoice; and
- together, the documents comply with the requirements for a valid tax invoice;

the Commissioner may treat both documents together as a tax invoice.

Further, the Commissioner has a discretion under s. 29-70(1B) to treat any document or combination of two documents as a tax invoice, even in circumstances where the requirements in ss. 29-70(1A) and (1B) have not been met.

In addition, there are proposed concessions for documents that would be tax invoices if they contained information from which the recipient’s identity or ABN could be readily determined *and* contain sufficient information to clearly show the identity of the GST group, the representative member or another member of the GST group. However, this concession only applies if the representative member of the GST group is entitled to claim an input tax credit for the acquisition.

It should be noted that the less prescriptive approach to tax invoice requirements has not been welcomed by everyone, particularly suppliers of tax and accounting software. Indeed, there are concerns as to how

[15] ATO Receivables Policy, Chapter 35 Collection of Consolidated Group Liabilities, 24 July 2008, paragraph 164 and 166.
[16] ATO Receivables Policy, Chapter 35 Collection of Consolidated Group Liabilities, 24 July 2008, paragraph 164 and

"it can be clearly ascertained from the document that it was intended to be a tax invoice", albeit this is an objective test. It is also anticipated that the new rules will add an administrative burden by creating a possible need for businesses to collect and store various documents such as packing slips, business cards, quotes and envelopes, to constitute a tax invoice. However, it should be remembered that suppliers that comply with the existing GST law will not be required to make any changes to their systems.

The amendments will apply to net amounts for tax periods commencing on or after 1 July 2010.

4.3 Adopting general rulings system for indirect taxes and excise

Currently, there is no legislative framework for rulings in relation to indirect taxes, and the Commissioner administers the system under his general powers of administration of indirect taxes. It is proposed to harmonise the rulings regimes by extending the scope of the general rulings system to encompass indirect tax rulings. The objective is to achieve consistency across the taxes and to simplify the law.

The following changes to the way indirect tax rulings are dealt with should be noted.

What is a public indirect tax ruling?

Previously, all of the Commissioner's written publications on the interpretation of indirect tax laws constituted public indirect tax rulings, with the exception of private GST rulings. This included fact sheets, guides and other information provided on the ATO website.

Once the amendments come into force from 1 July 2010, only published written publications labelled 'public ruling' will be public rulings for the purposes of the rulings system and legally binding on the Commissioner.

Objections

Previously, there was no inherent right to object to a private GST tax ruling. Taxpayers were required to obtain an assessment from the Commissioner and lodge an objection against the assessment accordingly.

The general rulings system includes a right of objection which will extend to private GST rulings (under s. 359-60(1) of Schedule 1 to the TAA).

Product and class rulings

Under the proposed changes, product and class rulings can be issued in respect of GST.

Other features of the general rulings system that will apply to indirect taxes are listed at paragraph 2.12 of the Explanatory Memorandum as follows:

- "the Commissioner is able to apply the law if it is more favourable than a ruling;
- public rulings can be made on any matter involved in the application of a provision, including matters relating to administration, procedure, collection and ultimate conclusions of fact;
- private rulings may cover anything involved in the application of the provision, including valuations. The Commissioner may charge for a private ruling on a valuation issue;
- if a taxpayer has applied for a private ruling and the Commissioner has not made the ruling or declined to make the ruling within 60 days, then the applicant can issue a written notice requiring the Commissioner to make the ruling. If the Commissioner does not make the ruling or declines to rule within 30 days, then the taxpayer has an objection right;
- the Commissioner may rely on information from other sources, provided the Commissioner tells the applicant what the information is, and gives them a reasonable opportunity to respond before making the private ruling; and

- the Commissioner can make assumptions about a future event or other matter for a private ruling, provided the Commissioner informs the applicant of the assumptions and gives the applicant a reasonable opportunity to respond."

There will be a number of specific rules that apply only to indirect tax rulings:

- Oral rulings - Oral rulings will not be available in respect of indirect taxes.
- End date - The current law for indirect tax rulings provides that where the Commissioner does not specify an end date, the ruling will continue to apply until it is withdrawn or replaced by the Commissioner. This rule will continue to apply to private indirect tax rulings, notwithstanding that under the general rulings system, if the Commissioner does not provide an end date, the ruling will cease to apply at the end of the income year or accounting period in which it started to apply.
- Revised rulings - Under the general rulings system rules, time limitations are placed on the Commissioner's ability to issue or revise a ruling in respect of a scheme, if the scheme has been or is in the process of being carried out. The Commissioner will have greater flexibility in respect of revising indirect tax rulings, and will be authorised to do so at any time.
- Trustees - In contrast to the general rulings system, private indirect tax rulings issued to a trustee of a trust will not apply to the beneficiaries of the trust.

The amendments will take effect from 1 July 2010. Public and private indirect tax rulings in force immediately prior to that date will remain valid.

5 MAY 2010 BUDGET ANNOUNCEMENTS WITH EFFECT FROM 1 JULY 2012

5.1 GST cross-border transactions

The Government will implement *all* the recommendations of the Board of Taxation from its *Review of the application of GST to cross-border transactions*[17], with effect from 1 July 2012[18]. Broadly, according to the Budget Paper, the changes are intended "to significantly reduce the number of non-residents who are unnecessarily drawn into Australia's GST system, through limiting the connected with Australia provisions; expanding the compulsory reverse charge provision; extending the GST-free rules for cross-border supplies; and removing the need for some non-residents to register".

As can be seen from the list in Appendix A[19], the proposed changes are significant. That, however, is not an excuse for Treasury to put off the start date of these changes until 1 July 2012. Taxpayers and their advisors must decide, in some cases in respect of current structuring, whether to proceed under the current laws with a view to revisiting again in 2 years' time or to postpone if possible certain structuring until the new laws are introduced.

5.2 Financial supply provisions

The Government will amend the financial supply provisions of the GST law to clarify the operation of the legislation and reduce compliance and administrative costs, particularly for many small businesses, with effect from 1 July 2012. "The reforms include increasing the financial acquisitions threshold from $50,000 to $150,000 of input tax credits; delivering compliance savings for many more small businesses; protecting the GST base by reducing opportunities for businesses to inappropriately take advantage of

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[17] The Board of Taxation, Review of the Application of GST to Cross-Border Transactions – A Report to the Assistant Treasurer, February 2010.
[18] Budget Measures, Budget Paper No. 2 2010-11, 11 May 2010.
[19] The Board of Taxation, Review of the Application of GST to Cross-Border Transactions – A Report to the Assistant Treasurer, February 2010, pages 63-65.

the reduced input tax credit concessions by bundling services;[20] and allowing small businesses accounting for GST on a cash basis to claim input tax credits upfront in relation to hire purchase arrangements".

5.3 GST margin scheme

The Government will restructure the margin scheme provisions to clarify and simplify the current provisions, with effect from 1 July 2012. In adopting this course, the Government has seemingly blended two out of the three different options that it was canvassing, namely, the replacement of the entire legislative framework with a clear set of principles or the option of further minor technical amendments to the GST margin scheme rules. However, it is clear that the Government is not pursuing the third option which centred on the replacement of the GST margin scheme rules with a notional input tax credit regime. The Government will also make a minor technical amendment to ensure that a valuation can be obtained for the purposes of using the margin scheme for subdivided land.

5.4 Sale of boats for export within 12 months of delivery

The Government will allow eligible supplies of boats used for recreational purposes to be GST-free if the boats are exported from Australia within 12 months, with effect from 1 July 2011(note that this is a different start date to the other measures which are 2012). The current limit is 60 days.

5.5 GST and cross-border transport supplies

The Government will make a number of minor revisions to its 2009-10 Budget measure that reduces GST compliance costs for businesses involved in the domestic transport of exported and imported goods, to ensure that the place of consignment will always be determined by the place of delivery in the principal contract. The measure will also ensure that ancillary services to the international transport of goods receive the same GST treatment as the transport supply that they facilitate.

See Assistant Treasurer Press Release No. 031, '*Bill on GST Administration of Cross-Border Transport Open for Consultation*', 26 February 2010. The Exposure Draft legislation is available at http://treasury.gov.au.

The changes will take effect from the date of Royal Assent.

5.6 GST compliance program

The Government will provide $337.5 million over four years to the ATO to fund additional activities that promote voluntary GST compliance and provide a level playing field for Australian businesses. It is intended to address issues relating to fraudulent GST refunds, systematic under-reporting of GST liabilities, non-lodgement of GST returns and non-payment of GST debts.

The funding will be provided over four years from 2010-11.

6 OTHER CHANGES POSTPONED TO 1 JULY 2011

The Government announced in its Budget for 2010-2011 under the heading of "Government response to Board of Taxation report: minor changes" that it will make further minor revisions" to its 2009-10 Budget measures in response to the Board of Taxation's recommendations from its review of the legal framework for the administration of the GST. "These measures will remove unintended policy outcomes and ensure

[20] See also Taxpayer Alert TA 2010/1 *GST - interposing an associated 'financial supply facilitator' to enhance claims for reduced input tax credits for expenses incurred in the course of a company takeover.* By virtue of the proposed start date of 12 April 2012 for the measure announced in the 2010-2011 Budget, there are further uncertainties as to the purport of TA 2010/1 and the action, if any, that the ATO will initiate with respect to such arrangements.

that the reforms achieve their maximum effectiveness in reducing compliance costs, streamlining the provisions and removing anomalies in the GST administrative framework". While it is not clear, presumably these changes will have a start date of 1 July 2011.

Under the same heading of "minor changes", the Government reiterated that the start date for the following components of the 2009-10 Budget measures have been revised to 1 July 2011[21]. It had earlier foreshadowed the postponement of these changes (which are far from "minor") in a press release of the Assistant Treasurer issued on 22 January 2010.

- adopt the income tax self assessment regime for indirect taxes and refresh the period of review;
- reform the change of use adjustments;
- allow adjustments for pre-registration acquisitions;
- clarify the treatment of tax law partnerships;
- simplify the GST grouping membership interest rules and allow grouping of non-operating holding companies; and
- introduce a reverse charge for supplies of going concerns and farmland.[22]

There does not appear to be a Government list of measures, previously advised in the Budget for 2009-2010 and which are now not being pursued. However, working backwards from the Government's announcements in the Budget for 2009-2010, it appears that the Government no longer supports the Board's recommendation that legislation be introduced in order that "recipients and suppliers should be able to rely on each other's rulings in relation to the tax status of supplies between them, where they agree to provide their rulings to each other for this purpose"[23] In addition, no further mention has been made of the Board's recommendation that "taxpayers be given the option to treat business to business transactions as taxable (if it is impossible to know the correct characterisation at the time of entering into the relevant transaction)". This recommendation was initially supported by Government and was to take effect from 1 July 2010[24].

14 May 2010

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[21] Budget Measures, Budget Paper No. 2 2010-11, 11 May 2010.
[22] See Treasury Discussion Papers re Implementation of the recommendations of the Board of Taxation's review of the legal framework for the administration of the GST, 10 June 2009, for a discussion of what those measures may entail. For example, chapter 2.8 addresses the reverse charge mechanism and GST free farm land supplied for farming.
[23] See Government Response to Board of Taxation Review of GST Administration, Media Release of Assistant Treasurer No. 042, 12 May 2009, Attachment A, recommendation 18, where this measure was supported with a proposed start date of 1 July 2010.
[24] See Government Response to Board of Taxation Review of GST Administration, Media Release of Assistant Treasurer No. 042, 12 May 2009, Attachment A, recommendation 12, where this measure was supported with a proposed start date of 1 July 2010.

Appendix A – List of Recommendations[25]

Recommendation 1: The GST law should be amended to limit the application of the connected with Australia provisions for the supplies by a non-resident of services and intangibles

Supplies of services and intangibles by a non-resident that are done in Australia should not be connected with Australia if:

- the supply is made to a business that has a presence in Australia that is registered for GST; and
  - the non-resident supplier has no business presence in Australia; or
  - the non-resident supplier has a business presence in Australia but does not use that business presence in making the supply.

Recommendation 2: The GST law should be amended to limit the application of the connected with Australia provisions for the supply of goods by a non-resident

Supplies of goods by a non-resident should not be connected with Australia if:

- the supply is made to a business that has a presence in Australia that is registered for GST; and
  - the non-resident supplier has no business presence in Australia; or
  - the non-resident supplier has a business presence in Australia but does not use that business presence in making the supply.

Recommendation 3: The GST law should be amended to limit the application of the connected with Australia provisions for certain supplies of goods within Australia between non-residents

Supplies of goods that are already in Australia between non-residents who carry on their enterprise outside Australia would not be connected with Australia if the non-resident recipient of the supply continues the underlying lease of those goods to a business that has a presence in Australia that is registered for GST.

Recommendation 4: The GST law should be amended to expand the existing compulsory reverse charge provisions to include goods

The existing compulsory reverse charge provision (Division 84) should be broadened to complement changes to the connected with Australia rules.

Recommendation 5: The GST law should be amended to allow supplies made to a non-resident but provided to a registered business in Australia or employee or office holder to be GST-free

A supply of services or intangibles that is made to a non-resident should be GST-free in circumstances where the supply is provided to:

- a registered business in Australia;
- an employee or office holder of a registered business in Australia who is acting in that capacity; or
- an employee or office holder of an unregistered non-resident business who is acting in that capacity and the acquisition by that non-resident is for a fully creditable purpose.

Recommendation 6: The GST law should be amended to allow supplies of warranty services made to a non-resident but provided to an Australian warranty holder to be GST-free

The board recommends that the supply of warranty services (including replacement parts) to an unregistered non-resident warrantor be GST-free if the goods were:

[25] The Board of Taxation, Review of the Application of GST to Cross-Border Transactions – A Report to the Assistant Treasurer, February 2010, pages 63-65.

- supplied under a warranty agreement; and
  - the goods were subject to GST either as a taxable supply or a taxable importation; or
  - the goods were GST-free or not subject to GST (for example, low value importations).

Recommendation 7: The GST law should be amended to expand the non-resident agency provisions so that they apply more broadly than to common law agency relationships

The non-resident agency provisions should be expanded to allow a non-resident without a business presence in Australia to appoint a resident commission agent. The non-resident and the resident commission agent would both have to agree for the agency provisions to apply.

Recommendation 8: The GST law should be amended to remove the requirement for non-resident registration under the agency provisions

Amend the GST law to remove the requirement for non-residents to register for GST if the only taxable supplies by the non-resident are made through one or more resident agents.

Recommendation 9: The GST law should be amended to remove the requirement for non-residents to register if they only make GST-free supplies

Non-residents making only GST-free supplies should not be required to register for GST. However, to the extent that the non-resident also makes other supplies that are not GST-free, then the GST-free supplies should count towards the GST registration threshold.

Recommendation 10: The registration process for non-residents should be streamlined

Non-residents should be able to be registered for GST only (if they are not entitled to an ABN) by providing the following evidence:

- documentation to show that the entity is registered with an ASIC equivalent; and
- a letter issued by the revenue authority of a comparable taxing regime that the entity exists in their records and that the entity carries on an enterprise.

Recommendation 11: A direct refund system is not required at this time

While a direct refund system is not required at this time the Board believes this issue should be reviewed after the Board's other recommendations have been implemented and operational for an appropriate period of time.

Recommendation 12: Options for calculating the transport and insurance cost to include in the value of taxable importations should be introduced

The Government should allow all GST registered importers to calculate the transport and insurance costs as the actual amount paid or payable, or alternatively, use an uplifted percentage or predetermined rates.

Recommendation 13: The low value importation threshold of $1,000 is appropriate

The Board is of the view that it is not administratively feasible to try to bring non-resident supplies of low value goods and services into the GST system at this time.

Recommendation 14: The Commissioner should improve taxpayer awareness and education to address the circumstances that no entity is entitled to claim back the GST on the importation of goods

The Commissioner should ensure that this issue is avoided through improved taxpayer awareness and education that specifically address circumstances that no entity is entitled to claim back the GST on the importation and provide guidance as to how this can be avoided.