

GST administration – commentary

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Abstract

This article provides comments on two articles presented on the 20th anniversary of GST administration in Australia. In relation to the administration of GST rulings over that period, the author disagrees with some of the assessments made of the ATO's performance, and seeks to highlight ongoing issues with (a) the ongoing use of 'foundation' GST public rulings; (b) the lack of any stated period for any GST private ruling and the consequent issues of ongoing reliance by taxpayers; and the problems associated with a particular provision discussed in one of the articles – subsection 357-60(3). The author explores the ATO's performance in reducing the large GST gap mentioned in one of the articles and agrees that the process of GST refunds is still overly complex.

Key words: Goods and services tax, GST gap, GST refunds, GST public rulings, GST private rulings

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1. INTRODUCTION

I was honoured to be asked to participate in this event and the session on goods and services (GST) administration as a Panel Speaker. Not only do I vividly recall the administrative arrangements for the commencement of the GST system in Australia and spoke about them at the time and afterwards, I also spoke on the topic at the event organised by Atax to mark the 10th anniversary of GST.

In my view, it was in some part a reflection of the maturing state of Australia's GST system that Karl-Heinz Haydl, Chair of the *Business at OECD's* VAT/GST Committee and Co-chair of the OECD's VAT/GST Technical Advisory Group, presented one of the session's papers, looking at the role of business in VAT implementation and administration. Other OECD representatives delivered papers in other sessions. This simply did not happen ten years ago.

Whilst there is no doubt the OECD is now closely interested in the frameworks being established by Australia and other countries to tackle GST in the global context, particularly in the on-line market space, I will confine my comments to the matters covered by the other two speakers in the session on GST administration – Tim Dyce, (then) Deputy Commissioner of Indirect Tax, Australian Taxation Office (ATO), and Kevin O'Rourke, Director of O'Rourke Consulting.¹

My first comment though is on the title of the conference – *Where policy meets reality*. This brought a small smile to my face, because as far as the ATO's administration of GST has been concerned, policy first met reality *before* the commencement of the GST system on 1 July 2000, and has been doing so ever since.

If tax administration can ever be described as exciting, then the period between the eventual passage of the package of GST legislation on 28 June 1999 and its commencement was an exciting time. In short order, in the lead-up to the commencement of GST in Australia, the ATO's initial policy of manually processing every GST registration application was dispensed with. It had quickly become obvious to the ATO that the reality was that it had neither the time nor the resources to persist with manually checking every application, and instead the policy became one of deeming any applicant to be registered unless and until a post-1 July 2000 examination of the applicant determined otherwise, retrospectively. This is just one example of the early stages of GST administration where pragmatism often displaced policy. In this instance, it was necessitated by the ATO's gross underestimation of the number of original GST applications it would receive.

2. GST RULINGS AND GUIDANCE

2.1 GST private rulings

In his paper and presentation, Kevin referred to the 'staggering' number of GST private rulings made by the ATO in that hectic time, specifically 84,287 in calendar year 2000. This compares with the more recent numbers of less than 1,000 GST private rulings each year.

¹ See Kevin O'Rourke, 'GST administration – a practitioner's perspective', this issue.

The reality was, however, somewhat different as I recall. Rather than create a category of binding private rulings for GST alongside or within the existing income tax binding rulings system, the drafters of our original GST legislation decided to adopt section 77 of the *Sales Tax Assessment Act*² – a sales tax recovery provision – as the model for GST rulings. This was despite the then Treasurer, Peter Costello, lauding the GST legislative package as sweeping away sales tax as ‘an outdated, inefficient tax system that does not serve the needs of the modern nation’.³

This meant that *any* written advice to a taxpayer concerning GST was administratively treated as a private ruling, regardless of whether or not the advice met the technical requirements then applying to income tax private rulings. In most cases, they did not. Thus, an ATO response to simplistic, if not merely procedural, questions such as ‘*I am selling my house. Do I need to charge GST?*’ were classified as private rulings. Thus, I feel it is dangerous to now draw any conclusions as to the performance of the ATO’s early administration of GST by pointing to that ‘staggering’ number.

A final comment about GST private rulings: the ongoing administration of the private rulings register. To put it bluntly, the on-line depository of all GST private rulings is a mess. The ATO seems to have either forgotten or no longer cares about the reason for giving the public access to edited versions of these rulings – transparency – courtesy of the Sherman Report following the Petroulias scandal.⁴ No longer a unique database, the depository is now embedded in the ATO’s Legal Database and categorised as ‘Edited Private Advice’. Browsing it is impossible as:

- (a) access is via folders created for each date any edited rulings are uploaded, not by tax or topic;
- (b) headings adopted for each GST private ruling are haphazard and cursory, eg, ‘GST’, ‘GST and sushi’; and
- (c) the actual content of many GST private rulings has been eviscerated to such an extent as to render the outcome either meaningless or without context.

Now, almost 20 years after the introduction of GST and the contemporaneous Sherman Report, the private rulings register is an oddity, and I suspect no rioting will occur were it to be removed and discontinued. It is a pointless exercise of administrative time and effort.

² *Sales Tax Assessment Act 1992* (Cth) s 77. This provision stated in part:

- (1) This section applies to a taxpayer if:
 - (a) the Commissioner alters a previous ruling that applied to the taxpayer; and
 - (b) in reliance on the previous ruling, the taxpayer has underpaid tax on a dealing that happened before the alteration.
- (2) The Commissioner must remit the underpaid tax unless the Commissioner is satisfied that the taxpayer contributed to the giving, or continuing in force, of the earlier ruling by a mis-statement or suppression of a material fact.

³ Commonwealth Parliamentary Debates, House of Representatives, Wednesday 2 December 1998, 1087.

⁴ Tom Sherman, ‘Report of an internal review of the systems and procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office’ (2000).

2.2 Subsection 357-60(3)⁵

Described by Kevin as a ‘curiosity’, subsection 357-60(3) stipulates that if there is a ruling binding the Commissioner in relation to a supplier and the amount of GST payable on a supply, the amount of GST payable (and thus the corresponding input tax credit) is the amount stated in the ruling.

To my mind, subsection 357-60(3) remains a perverse antithesis of the long-dead proposal to allow third-party reliance on GST private rulings – a proposal which today is just as valid as it was when it was first mooted, considered, hijacked, and rejected.

At the time it was introduced, I was vociferous in my calls for subsection 357-60(3) to be repealed,⁶ not least because the provision represents an unnecessary and confusing obstacle to certainty and purports to do away with legal rights held by recipients to challenge the amount of ‘GST payable’ at the heart of input tax credit entitlements. It was and remains my view that subsection 357-60(3) can be repealed without any loss of functionality of the remainder of the GST administrative provisions.

For its part, the Tax Institute chimed in with a formal submission to the then Assistant Treasurer in March 2011 pointing out the ATO had confirmed that subsection 357-60(3) effectively denies recipients any right to object and, accordingly, labelled the provision as unconstitutional.⁷

Subsection 357-60(3) remains law. Does the ATO apply it? I have been told by one senior GST practitioner that he has seen it applied once, ‘benevolently’. That is, a particular GST private ruling had the effect of a lower amount of GST payable than was required by law, and the ATO applied the ruling to the recipient’s benefit.

My concern is that the true effect of subsection 357-60(3) will one day be revealed by a solitary decision of the ATO to apply it malevolently, similar to *Patcorp Investments* when a company suddenly found its right to a dividend rebate under section 46 of the *Income Tax Assessment Act 1936* did not actually exist as it was not the legal owner of the relevant shares and despite the practice, if not policy, of the ATO until then of ignoring nominee company ownership for the purposes of the rebate.⁸

2.3 GST public rulings

Kevin discussed the ongoing benefits of the ‘foundation’ GST public rulings. I disagree with the current utility of many of these early rulings. Whilst a number of them have been amended over time to take account of relevant court decisions (or to dismiss irrelevant court decisions), many of them were broad brush strokes when they were made, and they continue to be representations of interpretative views of the ATO that are subjectively narrow in focus and which have never been tested.

⁵ *Taxation Administration Act 1953* (Cth), Schedule 1, s 357-60(3).

⁶ See, for example, Peter Hill, ‘Editorial: Repeal the Rogue Rule’ (2010) 10(10) *Australian GST Journal* 93; and Peter Hill, ‘The New GST Rulings System – Emerging Issues’ (Paper presented at the UNSW Atax 23rd Annual GST Conference – *GST in a Brave New World*, Noosa, 2011).

⁷ Letter to the Assistant Treasurer from Robert Jeremenko, Senior Tax Counsel, Tax Institute, 25 March 2011. See also the Minutes of the Meeting of the National Tax Liaison Group’s GST Subcommittee on 30 November 2010, 46.

⁸ *Federal Commissioner of Taxation v Patcorp Investments Ltd* [1976] HCA 67; 140 CLR 247.

Fairly recently I experienced an example of this issue in a matter involving many millions of dollars in GST. There was only one ‘authority’ on the GST consequences – one of these foundation rulings – and perhaps unsurprisingly, one party relied on one part of the ruling to argue that GST was payable and another party relied on another part *of the same ruling* to argue that GST was not payable.

As a consequence, when Kevin states in his article that ‘[t]hose early public rulings have succeeded in being helpful and informative to taxpayers and advisors’,⁹ I would agree only in relation to their immediate effect on issue, and only to a limited extent. Kevin also feels ‘there is a strong case for maintaining them, as well as integrating them into a coherent body of work’.¹⁰ This I have to disagree with.

In my view, all the ‘foundation’ GST public rulings should be withdrawn *en masse*, reviewed and then, if necessary, re-issued. The longer these original rulings remain ‘live’, the less their utility. I have two main reasons for suggesting this. The first has to do with developments occurring since such a ruling was originally issued. In any such event, the policy is to graft the development into the framework of the existing ruling. Over time, the exceptions and differences overwhelm the principles, rather than prompting an overall re-think.

The second reason is more obvious, and can be demonstrated by GSTR 2006/9.¹¹ This public ruling covers a fundamental issue of GST – the meaning of ‘supply’ for the purposes of GST. If there is no supply, there cannot be a taxable supply and therefore no liability or input tax credit.

GSTR 2006/9 enunciated 16 ‘propositions’ about the concepts of ‘supply’ (verb) and ‘a supply’ (noun). For example, Proposition 5 is that ‘an entity will make a supply if it provides something to another entity’.¹² As a slight corollary to Proposition 5, Proposition 6 is that ‘a supply usually, but not necessarily, requires something to be passed from one entity to another’.¹³

Albeit six years in the making, GSTR 2006/9 purports to explain ‘the Commissioner's view of the law as it applied from 1 July 2000’.¹⁴ This is an example of ATO policy struggling to match reality. Notwithstanding that statement, GSTR 2006/9 has been amended on *eight* separate occasions. I have to question the utility of the current consolidated version.

For example, I challenge any tax professional to make sense of the notes in paragraph 8 of GSTR 2006/9 as to its *current* date of effect. This is but a small sample of those notes:

The Addendum to this Ruling that issued on 6 December 2006 explains the Commissioner’s view of the law as it applied from 1 July 2000. You can rely on that Addendum from its date of issue (6 December 2006) for the purposes of former section 105-60 or section 357-60 of Schedule 1 to the Taxation Administration Act 1953 (as applicable). The Addendum to this Ruling that

⁹ O’Rourke, above n 1.

¹⁰ *Ibid.*

¹¹ Australian Taxation Office, ‘Goods and Services Tax: Supplies’, Goods and Services Tax Ruling GSTR 2006/9.

¹² *Ibid.*, proposition 5.

¹³ *Ibid.*, proposition 6.

¹⁴ *Ibid.*

issued on 1 July 2009 explains the Commissioner’s view of the law as it applied before and after its date of issue. You can rely on that Addendum from its date of issue (1 July 2009) for the purposes of former section 105-60 or section 357-60 of Schedule 1 to the Taxation Administration Act 1953 (as applicable).¹⁵

Hopefully, you get the picture.

Since GST rulings were *finally* migrated to the existing binding rulings system with effect from 1 July 2010,¹⁶ the ATO has issued a mere 18 GST public rulings. Half of that total were issued before 2013. Subsequently, the ATO has issued no more than two GST public rulings in the GSTR series each year. As for GST Determinations – also categorised as binding public rulings – the ATO has not issued any GSTDs for over two years, and no more than two per year since 2013.¹⁷

The only positive thing I can say about GST public rulings is that they no longer purport to retrospectively explain the Commissioner’s view of the law as it applied on the commencement of GST on 1 July 2000. It would be simply ridiculous if they did.

2.4 No sunset clause, ongoing use/reliance

An income tax private ruling will, as a matter of policy, specify the income tax years to which the ruling relates. This is to overcome the effect of subsection 359-25(4), which would otherwise deem the ruling to stop having any effect at the end of one tax year.¹⁸ Excluded from the operation of this provision are GST and other indirect tax private rulings. The result is that, as a matter of administrative policy, the ATO does not generally specify any period of time of applicability of any GST private ruling it issues. This means that a GST private ruling issued in, say, 2011, is still *prima facie* valid in 2019 if it has not previously been withdrawn.

That fact alone is not an issue, but the ATO does not actively track and monitor any GST private ruling. Perhaps it should, or begin specifying time periods in such rulings, to at least prompt a timely review of the ruling given. In my experience, recipients of favourable GST private rulings can and do rely on them for many years, even private rulings made before they were binding on the Commissioner, and I have had more than one argument over whether or not a ruling recipient can legitimately continue to rely on their old and dusty GST ruling.

In short, I consider there to be grounds for the ATO to implement either a policy of every GST private having a sunset clause (negotiated or not) or at least a default system of unilateral withdrawal after a specified period – something that would force a recipient to actively re-engage with the ATO on their GST position to maintain their favourable treatment and thus, consequently, force a fresh examination of the view of the law adopted by the ATO in its original ruling.

¹⁵ Ibid, para 8.

¹⁶ By virtue of Schedule 2 of *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*.

¹⁷ As of 24 July 2019, the most recent GST Determination is GSTD 2017/1 – ‘Goods and Services Tax: When is the Supply of a Credit Card Facility GST-free under paragraph (a) of Item 4 in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999 (Cth) (GST Act)?’.

¹⁸ *Taxation Administration Act 1953* (Cth), Schedule 1, s 357-25(4).

3. GST GAP

Tim pointed out in his presentation that since the introduction of the tax, approximately AUD 785 billion had been collected for GST, via approximately AUD 7.9 trillion in GST throughput, and he mentioned the ATO's activities to reduce the net GST gap.

For 2016/17 – the most recent year examined at the time of Tim's presentation – the ATO originally estimated that gap to be AUD 5.3 billion, representing a difference of 7.9 per cent between the GST that the ATO believed should have been paid and the amount that was paid.¹⁹ Notwithstanding the ATO only attached a reliability rating of 'medium' to this estimate – in other words, there was a medium chance the actual GST gap was more or less than \$5.3 billion – it is a staggering amount and was nearly 300 per cent more than the then most recent ATO estimate of the income tax gap in the large corporate sector, being AUD 1.8 billion for the 2015/16 income year.²⁰

Apart from the streamlining of compliance and more education activities, Tim was a bit light on what the ATO is doing to combat the GST tax gap, but it appears that whatever it is doing, it is not working. I can say this because the gap in dollar terms has increased from \$4 billion since 2012/13 to just under \$5 billion in 2017/18, and in percentage terms has never moved out of the range of 7.1 per cent to 8.2 per cent over the period since 2012/13.²¹

Is it a question of ATO resources allocated to administering compliance with GST law, or something else?

4. ADMINISTRATION OF REFUNDS

Kevin's article solidly recounts the history of the administration of GST refunds, and I concur with his assessment that '20 years into the GST, the law and administration relating to refunds remains far too complex'.²²

One thing that struck me, however, was the substantial changes that have been made in the ATO's administration of the verification of GST refunds before they are released.

In that regard, Kevin noted the outcome of a 2018 review by the Inspector-General of Taxation – that 'of the 2.4 million BASs lodged claiming GST refunds annually, the ATO's case selection process stopped less than 1 per cent for verification, which represented less than 6 per cent of GST refund amounts claimed'.²³

It has always been my view that it is not the number of refund claims held back that is relevant, it is the total dollar amount of those claims. That 6 per cent equates to approximately AUD 3 billion of a total of AUD 56.7 billion. This is a significant

¹⁹ Australian Taxation Office, 'Goods and Services Tax Gap' (26 October 2018), <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Goods-and-services-tax-gap/>.

²⁰ Australian Taxation Office, 'Large Corporate Groups Income Tax Gap' (13 December 2018), <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Large-corporate-groups-income-tax-gap/>.

²¹ See Australian Taxation Office, 'Tax Gap – Methodology', <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Goods-and-services-tax-gap/?page=6>.

²² O'Rourke, above n 1.

²³ Ibid, citing Inspector-General of Taxation, *GST Refunds* (March 2018) vii, https://cdn.tspace.gov.au/uploads/sites/16/2018/08/IGT-GST-Refunds-Final-Report_Redacted.pdf.

difference from the outcome of a similar review of the Inspector-General concluded in early 2005:

The Tax Office has information which shows that, during 2003-04, 4.3 per cent of all BAS refunds were stopped for manual checking. These stopped refunds amounted to approximately \$20 billion in dollar value and represent about *90 per cent of the total value of BAS refunds claimed*..... In all, some \$275 million (approximately) has been recovered from pre-issue reviews of \$20 billion of GST refunds. The additional tax recovered as a result of the practice of stopping and checking refunds was 1 per cent of all stopped refunds.²⁴

Clearly, improvements have been made to the ATO's automated programs for the selection of GST refunds to be held back for manual verification.

5. THE FUTURE

Will there be a 25th Anniversary of GST event? Or even a 30th? This is hard to say. Akin to fringe benefits tax (FBT), GST is at risk of becoming a forgotten tax as advances in automation continue to be made. If anything, however, the annual billion dollar-plus GST gap – assuming the ATO has its calculations reasonably correct – is something that needs serious attention.

²⁴ Inspector-General of Taxation, *Review of Tax Office Administration of GST Refunds Resulting From The Lodgment of Credit BASs – A Report to the Minister for Revenue and Assistant Treasurer* (2005) paras 2.7 and 2.13 (emphasis added).