

PERMUTATIONS, COMBINATIONS, CLASSIFICATIONS AND CALCULATIONS¹

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1. INTRODUCTION

The concept of "supply" is central to the operation of GST in Australia. Given that our GST provides for exemptions, ie GST-free and input taxed supplies, and that there can also be out-of-scope supplies, there is also an inherent requirement to classify supplies to determine their GST treatment. However, the analysis of what is being supplied and, therefore, how to calculate the applicable GST, if any, on the supply, continues to present challenges in the practical application of GST.

Notwithstanding the inherent requirement to classify the supply for GST purposes, this basic step of classification has not received much attention to date from the Australian Taxation Office (**ATO**), the tribunal or the courts. In addition to that lack of attention, part of the ongoing challenge has arisen from treating "a" supply, ie a single supply, as consisting of a number of components that have different GST treatment. Another part of the challenge comes about due to deficient provisions in the GST Act² to deal with that situation and no provision at all to deal with the related situation generally of multiple supplies for a single undissected price.

It is also contended that the issue of when a single supply should be dissected into components to be treated differently for GST purposes and multiple supplies for a single price has not received appropriate attention from the ATO, the tribunal or the courts.

This paper considers:

- (a) how the classification of supplies should be approached;
- (b) how to determine whether there is a single supply or multiple supplies;
- (c) whether and when a single supply can consist of components that can be classified differently for GST purposes; and
- (d) how GST should be calculated where different classifications arise without separated consideration, either in a single supply or multiple supply scenario.

2. CLASSIFICATION OF A SUPPLY

Although the classification of a supply, ie what is being supplied and what GST treatment applies to it, is an integral step in applying the GST Act, the principles to apply have not been elaborated upon to the extent that might be expected by now. There is little guidance in the GST Act and the Explanatory Memorandum³ to the GST Act does not consider classification of a supply in detail.

2.1 The goods old days - Sales Tax

The classification of a supply was a classic sales tax issue. Notwithstanding GST's stated benefits over the old sales tax, GST retains the classification challenge, as there are

¹ The author acknowledges the assistance obtained from the paper prepared and presented by Andrew Sommer, "What is in the mix? Supplies and Apportionment" (presented at the TEN GST Conference, February 2016). We agree with the points made by Sommer in that paper except to the extent that we disagree.

² Legislative references throughout this paper are references to the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)*, unless stated otherwise.

³ Explanatory Memorandum, *A New Tax System (Goods and Services Tax) Bill 1998 (Cth)*.

exemptions (ie GST-free and input taxed supplies) like there were in sales tax, in some cases the same or similarly worded exemptions.

As set out in the Australian Sales Tax Guide,⁴ the classification or characterising of goods has often been done by the courts using the "essential character" or "objective characterisation" of goods test. Under the "objective characterisation" test, goods should be classified "by having regard to their character as viewed objectively and having regard to the evidence relevant to their true nature and to the circumstances" in which they were to be used.⁵ Using the "essential character" test, set out in *Thomson Australian Holdings Pty Ltd v Commissioner of Taxation* (1988) 20 FCR 85, the "essential character [of the goods] derives from the basic nature of the goods, from what they are". French J (as he then was) also held in *Diethelm Manufacturing*, using the "essential character test", that factors such as the quality, cost, design and intended and actual purchasers of the goods were relevant in determining the essential character of the goods.⁶

The ATO's public ruling, *SST 11 - Sales tax: a guide to the classification of goods under the sales tax law (SST 11)*, also provided extensive ATO guidance on the classification of goods for sales tax purposes.

Interestingly, given the *Luxottica*⁷ case, "spectacles" were exempt from sales tax under item 85 of Chapter 9 in Schedule 1 of the *Sales Tax (Exemptions and Classifications) Act 1992*. In the sales tax context, because a pair of spectacles is a "commercially distinct" item from its separate components, the parts used in the construction of the spectacles were not originally exempt from sales tax. While the use of the term "commercially distinct" has its origins in the definition of "manufacture" for sales tax purposes⁸, its use is in the context of classifying a supply of what could otherwise be separate things, but has become something else entirely different to those separate components.

Although spectacles consists of frames and lenses, once put together, it becomes an item that is known as spectacles. Spectacles have a separate identity from the individual parts used to make spectacles. The components that made up the item, therefore, could not be exempt from sales tax unless the legislation specifically provided for the exemption. To provide for this, the *Sales Tax (Exemptions and Classifications) Act 1992*, under section 8, allowed for the "parts" of certain exemption items to also be exempt from sales tax.

In contrast, item 155 in Schedule 3 to the GST Act only provides that "lenses for prescription spectacles" are GST-free under division 38. One might argue that once lenses have been placed in frames to form spectacles, they are no longer lenses "for" prescription spectacles, they are now "in" spectacles. Therefore, the exemption in item 155 would no longer apply in respect of the lenses. The spectacles, being a commercially distinct item, would then be taxable (because there is no exemption for spectacles). Section 38-45(2) provides that a thing supplied as a spare part for, and specifically designed as a spare part for another thing exempt as listed in Schedule 3 is also GST-free. It is doubtful that this could apply to the lenses included in the spectacles on initial sale. This sort of analysis did not occur in *Luxottica*.

2.2 ATO guidance

The ATO guidance in relation to classification for GST comes only as part of the ATO's view as to of when a single supply should be split into different components, ie a "mixed

⁴ Australian Sales Tax Guide, 1993 CCH Australia Limited, [42-100] and [42-300].

⁵ See also *DFC of Taxation v Thomson Publications (Australia) Pty Ltd* 79 ATC 4296.

⁶ *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* [1993] FCA 437, 36.

⁷ *Commissioner of Taxation v Luxottica Retail Australia Pty Ltd* [2011] FCAFC 20.

⁸ *Sales Tax Assessment Act (No. 1) 1930* section 3 definition of "Manufacture" (b).

supply". This is found in the public GST ruling, *GSTR 2001/8: Apportioning the consideration for a supply that includes taxable and non-taxable parts* (**GSTR 2001/8**).

Relevantly, GSTR 2001/8 states that:

10. A supply may be characterised as consisting of one or more things or parts. That is, the supply may be regarded as commercially distinct in its own right or it may be regarded as having several identifiable parts.

This idea that the combination of different things, when put together to become something that is "commercially distinct" has been lifted from the sales tax era. However, while it is referred to by the ATO, it is not considered any further, not even explaining from where the comment in paragraph 10 clearly seems to have come.

While acknowledging that a supply can be "commercially distinct", the ATO provides no further assistance in relation to how to classify a supply that did consist of separate parts but when combined, has become something else. The lack of guidance in this regard is part of the wider issue that the basic classification of supplies for GST purposes has been overlooked or at least not dealt with comprehensively. Further, the difficulty with the ATO's view is that the context of GSTR 2001/8 is in relation to the apportionment of consideration, rather than in relation to classifying the supply itself.

2.3 GST cases

The case law in relation to the classification of supplies for GST purposes has not been particularly elaborative. In truth, a lot of the GST cases have dealt with classification, although not having expressed the issue in that way. The cases seem to be better remembered for other complexities in relation to GST those cases addressed. Where GST cases have considered the classification of the supply, typically it has been done in the context of general law principles, such as contract and property law. We have previously considered this.⁹

In some cases, that process commenced with the proposition that there was no supply at all.¹⁰ A string of cases had to deal with the classification of premises.¹¹

The GST cases that have specifically dealt with classic goods exemption classification include *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329. In relation to whether the supply of mini ciabatte was GST-free, Sundberg J said "My attention was not drawn to any Australian cases dealing with the approach to be adopted to classification under the [GST] Act."¹² Sundberg J (upheld in the Full Court¹³) approached the classification issue with assistance from the "view of the ordinary person" adopted in a number of UK cases dealing with VAT (*Customs and Excise Commissioners v Ferrero UK* [1997] STC 881, *Commissioners for Her Majesty's Revenue & Customs v Procter & Gamble UK* [2009] STC 1990), while also referencing a sales tax case that supported this position (*Zerov Pty Ltd v Deputy of Commissioner of Taxation* (1997) 35 ATR 349). This approach would be consistent with the sales tax "objective characterisation" test. This

⁹ Geoff Mann & Jadie Teoh, "No tax is an island: the interpretation and application of GST" (presented at the ATAX Conference, April 2014).

¹⁰ *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159. *AP Group Ltd v CoT* [2013] FCAFC 105, *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] HCA 22, *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCA 41

¹¹ *Vidler v CoT* [2010] FCAFC 59, *South Steyne Hotel Pty Ltd v CoT* [2009] FCAFC 155, *Marana Holdings Pty Ltd v CoT* [2004] FCAFC 307, *Sunchen Pty Ltd v CoT* [2010] FCAFC 138, *Toyama Pty Ltd v Landmark Building Developments Pty Ltd* [2006] NSWSC, *ECC Southbank Pty Ltd atf Next Southbank Unit Trust v CoT* [2012] FCA 795.

¹² *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329, 14. Note, not even a reference to *Cascade Brewery Company Pty Ltd v CoT* [2006] FCA 821 decided by Sundberg J, referring to customs and sales tax history.

¹³ [2011] FCAFC 6

would seem sensible given the wording of the exemption was the same as the sales tax exemption.

In *JMB Beverages Pty Ltd v CoT* [2009] FCA668, Edmonds J referred back to sales tax, from where the food exemptions had largely come. His Honour adopted a purposive approach and examined the essential character of the product.¹⁴

In the case of *Snugfit Australia Pty Ltd v Commissioner of Taxation* [2013] AATA 8020 (***Snugfit***), the Tribunal used the sales tax "essential character" test, to determine whether a product could be classified as a medical aid or appliance that was GST-free for GST purposes. These contrasting approaches to dealing with classification of supplies for GST means that there is no clear direction to the classification of supplies for GST purposes.

There has been more recent guidance in the GST case of *ATS Pacific*,¹⁵ which concerned the character of a supply made as a result of performance of terms and conditions of a contract regarding the supply of holiday tour packages. Edmonds J, with whom Pagone and Davies JJ agreed, found that "the issue of characterisation...is undoubtedly a question of fact".¹⁶

That said, there have been some cases which were ripe for discussion of the classification of the supply. In particular, *Food Supplier*¹⁷ and *Luxottica*¹⁸ could have considered this point (discussed further below), but neither case really addressed the issue. In both cases, it appears that the arguments put to the Tribunal and Court by the taxpayer and the Commissioner, and the subsequent decisions handed down, assumed that the taxpayer had made a single supply that did consist of separate components. However, the preliminary issue of classifying the supply was not discussed. A classification of the supply in *Luxottica* as a single supply of spectacles and close examination of the exemption in question (ie item 155 of Schedule 3 of the GST Act, "lenses for prescription spectacles") might have produced a different outcome.

Classification of a supply first, should assist in determining whether there is a single supply, multiple supplies or a single supply that needs to be separated out into different components. The next step would be close examination of the relevant exemption, as this is what the supply must fall into to be exempt. It is that classification that is in question.¹⁹ Greater guidance in this regard remains to be provided (or at least recognised as existing from the sales tax era).

3. **SINGLE OR MULTIPLE SUPPLY**

Aside from the classification issue, a preliminary hurdle in considering the GST treatment of supplies is whether there is a single supply (possible with separate components that have differing GST treatments) or multiple supplies that are part of the one transaction.

¹⁴ Upheld in *JMB Beverages Pty Ltd v CoT* [2010] FCAFC68. The earlier cases of *P&N Beverages Australia Pty Ltd v CoT* [2007] NSWSC 338 and *Cascade Brewery Company Pty Ltd CoT* [2006] FCA 821 adopted similar approaches.

¹⁵ *ATS Pacific Pty Ltd v Commissioner of Taxation* [2014] FCAFC 33.

¹⁶ *Ibid*, 38.

¹⁷ *Food Supplier v Commissioner of Taxation* [2007] AATA 1550.

¹⁸ *Luxottica*, above n 7.

¹⁹ *Lansell House*, above n 13, 7.

The ATO doesn't really address the issue of single supply v multiple supply, other than to exclude the issue from GSTR2001/8.²⁰ Several cases have dealt with the issue but not at length.²¹

Notwithstanding the longer history of VAT in the United Kingdom, these issues around single or multiple supplies, (and also if single supplies have components requiring different treatment and classification, discussed below) still arise.

In the recent case of *Metropolitan International Schools v Revenue and Customs* [2015] UKFTT 517 (**MIS**) the parties advanced on the assumption that the supply by Metropolitan International Schools was a single supply. The issue in contention was whether it was a supply of zero-rated books or standard-rated education. The UK First Tier Tribunal agreed with the taxpayer's view that the single supply was of the manuals (ie books) with other services provided being ancillary.

In coming to the decision, the UK First Tier Tribunal stated the following principles for determining whether a transaction comprised a single supply or multiple supplies:

- (i) all the circumstances must be considered from an economic point of view and from the perspective of the typical consumer;
- (ii) there is one supply where one element is the principal supply and the other element or elements are ancillary to the principal supply;
- (iii) in some cases, from an economic point of view, it would be artificial to split two elements into separate supplies so it would constitute one supply; and
- (iv) the issue of whether pricing is based on a composite price for the two elements or separate prices for each element can be of relevance but is not determinative.

In *Food Supplier*, the Tribunal found that two items packaged together for one undissected price were a single mixed supply and required the consideration to be apportioned between the packaged items.

5. Some GST cases dealing with packaged items involve the question whether a supply is a "composite supply" or a "mixed supply". In a composite supply, items which are integral, ancillary or incidental to the main item may be treated for GST purposes in the same way as the main item. An example might be a paper serviette supplied with food. In a composite supply, where the main item is GST-free (usually when it is food), no GST will be payable. A mixed supply, on the other hand, is a supply of separate items together. The present supply is a mixed supply. The promotion items have intrinsic value, will not be consumed with the food and are mostly unconnected with the food. This is so even when, for example, the main item is a jar of coffee and the promotion item is a mug in which coffee might be served. This particular example was given in the Further Supplementary Explanatory Memorandum addressing the introduction of the food subdivision of the GST Bill in the Senate (para 1.58). Where items are supplied together in a mixed supply, the supply will attract GST if the supply of one or more of the items is a taxable supply.

6. The present case is not determined by whether there is a composite or mixed supply. The issue in the present case is whether the promotion item is supplied for consideration. If there is no consideration there is no taxable supply.

²⁰ Para 5A.

²¹ eg *ATS Pacific Pty Ltd v CoT* [2014] FCAFC 33, *Living Choice Australia Limited v CoT* [2014] AATA 168.

This was perhaps a missed opportunity to consider whether the packaging of the items together really did make the supply a single supply, or whether each individual item should have been recognised as a supply by itself before moving on to apportionment of consideration. The reference to the Further Supplementary Explanatory Memorandum, presciently but not necessarily technically correct, providing a mug and instant coffee as an example of a "mixed supply", could well have been expected to have been expanded by analysis. As Logan J said in *DCoT v PM Developments Pty Ltd* [2008] FCA 1886, "an assertion as to meaning and affect in an explanatory memorandum..... is not a substitute for the language employed by the Parliament in the Bill as enacted".²² His Honour went on to point out clear errors in the explanatory memorandum noting that "such errors hardly, with respect, inspire confidence in the utility of the explanatory memorandum. The description in the explanatory memorandum is not matched by the language employed within Div 147 as enacted"²³.

Applying the principles laid down by the Tribunal in *MIS*, despite the packaging of the items together, the economic point of view might suggest that there were two supplies made to the customer as one element was not necessarily the principal supply. It would not be considered an artificial split of the elements of the package given that the two items were in fact separate items that had been brought together only via packaging for promotional purposes.

Whether or not this analysis of the supply would have led to the same outcome in *Food Supplier* is neither here nor there, as the real issue was about the apportionment of the consideration between the separate supplies/components. However, the proper classification of the supply in the first place may have assisted in this case either not having given rise to a dispute at all, or at least proper steps taken in classification and identification of what is actually being supplied.

4. **CAN A SINGLE SUPPLY CONSIST OF MORE THAN ONE COMPONENT?**

In classifying what is being supplied, we would ordinarily need to have determined how many supplies we have to classify. Subject to specific provisions in the GST Act which deem multiple supplies to be single supplies²⁴ or to have the same treatment as another supply,²⁵ once we have identified the individual supplies, is that when we apply our classification or do we need to look more closely at each single supply?

Section 7-1(1) tells us that "GST is payable on taxable supplies and taxable importations". This paper deals only with taxable supplies.

Section 9-40 tells us that "you must pay the GST payable on any taxable supply you make".

Section 9-5 tells us what is required for you to be considered to make "a" taxable supply. The opening words might suggest that taxable supply is to be considered as a singular concept, which has one GST treatment, whether it be taxable or not, ie GST-free, or input taxed (or even out-of-scope but we will not deal with that situation in detail here).

Reading on though, section 9-5 reveals that a supply is not a taxable supply "to the extent that" it is GST-free or input taxed. The words "unless" or "except if" instead of "to the extent that" would have been consistent with a supply being a singular concept that could only be taxable or not, (ie at least GST-free or input taxed), but not a mixture. But

²² at para 47.

²³ at para 48.

²⁴ For example, section 38-6.

²⁵ For example, incidental financial supplies, as set out in regulation 40-5.10 of *A New Tax System (Goods and Services Tax) Regulations 1999*.

because a supply is only a taxable supply "to the extent" that it is not GST-free or input taxed, there is an impression that a single supply can consist of components or parts that are treated differently for GST purposes.

In an income tax context, the case of *Ronpibon Tin N. L and Tongkah Compound N.L. v Federal Commissioner of Taxation* [1949] HCA 15 (**Ronpibon Tin**) considered whether a single expenditure may need to be apportioned into separate parts due to the words "to the extent that" occurring in section 51(1) of the then *Income Tax Assessment Act 1936 – 1944*.

While *Ronpibon Tin* is in relation to deductibility of expenditure in an income tax context there isn't anything about GST that inherently means that the use of the same words could not mean the same thing in determining how to tax supplies. The words then suggest that the supply of a thing can be apportioned into separate components, to the extent to which they are taxable, GST-free and/or input taxed.

Conceptually, it might seem easier to split an amount of expenditure between different applications or objectives than to divide a thing supplied once it is determined that there is a single supply (although perhaps some things could be more easily divided than others).

Other indications in the GST Act that a single supply can consist of more than one component include:

- (a) Section 9-30(3), which contemplates that a supply can be both GST-free and input taxed (though note this contrasts to the expressions reflecting a singular supply in section 9-30(1) and (2));
- (b) Sections 40-35(2), 40-65 and 40-70 which all, relevantly, contemplate a supply not being a taxable/input taxed supply "to the extent that" it is a supply of something with a different GST treatment;
- (c) Division 96, which specifically provides that a supply that is partly connected with the indirect tax zone is to be treated as if it is two separate supplies; and
- (d) Division 156, which treats a supply that is provided on a periodic or progressive basis as if they are separate supplies made in each period or at each progress point.

It is noted though that divisions 56 and 156 expressly deem a supply to be separated into a number of parts to each be treated as separate supplies for the specified purposes. The other sections referenced above do not so expressly deem separate supplies but seem to assume the GST Act deals with the parts identified separately (presumably differently), at least in some respects.

The ATO's view, set out in GSTR 2001/8, is that a supply can be a "mixed" or "composite" supply, being a single supply that has different parts or components, while some recent GST cases have accepted or assumed that a supply can have different parts or components (eg *Food Supplier* and *Luxottica*).

On this basis, it would seem that we must, at least, open our minds to the possibility that "a" supply for GST purposes can involve more than one component and a supply having different components may need each component to be treated separately for GST purposes. However, while acknowledging the potential for a supply to have components, and while some provisions of the GST Act expressly direct this, the issue really is in determining when it is that a supply should be regarded as having different components that require different GST treatment if the GST Act does not expressly direct this.

5. **WHEN DOES A SINGLE SUPPLY CONSIST OF DIFFERENT COMPONENTS?**

While accepting that it is possible that a single supply must be dissected into components, and the GST treatment of each component separately determined to determine the overall GST outcome for that single supply (ie how much GST is payable and input tax credit entitlement), that doesn't mean it is the norm or that dissection is to be sought after. There is no requirement in the words of section 9-5 to always do this. *ATS*²⁶ and *Qantas*²⁷ decisions support the position that there should be no artificial or uncommercial dissection of a single supply. Even in *Luxottica*, the Full Court indicated dissection should be avoided as part of the classification process.²⁸

Indeed, section 9-5 starts from the position that if the conditions of sections 9-5(a) to (d) are satisfied, the supply is taxable. Therefore, it is necessary to find an exception to this position in the GST-free or input taxed exemptions.

The ATO view that a single supply can consist of different components is set out in GSTR 2001/8. GSTR 2001/8 adopts terminology not used in the GST Act, although used in the Supplementary Explanatory Memorandum to the GST Act Bill,²⁹ specifically:

16. In this Ruling the term 'mixed supply' is used to describe a supply that has to be separated or unbundled as it contains separately identifiable taxable and non-taxable parts that need to be individually recognised.

...

17. In this Ruling, the term 'composite supply' is used to describe a supply that contains a dominant part and includes something that is integral, ancillary or incidental to that part. You treat a composite supply as a supply of a single thing. Paragraphs 55 to 63 explain what are integral, ancillary or incidental parts.

...

43. A mixed supply is a single supply made up of separately identifiable parts, where one or more of the parts is taxable and one or more of the parts is non-taxable, and these parts are not integral, ancillary or incidental in relation to a dominant part of the supply. On the other hand, a composite supply is a single supply made up of one dominant part and other parts that are not treated as having a separate identity as they are integral, ancillary or incidental to the dominant part of the supply.

Query whether a "composite" supply is simply a single supply that is not a mixed supply or whether it is a mixed supply where there is no consideration for one of the components. Sommer provides further explanation of the possible outcomes from characterising a supply as a mixed versus a composite supply.³⁰

GSTR 2001/8 goes on to say that it is "a matter of fact and degree whether the parts of a supply are separately identifiable, and retain their own identity".³¹

52. The Commissioner's view is that a supply has separately identifiable parts where the parts require individual recognition and retention as separate parts, due to their relative significance in the supply. This view applies where the supply is comprised of a mix of

²⁶ *ATS Pacific Pty Ltd v CoT* [2014] FCAFC 33, Edmonds J, paras 63-65.

²⁷ *Qantas Airways Limited v CoT* [2011] FCAFC 113, Edmonds & Perram JJ, para 55.

²⁸ [2011] FCAFC 20, at para 15.

²⁹ eg Senate Further Supplementary Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Bill 1998*, 1.58.

³⁰ Sommer, above n 1, 5-7.

³¹ GSTR 2001/8 paragraph 45.

separate things, such as various combinations of goods and services, including the provision of advice.

53. Also, a supply may be considered to have more than one part because of the effect of a particular provision of the GST Act, as was the case in *Luxottica* (see paragraph 44C of this Ruling). Other examples are supplies by way of lease of goods or supplies of rights which are treated as having two parts where the goods or rights are used or consumed in Australia (taxable part) and outside Australia (GST-free part).

54A. Further, separately identifiable parts of a supply may not be individually recognised because of the effect of a specific provision of the GST Act. For example, a supply to an eligible disabled person of a car part and labour services in fitting that part may be considered to have separately identifiable parts due to their relative significance in the supply. However, in subsections 38-505(4) and 38-510(4), the expression a 'supply of car parts' includes the labour services in fitting the car parts to the car of an eligible disabled person. There is a single GST-free 'supply of car parts'.

54. Any of the separately identifiable parts that comprise a mixed supply may themselves be composite, being comprised of a dominant part and an integral, ancillary or incidental part. Example 8 in paragraph 76 is a mixed supply with composite parts. [non mixed supply or just no consideration]

However, despite the ATO view, it would not be an unreasonable proposition that it would only be necessary to dissect a single supply in a way as and when required by the GST Act, ie only then do the parts "need" to be individually recognised, as indicated in paragraph 16 of GSTR 2001/8.

Given that section 9-5 refers to a supply not being a taxable supply to the extent that it is GST-free or input taxed, the extent of that exemption (whole or part of a supply) could well be expected to be found in the terms of that exemption. It makes sense that the exemptions in Chapter 3 of the GST Act would be a good place to start in seeking direction as to when dissection into components for classification is required.

Generally, the provisions of Division 38 and 40 deal with "a" supply being GST-free or input taxed. Indeed, sections 38-1 and 40-1, which provide a description of what division 38 and 40 respectively are about, phrases the description of making a supply in the singular form.

However, there are a number of provisions which provide for supplies to be exempt expressly only to a certain extent (eg sections 38-6(2), 38-20(2), 38-60, 38-105(4), 38-190(1), 38-505(2), 38-510(2), 40-35(2)(A), 40-65, 40-70), by very clear implication (eg section 38-90(2)(a)) or clearly envisage supplies might be partly exempt (eg section 38-60, 38-190(2A)). Divisions 38 and 40 contain no provisions deeming parts of a supply to be separate supplies though. Only by way of note to section 38-187 does this section suggest that a supply could have separate components, where it is not entirely connected with the indirect tax zone. This could perhaps be explained by the interaction with Divisions 156 and 96.

There is some guidance in other parts of the GST Act, particularly in Chapter 4 of the GST Act (the "special rules"), including Division 96 and Division 156, which deem a supply to be divided into parts with each part treated as a separate supply for certain purposes of the GST Act.

Given section 9-5 as the starting point and the clear provision within certain the exemptions in divisions 38 and 40, as well as other clear provisions requiring dissection of single supplies, it is submitted that where no such clear words exist, any implication to do so would need to be overwhelmingly clear. Otherwise, it is submitted that there is no requirement to dissect the supply. Either the single supply satisfies the requirements of the exemption, classified applying the approach discussed above, and is wholly not subject to GST, or it does not, and it is wholly taxable. It is noted that this view is perhaps

a qualification to Sommer's useful observations that specific words of apportionment are not required in the provisions of division 38 and 40 for parts of a single supply to be treated as GST-free or input taxed respectively.³²

The lack of guidance in Australia is, again, in contrast to some of the principles that have come from the UK. The taxpayer in *MIS* argued that the supply of manuals was the primary supply, with ancillary supplies including tutor support via phone and email contact, marking and returning "Tutor Marked Assignments", provision of websites for learning and practical courses. Most of these services were infrequently used and often directed the customers back to the manuals. Thus, from the taxpayer's perspective, these "add on" services were ancillary to the principal supply of manuals and they served to enhance the utilisation of the manuals.

The Revenue contended that the nature of the single supply should be identified by looking to the "overarching" characteristics of the supply. The Revenue claimed that the only apt description of the supply was education, which was said to be the nature of the "student's economic purpose".

The UK First Tier Tribunal stated the following four tests for determining the correct nature of a single supply, noting that "common sense" could possibly serve as the fifth test:

- (i) if there is a single supply, and principal and ancillary elements of the supply are identified, the single supply takes its nature from the principal element and the ancillary elements are subsumed;
- (ii) if there is a single supply because from an economic point of view the typical customer wants one composite service, the decisive factor is governed by which element of the supply is predominant;
- (iii) if there is no "principal" or "predominant" element (as required by the first and second tests), and both elements in the single supply are of equal importance, the supply is described as having the two elements and if it is not exempted from tax, it is standard-rated; and
- (iv) if there are various constituent elements to a single service, the single service should be taken to be the service as described in the overarching classification of all the components.

In *Luxottica*, the Full Federal Court found that the supply of spectacles was considered a single mixed supply of separately identifiable components. There was no elaboration as to what in the GST Act led to this conclusion. However, if the principles set out above from *Metropolitan International* had been applied, perhaps the same outcome would not have been reached, on the basis that there were no principal or ancillary parts to the supply, but the supply of one overarching thing, ie the spectacles.³³ If that was the case, there would not have been the need to consider the GST treatment of the separate components of the supply of spectacles, leading to the outcome that the entire supply was a taxable supply for not fitting into an exemption.

Arguably, the supply of spectacles is analogous to the supply of a cake, as set out in relation to proposition 3 in GSTR 2006/9 by the ATO. While a cake often consists of flour, eggs, milk and a variety of other ingredients, when put together to make a cake, it is no

³² Sommer, n1, p17

³³ Note the ATO's view in GSTR 2001/8 at paragraph 44C that the "commonsense an practical approach" in *Luxottica* led to the supply being characterised as a single supply that was a mixed supply becomes of the operation of section 38-45.

longer the supply of those separate ingredients but the supply of a new thing, being a cake.

The supply of a cake would seem to be a clear example of when a supply need not be separated into its different components. Arguably, spectacles is another example.

In the ATO's ruling, *GSTR 2006/9: Supplies (GSTR 2006/9)*, proposition 3 provides that "a supply may be mixed, composite or neither". While the main discussion on whether a supply is "mixed" or "composite" is referred back to GSTR 2001/8, the example provided for when a supply is neither a mixed or composite supply, but becomes something else, is the example of a cake. While a cake is made from ingredients such as flour, butter, sugar and eggs, once put together to make a cake, it is "readily apparent" that it is a cake that is supplied and there are no separate components to the supply.³⁴

6. **HOW DO YOU CALCULATE THE VALUE OF THE DIFFERENT COMPONENTS OF A SUPPLY?**

Once it has been determined that a supply has components that require separate classification, ie partly taxable, partly GST-free or partly, input taxed, and a classification for each component has been determined, it is necessary to work out the value of the part that is a taxable supply to calculate the GST payable.

Where the supply is partly taxable and partly GST-free or input taxed this is meant to be dealt with by section 9-80 through the irrefutable logic of mathematics. However, the formula provided in section 9-80(2) for determining the value of the part of the supply that is a taxable supply "is circular and therefore not solvable".³⁵ We have discussed section 9-80 and its incurable equation in our paper "Looking through rose coloured glasses".³⁶

Faced with this difficulty in *Luxottica*, the Full Federal Court set out to make the section work based on the intention of what section 9-80 was expected to achieve.

28. The problem of a statutory provision that cannot be made to work is not a new one. In *IAC (Finance) Pty Limited v Courtenay* [1963] HCA 64; the High Court had to consider a provision that was unworkable. At 572 Kitto J remarked that this conclusion as to the operation of the provision was not reached by a process of interpretation and added, "It is a conclusion not as to the meaning of the section but as to the way it works". Justice Taylor was similarly at a loss as to the meaning and said, at 583-4, "Read literally [it] accomplishes nothing. ... It is however, not unreasonable to assume that the section was intended to achieve some object".

...

30. As noted above the object of s 9-80 is tolerably clear...

The Court refused to find any error by the Tribunal in finding as a matter of fact that the price agreed between the parties would determine the value of the frames for GST purposes.

This method of statutory interpretation (ie making the section work in accordance with the intent) is consistent with *Chevron Australia v Commissioner of Taxation (no 4)* [2015] FCA 1092

³⁴ GSTR 2006/9 paragraph 66.

³⁵ *Luxottica*, above n 7, 18.

³⁶ Australian GST Journal, Thomson Reuters Volume 11, Issue 5 June 2011.

551. Further, in my opinion, difficulties of construction are not to be regarded as synonymous with legal uncertainty which only arises after the process of statutory construction has concluded...

However, it is not consistent with the outcome in *DPP v Walters* [2015] VSCA 303:

8. In the present case, the defect in the legislation is incurable. Parliament did not provide any mechanism for the achievement of the intended future median, and the Court has no authority to create one, as the Director of Public Prosecutions ('the Director') properly conceded. To do so would be to legislate, not to interpret. Acknowledging the absence of the necessary statutory language, the Director was constrained to rely on the aspirations of the Minister as stated in the second reading speech, but those statements could never have been a substitute for the missing statutory language.

If a "mixed" supply has been identified the ATO considers that the split of the consideration for that supply between the components must be "reasonable".³⁷

The inconsistency by the courts as to how to deal with these incurable clauses adds further uncertainty for GST. However, because the courts have allowed section 9-80 to work, and the Commissioner accepts that it can work, it seems unlikely that it will be amended anytime soon. As a result, there is still some uncertainty in determining the amount of GST payable on a supply.

Despite the "tolerably clear" objection of section 9-80, this could have been argued to in the case with former division 147 for representatives of incapacitated entities. However, in *PM Developments*,³⁸ despite the clear intention of that division in the explanatory memorandum, Logan J found that the explanatory memorandum was "no substitute for the language employed by the Parliament in the Bill as enacted".³⁹ If the outcome in *PM Developments* is applied to section 9-80, the unsolvable formula in section 9-80(2) would have to be "struck out", such that section 9-80(1) would be the only section to have work to do in calculating the value of taxable supplies that are partly GST-free or input taxed.

As section 9-80(1) requires the value to be calculated as the "proportion of the value of the actual supply that the taxable supply represents", ie the application of some form of apportionment method, which must presumably be fair and reasonable, it would appear that the same outcome as adopted by the ATO is, nevertheless, achieved. This would also be consistent with the outcome in *Luxottica*, where it was found that commercially, it was clear that the discount offered applied to the frames only and that the terms of the discount were reasonable. Therefore, the consideration received for the entire spectacles did not need to be apportioned across both the frames and the lenses, other than as agreed by the parties, such that the discount provided to the customer applied only to the frames when calculating the taxable value of the supply.

It should be noted that in comparing section 9-80 to section 96-10, there is much clearer calculation set out in section 96-10 to calculate the value of the part of the supply that is connected with the indirect tax zone. However, if that part of the supply connected with the indirect tax zone is partly taxable and partly GST-free or input taxed, then section 9-80 is then to be applied to that part of the supply so connected.

Maybe the potential difficulty of apportionment of consideration is another reason why we should be reluctant to jump to the conclusion that a single supply has components to be classified differently.

³⁷ GSTR 2001/8 paragraph 26.

³⁸ *Deputy Commissioner of Taxation v PM Developments Pty Ltd* [2008] FCA 1886.

³⁹ *Ibid*, 47.

7. **MULTIPLE SUPPLIES FOR ONE PRICE**

What none of the above addresses is the issue of where it is clear that there is more than one supply made (ie not "a" supply), but only one price is paid for all those supplies.

Where there is clearly more than one supply with different GST treatment, but only one single sum paid for all of those supplies, the ability to calculate the GST liability is not specifically dealt with under the GST Act, although it might be expected to be a more common scenario than a single supply requiring dissection. The ATO specifically excludes this issue from GSTR 2001/8⁴⁰ and does not provide sufficient other guidance.

Section 95 of the *Sales Tax Assessment Act 1992* provided for this (and the single supply requiring dissection) as follows:

95 Apportionment of global amounts

(1) If there is a need to know the price for which particular goods were sold, but the parties have not allocated a particular amount to those goods, the price for which those goods were sold is (for the purposes of the sales tax law) the price for which the goods could reasonably be expected to have been sold if they had been sold separately.

(2) Similarly, if there is a need to know how much of a global amount relates to some other element of a transaction, but the parties have not allocated a particular amount to that element, the amount to be allocated to that element (for the purposes of the sales tax law) is the amount that could reasonably be expected to have been allocated to that element if that element had been the only subject matter of the transaction.

Often the supply of multiple supplies in one transaction will have the consideration for each identified and the supply of one will not be conditional on the supply of the other. Therefore, there would be no GST difficulty.

However, there are common examples of multiple supplies made under promotional offers where the supply of one is conditional on the supply of the other, for example:

- (a) "Buy 2 products from this range and get the third (cheapest) product free"; or
- (b) "Buy 3 products for the price of 2".

Based on the commercial marketing of the above promotions, arguably, any consideration provided for the supplies made under (a) would only be referable to the first two products and not the third free product, as no consideration has been provided for that product. This view is supported by the decision in *Luxottica*, which found that the decision to discount only the frames and not the lenses was a commercial incentive that was reasonable. The ATO could also be said to support this view based on an example provided in GSTR 2001/8:

Example 13A - 'free' goods - a reasonable apportionment

81ZG. A shop owner has a surplus of a particular type of confectionery which normally sells for \$7 per block but which is nearing its 'use-by' date. Rather than have the goods lose their value, he advertises, as a 'one-off' promotion, that he will give away blocks of this confectionery to the first 100 customers that buy at least \$30 worth of other food items. For the sales in question, the business owner apportions all the consideration to the other food items, and nil consideration to the confectionery. In the particular circumstances, this may be considered a reasonable apportionment of the consideration. There are sound commercial reasons for this one-off promotion and no evidence to suggest that it is contrived to reduce the GST otherwise payable.

⁴⁰ GSTR 2001/8 paragraph 5A.

In contrast, any consideration provided for the supplies made under (b) would have to be apportioned among all the products in a reasonable way, as the promotion envisages that the price is being paid for all the products, albeit calculated only by reference to the separate price for only two of the supplies. Again, *Luxottica* supports this view as the commercial structure of the promotion is such that there no product given away for free. Rather, all the products are being provided at a discount. *Food Supplier* would also provide support for this view.

Notwithstanding no formula in the GST Act to deal with the position of multiple supplies for a single price, it is submitted that the approach in section 95(1) of the Sales Tax Assessment Act 1992 and as adopted in *Luxottica* and *Food Supplier* effectively should apply.

That is, if the facts of the arrangement between the parties reveal any dissection and that is commercial and not unreasonable, that should be adopted in determining value of individual supplies. Otherwise, a fair and reasonable apportionment based on the consideration for which individual supplies would have been expected to be supplied, should be applied.

8. **CONCLUSION**

From the above discussion, we offer the following as the appropriate process for determining the GST treatment of a supply:

(a) **Classify**

The step of properly classifying a supply should occur first and should determine whether there is a single supply or multiple supplies, and will assist with the later step of determining, where a single supply occurs, if a single supply needs to be dissected into components.

(b) **Carefully consider the relevant exemption**

Does the exemption apply to the single supply as a whole or does the exemption require a single supply to be dissected into components either expressly or by very clear implication such that the exemption applies to part of the supply.

(c) **Apportionment**

If required, the apportionment would adopt the position adopted by the parties (if any), provided it is reasonable and commercial, to determine value for GST purposes or, otherwise, determine value on a fair and reasonable basis, eg on a proportionate basis by reference to the consideration for which the components of the supply would otherwise be supplied individually.

22 April 2016