



A National Tax Publication
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Introducing our new GST specialists...

In the last few months, BDO has strengthened its indirect tax practice, with the addition of a new GST expert in Sydney and Brisbane. David Wilson recently commenced as a partner in BDO's Brisbane office while Sydney has welcomed Lauren McHugh as a senior consultant.

David Wilson specialises in indirect taxes, including GST, customs and excise duties, anti-dumping, sales tax, luxury car tax and wine equalisation tax. Prior to joining BDO, David was a director in the specialist Indirect Tax Group of a big four accounting firm.

David has more than 15 years experience in assisting clients of all sizes to maximise their indirect tax opportunities, while maintaining an appropriate focus on compliance. Significantly, David's experience covers both the public and private sectors.

David's recent assignments include:

- providing strategic structuring advice and comprehensive due diligence services concerning proposed merger and acquisition activities;
- preparing "reasonably arguable position papers" in respect of the "creditable purpose" and "connected with Australia" provisions of the GST legislation;
- advising clients on the entitlement to claim a large GST refund, taking into account the "timing" and "grouping" provisions, and identifying GST refunds in connection with imported goods and

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- transactions within a corporate group;
- preparing Enhanced Project By-law Scheme applications in respect of projects in various industries including mining, manufacturing and primary production;
- assisting clients with the maximising of fuel tax credits claims and energy grant credit refund claims;
- providing strategic advice in respect of the GST and customs duty implications associated with various international structures, and with them management of GST and customs duty issues arising from year end transfer pricing adjustments; and
- successfully negotiating with the Tax Office in respect of comprehensive GST audit activity.

Lauren McHugh is a qualified GST expert dealing with GST matters for a variety of corporate clients across various industries in Australia and the United Kingdom. Prior to joining BDO *Continued over page...*

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Lauren worked for a big four accounting firm and also worked in-house with a London-based energy company. Lauren has experience in providing a wide range of GST advisory services to corporate buyers, including technical and strategic advice, GST post implementation reviews, due diligence reviews and BAS preparation.

Lauren's recent assignments include:

- completing GST due diligence reviews in relation to the sales of companies and businesses;
- advising on the GST implications for complex import and export arrangements;
- preparing internal review submissions

to the Tax Office regarding the GST classification of various products, notably food;

- advising on corporate group structures from a GST perspective;
- providing strategic GST advice in relation to sales of businesses, notably in the availability, or not, of the supply of going concern concessions; and
- GST compliance support for numerous non-resident entities.

Please feel free to contact David and Lauren with any indirect tax queries. Please refer to the last page of this GST News for the relevant contact in each office.

Penalties for overclaiming input tax credits

An Administrative Appeals Tribunal case decided late last year demonstrates the risks of inserting incorrect amounts into business activity statements. The case, *NOAC Consultants Pty Ltd and Commissioner of Taxation* [2006] AATA 1305, concerned a taxpayer, an accountant and tax agent, who claimed input tax credits for personal expenses. Following a Tax Office audit, the claim was reversed and a 50% penalty was imposed. The taxpayer requested that the penalties be remitted fully due to hardship. However, the Commissioner refused. The Tribunal agreed with the Commissioner, stating that the taxpayer had been reckless; in fact, the taxpayer's actions bordered on intentional disregard for the law and the penalty could have been as high as 75%.

BDO comment: As has been mentioned in previous editions of this GST News, the Tax Office has moved from its supportive and educational approach in enforcing GST, to a harder line. In the current case, the taxpayer had overstated input tax credits and, therefore, a penalty was imposed. The Commissioner did not remit that penalty. The taxpayer was possibly lucky in this regard, as there have been several cases of persons being jailed in respect of GST. Given the potential loss to revenue, one would expect that any understatement of GST or overstatement of input tax credits will result in significant penalties being charged.

Commissioner cannot wind up taxpayer

A recent case in the Queensland Supreme Court demonstrates the Commissioner cannot arbitrarily wind up corporate taxpayers. In *Neutral Bay Pty Limited v Deputy Commissioner of Taxation* [2006] QSC 394, the taxpayer had entered into a scheme relating to the sale of residential apartments. Not liking this scheme, the Commissioner invoked the GST general anti-avoidance rules contained in section 165 of the GST Act, and had issued amended assessments. The taxpayer was arguing against the assessments, but the Tax Office sought to wind up the taxpayer company who was unable to pay these assessments. The Court agreed with the taxpayers and refused the order to wind up the company. Even the Tax Office conceded that the taxpayer did have an arguable case and, therefore, the Court did not allow the wind up order.

BDO comment: It would have been unfair if the Deputy Commissioner had won this case, as it would allow for the wind up of taxpayers for outstanding tax debts in situations where the tax debt is still in dispute. This would enable the Tax Office to prevent a taxpayer arguing a case by simply winding up that taxpayer. Another interesting point that has come out of this case related to the fact that the Commissioner invoked the section 165 general anti-avoidance rules. The first case on the application of such rules only occurred last year. However, given the wins by the Tax Office in relation to equivalent provisions in the income tax law, it is likely that we will see Division 165 arise in many more scenarios.

An enterprising approach to enterprises

The recent Miscellaneous Taxation Ruling MT 2006/1 issued by the Tax Office highlights the Tax Office's view of the meaning of an "entity carrying on an enterprise". This is relevant to determining an entity's entitlement to an Australian Business Number and therefore the entity's entitlement to register for GST. This Ruling is also applicable generally to the term "enterprise" in the GST Act and is therefore relevant to whether an entity makes taxable supplies and its entitlement to claim GST credits on certain acquisitions. Two significant points of note from the Ruling are explored below.

First, the Tax Office considers that the activities of some holding companies will not be sufficient to meet the requirements of carrying on an enterprise. This will be an issue where the holding company makes a share acquisition and incurs significant acquisition costs. If it is not carrying on an enterprise, it will not be entitled to claim any GST credits on those costs (regardless of the various GST rules concerning financial transactions). It is generally necessary that the entity engage in activities more extensive than simply the mere passive receipt and distribution of dividends. Factors that may indicate that the entity is carrying on an enterprise can include its active involvement in the management of subsidiaries, provision of loans, guarantees or indemnities to subsidiaries, provision of equipment, premises or rights to intellectual property to subsidiaries or the provision of specific management services to its group such as secretarial, finance, legal, taxation, information technology or recruitment and human resources expertise. Activities of head companies are generally required to be more extensive than just those activities required in accordance with a statutory scheme, such as the preparation of a set of consolidated accounts as required by ASIC.

Second, the Tax Office also identifies isolated or "one-off" real property transactions as high-risk activities that may not be considered to be conducted in the course of "carrying on an enterprise". Again, the facts and circumstances of the particular case will depend on the nature of the activities, but where the real property activities undertaken are so limited that they are simply the mere realisation of a capital asset through the sale of land or a building, the entity will not be entitled to be registered for GST and therefore will not be entitled to claim GST credits on construction and other development costs. For example, the subdivision and



sale of land with only minimal development work (that is, work undertaken to meet council requirements and to improve the presentation of certain allotments) is more likely to be considered the mere realisation of a capital asset. In contrast, activities undertaken and planned in a businesslike manner and supported by a comprehensive business plan and extensive development of the property, coupled with the intention of resale at a profit, are more likely to be considered as undertaken in the course of carrying on an enterprise.

BDO comment: The issues raised above will be a question of fact and degree and are to be analysed in the context of the relevant commercial arrangements. Significantly, the Tax Office has flagged these areas as audit priorities in its Compliance Program for 2006/07, which was discussed in the September 2006 edition of this GST News. It is important that taxpayers proactively seek tax advice prior to the commencement of new businesses/activities, reorganisation of group structures, acquisition of new entities and engagement in property transactions. The GST consequences of getting it wrong are high, since taxpayers are generally subject to penalties and interest on GST mistakes.

BDO national tax seminars

BDO conducts a series of bi-monthly seminars around the country, focusing on issues topical within the tax world. February's seminar is an update on GST and fringe benefits tax – recent changes and emerging issues. The seminars will be held in the third and fourth weeks of February. If you would like to attend or would like more information about upcoming seminars in the series, please contact your local BDO office.

Commissioner wins on holidays

The February 2006 edition of this GST News discussed the decision of *SAGA Holidays Limited v. Commissioner of Taxation* [2005] FCA 1892. The case concerned the supply of Australian tour packages to overseas tourists, and whether there is a taxable supply of the Australian accommodation element of these tour packages, particularly where an overseas tour operator makes the supply. The Federal Court found for the Commissioner and dismissed SAGA's appeal.

The Full Federal Court has now handed down its decision in the appeal to this case, in *SAGA Holidays Limited v Commissioner of Taxation* [2006] FCAFC 191. In a unanimous decision, the Full Court dismissed SAGA's appeal and held that the supply by SAGA (a non-resident tour operator) of the accommodation component of the package was subject to GST.

In the course of its decision, the Full Court again reiterated that the interpretation of the GST law should reflect its underlying purpose and policy. The Court also provided some guidance on when supplies should be analysed as a whole or divided into their individual components (that is, whether supplies are mixed or composite in nature).

BDO comment: The decision itself is of historical interest only, given the amendments to the GST law in 2005 to ensure that Australian tour packages sold by non-residents attract GST. Foreign tour operators and similar businesses should be mindful of their GST obligations. However, the decision is also a reminder that the cross-border GST rules are complex and advice should be sought on any international arrangements.



Minister communicates changes

As indicated in the previous article, the GST cross border rules are complex and the Tax Office has adopted an interpretation of those rules that taxes many international arrangements (these issues were discussed in the February and April 2006 editions of GST News). For example, the Tax Office's approach has meant that many telecommunications transactions are subject to GST, even though they are guaranteed to be GST-free under Australia's International Agreements.

In order to avoid this embarrassing result, the Government announced in December that it will amend the GST law to ensure that certain international telecommunications services supplied by Australian telecommunications providers, including global roaming supplies, will be GST-free. The amendments will apply from 1 July 2000. We are yet to see the draft legislation.

In addition, the Assistant Treasurer in December announced new arrangements for the taxation of investments in forestry managed investment schemes (MIS). Part of that announcement was that such schemes will no longer be entitled to register for GST. The amendments take effect from 1 July 2007. However, we are yet to see the draft legislation.

BDO comment: The announcements are relevant to any clients that are involved in the telecommunications and forestry MIS industries. They are also an indication that the GST law is in a state of flux. Since GST was introduced, there have been thousands of amendments to the GST law (not to mention the relevant GST rulings and cases). It is important that clients keep up to date with all changes to ensure they are complying with their GST obligations.

GST Christmas releases

Over the Christmas and New Year period, the flood of GST releases slowed down. However, there were still a few being issued and the number started to creep up towards the end of January.

The Releases relevant for GST that were issued in December 2006 and January 2007 include:

- Interpretive Decision ATO ID 2006/340: GST and whether a sublease of real property is a long-term lease;
- Interpretive Decision ATO ID 2007/6: GST and tax invoices issued by an unregistered agent of a supplier;
- Interpretive Decision ATO ID 2007/7: GST and registration of a responsible entity for a managed investment scheme;
- Interpretive Decision ATO ID 2007/15: GST and right to a share of net profit in return for a contribution of money: not a credit arrangement;
- Interpretive Decision ATO ID 2007/16: GST and right to a share of net profit in return for a contribution of money: not an interest in a debt;
- Interpretive Decision ATO ID 2007/17: GST and right to a share of net profit in return for a contribution of money: not a supply of money;

- Interpretive Decision ATO ID 2007/18: GST and right to a share of net profit in return for a contribution of money: a taxable supply;
- Decision Impact Statement on *Debonne Holdings Pty Limited v Commissioner of Taxation* [2006] AATA 886, which concerned a 'supply of going concern' claim in relation to a hotel, and which was discussed in the November 2006 edition of this GST News;
- Tax Office Release "GST Treatment of Residential Premises"; and
- Tax Office Media Release 2006/54, advising that a former Tax Officer has been jailed for obtaining false GST refunds.

Additionally, the Tax Office withdrew a number of Interpretive Decisions, many of which related to the GST impact of the compulsory acquisition of land. Other Interpretive Decisions withdrawn related to GST and medical supplies, such as crutches and overlays for pressure care, and are the latest in a long line of Decisions on that topic that have been withdrawn.

If readers would like more details of any of these documents, please contact the BDO office in your State.

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