

Chapter 3

Schedule 2 – Restriction on GST refunds and time limits for recovery and refund of indirect tax

Introduction

3.1 Schedule 2 of the bill amends the *Taxation Administration Act 1953* (TAA 1953) to correct a deficiency in the goods and services tax (GST) refund restriction provisions. The measure also addresses deficiencies in the four-year time limit on indirect tax and fuel tax credit related liabilities and entitlements to refunds related to indirect tax and fuel credits and ensures that they apply as intended.

Overview

3.2 Under section 105-65 of Schedule 1 to the TAA 1953 (restriction on refund provisions), if a business overpays GST on a sale to a customer then the GST may be refunded to the business only if the business has first refunded the overpaid amount to the affected customer. This is because it is the customer who is intended to bear the cost of the GST. Without the restriction on refund requirement, there is a potential for a windfall gain to arise to businesses that receive the refund of GST but have not borne the incidence of the tax.

3.3 In the case of business-to-business transactions, the Commissioner is not required to refund overpaid GST because the purchasing business is potentially entitled to input tax credits to offset the GST included in the price of its acquisition. A discretion exists so that, for example, in business-to-business transactions, the Commissioner may refund overpaid amounts if the supplier can demonstrate that they have first reimbursed the registered recipient of a supply for the amount of GST included in the price and the Commissioner considers it reasonable in the circumstances.

3.4 The Federal Court of Australia in *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159 (KAP Motors) held that a taxpayer that had overpaid GST on a motor vehicle holdback payment need not first reimburse their customer for this amount before seeking a refund from the Commissioner because the transaction resulting in the overpayment was not a 'supply' for GST purposes.

3.5 The decision in KAP Motors also highlighted a deficiency in the operation of the rule imposing a four-year time limit on indirect tax liabilities and entitlements to refunds. While generally refunds can only be claimed and tax recovered within four years, the relevant provisions may not apply in all circumstances as intended.

3.6 Under the current provisions, the four-year time limit on recovery of liabilities by the Commissioner may not apply in situations in which a taxpayer received a refund in relation to GST and it is later determined that the taxpayer was entitled to a

lesser refund in relation to GST for the relevant tax period. Similarly, the four-year time limit on refunds may not apply in situations where a taxpayer has overstated their tax liability for the relevant tax period to which the refund relates.¹

Proposed amendments

3.7 Item 17 repeals section 105-65 of Schedule 1 of the TAA and replaces it with a new section. The impact of the new section is that the Commissioner need not refund an overpaid GST amount where no supply of goods occurred and either the Commissioner is not satisfied that the taxpayer has first reimbursed the person to whom the supply was made, or the recipient of the goods or services was registered for GST purposes or required to be registered for GST purposes. Item 18 requires the amendment made by Item 17 above applies on or after 1 July 2008.

3.8 The amendments seek to ensure that the restriction on providing refunds of GST applies to situations in which transactions have been treated incorrectly as taxable supplies to any extent. This includes where a taxpayer has remitted GST on transactions for which there was no supply. This reinstates the approach taken by the Commissioner prior to the decision in KAP Motors and overcomes the identified deficiency in the law on or after 1 July 2008.

3.9 The amendments also ensure that the four-year time limit on recovery of liabilities applies in situations in which taxpayers were entitled to a refund in relation to GST, wine equalisation tax, luxury car tax or net fuel amounts for the relevant tax period to which the liability relates. In relation to the four-year time limit on refunds, these amendments ensure that the time limit applies in situations where taxpayers have overpaid an amount of GST, wine equalisation tax, luxury car tax or net fuel amounts for the relevant tax period to which the refund relates.

3.10 The amendments aim to restore the intended operation of the four-year time limit and ensure that the law provides certainty for taxpayers, allowing them a reasonable period to finalise their affairs knowing that, other than in cases of fraud or evasion, their tax position will not change after that time.²

Issues

3.11 The committee received one submission on schedule 2 of the bill. The Institute of Chartered Accountants in Australia argued that schedule 2 should be amended to correct drafting errors and address defects in the framework of the refund and the time limitation provisions.

1 Revised Explanatory Memorandum, pp 13-14.

2 EM, pp 14-15.

Refund provisions

3.12 The Institute argued that section 105-65 does not contain any statutory direction as to the matters to be taken into account by the Commissioner to deny a refund that is otherwise properly payable. The Institute suggested that it would assist administration and promote certainty if the provision contained matters that would be taken into account in determining whether the discretion to allow a refund ought to be exercised.³

3.13 The Institute also argued that the administration of the refund would be better served if the legislation provided for an exclusive code for refunds of overpaid GST and indirect tax.

The clear inference of the decision in KAP Motors is that Subdivision 105-C does not represent an exclusive code and that common law rights of refunds persist to the extent that the legislation does not preclude that right.⁴

3.14 The Institute submitted that the Explanatory Memorandum, in particular paragraphs 2.3 and 2.4 (discretionary power of the Commissioner), contains a number of statements that may give rise to some doubt as to the intended operation of section 105-65 and that it should be more accurately expressed.⁵

Time limitation provisions

3.15 The proposed subsection 105-50(2) proposes to treat as no longer recoverable, an amount paid to a taxpayer that exceeds the amount the taxpayer was entitled to be paid, if it has not been subject to a relevant notice from the Commissioner four years after the excess became payable. The Institute argued that the four-year time limit ought to expire four years after the overpayment – in this way the four year limit for an overpayment of a refund will coincide with the underpayment of a positive net amount.⁶

3.16 The Institute further argued that the law should require that the Commissioner specify the amount of the underpayment or overpayment, the tax periods and the particular of the items in question (subsection 105-50(3)). The Institute suggested that the existing terminology without any clarification creates uncertainty as to when a taxpayer's affairs reach finality.

3.17 The Institute suggested that that the proposed amendment to subsection 105-55(2) should clarify whether the 'refund' that is claimed is the overpayment of a positive net amount or an overpayment of GST on a supply. The Institute further argued that the taxpayer ought to be required to specify the amount of the

3 The Institute of Chartered Accountants, *Submission 1*, Appendix B, p. 2.

4 The Institute of Chartered Accountants, *Submission 1*, Appendix B, p. 2.

5 The Institute of Chartered Accountants, *Submission 1*, Appendix B, pp 3-5.

6 The Institute of Chartered Accountants, *Submission 1*, Appendix B, p. 5.

overpayment, the tax period and the particularity of the overpayment within the four year period (subsection 105-55(3)).⁷

3.18 The Institute submitted that the Explanatory Memorandum, for the reasons set out above, fails to fully explain the impact and the context of the time limitation in sections 105-50 and 105-55.⁸

Committee comment

3.19 The committee considers that Schedule 2 addresses deficiencies related to the restriction on GST refunds and time limits for recovery and refund of indirect tax. The committee believes that the proposed changes reinforce the original intent of the GST refunds policy – namely, that a refund of overpaid GST will only be made where the customer is first reimbursed.

Senator Annette Hurley

Chair

7 The Institute of Chartered Accountants, *Submission 1*, Appendix B, p. 6.

8 The Institute of Chartered Accountants, *Submission 1*, Appendix B, p. 7.