

GST Bulletin

# October 2013 developments

<b>WHAT YOU NEED TO KNOW</b>		
This Bulletin outlines Australian GST developments in October 2013, which may impact your business, including:		
<b>Relevant area</b>	<b>At a glance</b>	<b>Relevant to</b>
Division 11 – Creditable acquisitions and Division 29 – attribution rules	<a href="#"><u>Lakatos v Commissioner of Taxation [2013] AATA 712</u></a> – the Tribunal in has affirmed the Commissioner's decision in relation to over claimed input tax credits and the imposition of a penalty on a taxpayer who could not adequately substantiate his GST claims.	<b>All taxpayers</b>
Division 38-250 – Activities of charitable institutions	<a href="#"><u>GSTD 2013/4</u></a> – the ATO has released GSTD 2013/4 in relation to the GST treatment of assets that diminish in value over time that relate to supplies made by charities under Division 38 of the GST Act.	<b>Charities</b>
Division 40 - 35 – Commercial residential premises	<a href="#"><u>GSTR 2013/D2</u></a> – the ATO has released draft ruling GSTR 2013/D2 in relation to whether moveable home estates are commercial residential premises and how relevant sections of the GST Act apply to specific transactions relating to moveable home estates.	<b>Operators of moveable home estates</b>
Section 105-55 – Extension of time	<a href="#"><u>Hampson v Commissioner of Taxation [2013] AATA 731</u></a> – the Tribunal has refused to grant an extension of time to review the Commissioner's objection decision.	<b>All taxpayers</b>
Section 105-65 TAA	<a href="#"><u>GSTD 2013/D4</u></a> – the ATO has released GSTD 2013/D4 which relates to objecting to a private ruling that the Commissioner makes on the application of section 105-65 of the TAA.	<b>Taxpayers seeking refunds</b>
Division 135 – Increasing adjustments	<a href="#"><u>MBI Properties Pty Ltd v Commissioner of Taxation [2013] FCAFC 112</u></a> – the Full Federal Court has allowed the taxpayer's appeal against an earlier decision which found that an increasing adjustment arose under section 135-5 of the GST Act in relation to the acquisition by the taxpayer of three apartments as a GST-free supply of a going concern.	<b>Vendors / purchasers of residential property</b>
Various	<a href="#"><u>ATO Interpretative decisions</u></a> – the ATO has released various ATO Interpretative Decisions this month, including ATO ID 2013/54, 2013/55, 2013/56 and 2013/57.	<b>All taxpayers</b>
Various	<a href="#"><u>Addenda</u></a> – the ATO has released various addenda to GST Rulings, Class Rulings and Tax Advices this month.	<b>All taxpayers</b>

## Lakatos v Commissioner of Taxation [2013] AATA 712

The Tribunal in [Lakatos v Commissioner of Taxation \[2013\] AATA 712](#) has affirmed the Commissioner's decision in relation to over claimed input tax credits and the imposition of a penalty.

### **Facts**

The taxpayer is a used-car dealer. The taxpayer was registered for GST and made regular claims for input tax credits (**ITCs**). The Commissioner audited the taxpayer's affairs and found that the taxpayer had a much greater liability to pay GST. Additionally, some of the claims made for input tax credits could not be substantiated.

The dispute concerned the period between 1 July 2006 until 30 September 2010. During this time, the taxpayer stated he was only liable to \$11,288 in GST but claimed ITCs in the amount of \$178,246.

The Commissioner argued that the taxpayer was not entitled to the tax refund and owed an additional amount for taxable supplies that were not accounted for. Accordingly, the Commissioner imposed an administrative penalty of 25% as well as a 20% uplift in the penalty as a result of the taxpayer's poor compliance.

### **Held**

The Tribunal examined the taxpayers entitlements to ITCs. The taxpayer could not substantiate the full amount of ITCs that were claimed for a number of reasons including difficulty in locating invoices.

The Commissioner acknowledged that the taxpayer had only substantiated an entitlement to \$88,163.61 in ITCs. The Tribunal affirmed the Commissioner's assessment and found that there was not sufficient evidence to show that the taxpayer was entitled to ITCs above \$88,163.61.

The Commissioner also asserted that the taxpayer was required to pay \$104,340.27 in GST. The Tribunal accepted the Commissioner's figures as the taxpayer did not have enough evidence to satisfy otherwise (as required under section 144ZK of the TAA).

Following this, the Tribunal found that the taxpayer must repay the amount that was refunded and pay an additional amount of \$16,176.66 which is the difference between his GST liability and ITCs.

As the Tribunal was satisfied that the shortfall arose because the BASs were false or misleading and the taxpayer had failed to take reasonable care in relation to taxation laws, the shortfall amount imposed was 25% with a 20% uplift.

Accordingly, the objection decision under review was affirmed.

## GSTD 2013/4: GST treatment for capital assets that diminish over time

[GSTD 2013/4](#) was released on 2 October 2013 in relation to the GST treatment of assets that diminish in value over time.

The Determination discusses that the consideration the supplier provides for acquiring assets that diminish in value over time can be taken into account in determining whether a supply in that period is GST-free under section 38-250 of the GST Act (supplies by charities).

The Determination then provides examples of how to work out the amount of consideration that can be taken into account when dealing with assets that diminish over time if you are required to calculate the proportion of consideration.

## GSTR 2013/D2: Goods and services tax: supplies made by operators of moveable home estates

The ATO has released draft ruling [GSTR 2013/D2](#) in relation to whether moveable home estates are commercial residential premises under the GST Act.

The draft Ruling considers how sections 9-5 and 40-35 of the GST Act would apply in circumstances such as the following:

- a) the supply by way of lease or licence of a moveable home site to a resident. Taxable supply but not commercial residential premises;
- b) the supply by way of sale of a moveable home before it is placed on land and installed ready for occupation. Taxable supply however, if the moveable home has been used solely in connection with making input taxed supplies of residential premises, the sale will be input taxed under section 9-30 of the GST Act;
- c) the supply by way of lease or licence of both a moveable home site and a moveable home to a resident. Input taxed supply of residential premises to be used predominantly for residential accommodation under section 40-35 of the GST Act; and
- d) separate supplies of a moveable home site by way of lease or licence and a moveable home by way of sale to a resident. The supplies need to be characterised separately and not as if they form an aggregate supply. The supply by way of lease or licence of the moveable home site is a taxable supply under section 9-5 of the GST Act. Section 87 of the GST Act will not apply as the site is not commercial residential premises. The sale of a moveable home does not fall within the definition of "real property" and the sale will be a taxable supply.

The ruling provisionally considers that a moveable home estate is not commercial residential premises under the GST Act, as it is not covered by or sufficiently similar to the items listed as such in section 195-1 of the GST Act.

Once the final ruling is issued, it will apply both before and after the date of issue.

## Hampson v Commissioner of Taxation [2013] AAT 731

The Tribunal in [Hampson v Commissioner of Taxation \[2013\] AATA 731](#) has refused to grant an extension of time to the taxpayer to review the Commissioner's objection decision.

### Facts

The taxpayer applied to the Tribunal for an extension of time to file his application for review of the objection decision made by the Commissioner. The objection decision was made on 31 October 2011 and the taxpayer was notified he had 60 days to review the decision.

The Commissioner refused to issue a GST refund in relation to the June 2004 quarter on the basis that the application was made after 28 July 2008. The taxpayer argued his personal circumstances which included ill health and trouble with his business contributed to the late lodgement of his tax returns (in 2011).

The issue for the Tribunal was whether it is reasonable in all the circumstances to extend the time for the taxpayer to apply to the Tribunal for a review of the Commissioner's objection decision issued on 31 October 2011.

#### **Held**

The Tribunal refused to grant an extension of time.

The Commissioner opposed the application for the extension of time, despite acknowledging that the taxpayer was owed a refund of \$7,659. The Commissioner argued that as more than four years had lapsed, there is no discretion under section 105-55(1) of Schedule 1 of the TAA to grant the taxpayer a refund.

Section 105-55(1) of Schedule 1 of the TAA provides that the taxpayer is not entitled to a refund, other payment or credit to which the subsection applies, in respect of a tax period unless it is within the four year time frame.

The Tribunal found that due to the fact that the taxpayer was well outside the four year time frame and because of section 105-55(1) of Schedule 1 of the TAA, it was not reasonable in the circumstances to grant an extension.

### **GSTD 2013/D4 – Objecting to a private ruling**

[GSTD 2013/D4](#) has released a draft determination in relation to objecting to a private ruling that the Commissioner makes on the application of section 105-65 of Schedule 1 of the TAA.

The draft determination states that you can object to a private ruling that the Commissioner makes but only if the Commissioner has not made an assessment of your net amount for the tax period in which you overpaid the GST.

Once the determination is finalised it is proposed to apply both before and after its date of issue.

### **MBI Properties Pty Ltd v Commissioner of Taxation [2013] FCAFC 112**

The Full Federal Court in [MBI Properties Pty Limited v Commissioner of Taxation \[2013\] FCAFC 112](#) has allowed the taxpayer's appeal against an earlier decision which found that an increasing adjustment arose under section 135-5 of the GST Act in relation to the acquisition by the taxpayer of three apartments as a GST-free supply of a going concern (For Federal Court decision, see previous Ashurst [GST Bulletin dated 13 March 2013](#)).

#### **Facts**

This decision was an appeal from a decision of the Federal Court.

The taxpayer acquired three apartments from South Steyne Hotel Pty Limited (**South Steyne**) which were subject to certain leases and used in a serviced apartment business. South Steyne leased each of the apartments to Mirvac Management under individual leases agreements.

The sale of the individual apartments were GST-free supplies because the sale was found to be a GST-free going concern. The primary issue on appeal of this case was whether an increasing adjustment arose in respect of Division 135 of the GST Act. Under Division 135 of the GST Act, the recipient of a supply of a going concern has an increasing adjustment to take into account the proportion (if any) of the supplies that will be made through the going concern that will neither be taxable or GST-free supplies.

The Federal Court decision dismissed the taxpayer's application stating that the intention of section 135 of the GST Act was to be objectively determined and ascertained by reference to the nature of the enterprise to which the going concern related and through which the supplies were to be made.

The Full Federal Court stated that the issue was whether South Steyne was "treated" by the GST Act as continuing to make input tax supplies to Mirvac Management after it had ceased to have any interest in the units. If there was no continuing supply, there is no basis on which MBI could be liable to an increasing adjustment.

#### **Held**

The Full Federal Court allowed the taxpayer's appeal. The Court found the primary judge had erred in concluding that following the sale of the reversion from South Steyne to the taxpayer, there was a continuing supply by South Steyne to Mirvac Management.

Edmonds J stated that the idea that South Steyne continued to supply the lease to Mirvac Management is flawed. It was found that there was no continuing supply by South Steyne, merely a continuation of the lease. Edmonds J considered that references to "supplies made through the enterprise" in section 135 of the GST Act is to supplies to be made by the acquirer of that enterprise. This confines the liability for "increasing adjustment" to the supplier. Davies J supported this reasoning and found that no continuing supply by way of a lease can be attributed.

Their Honours also noted that Division 156 only applies to taxable supplies by way of a lease and does not apply in the present case because supply by way of the lease from South Steyne to Mirvac Management was held to be an input taxed supply in the South Steyne Full Court decision.

Accordingly, as there was no continuing supply (merely a continuation of a lease), the appeal was allowed.

## **ATO Interpretive Decisions**

The ATO has issued the following Interpretive Decisions this month:

- [ATO ID 2013/54](#) regarding if a government agency is making a taxable supply when it receives payment for the secondment of its employees to another government entity. The ATO ID states that in such circumstances, the payment received is not consideration for a supply;
- [ATO ID 2013/55](#) regarding the revocation of an entity's approval for making deferred payments of GST, if the entity applies to adjust previously declared custom values. The ATO states that the entity's approval for making deferred payments of GST will not be revoked under section 33.15 of the GST Regulations;
- [ATO ID 2013/56](#) regarding if the Commissioner will be satisfied that an amount of overpaid GST has been reimbursed when a supplier makes a journal entry in its accounts acknowledging the amount in overpaid GST; and
- [ATO ID 2013/57](#): regarding GST and the supply of residential premises by way of assignment of a long-term strata lot lease. The ATO has stated that a supply of newly constructed residential premises by way of assignment of a long-term lease will be a taxable supply, as they are a supply of new residential premises under section 40-75 of the GST Act.

The ATO has withdrawn the following Interpretive Decisions this month:

- Energy Grants (Credits) Scheme: On October 18 the ATO withdrew 130 ATO IDs concerning Energy Grants (Credits) Scheme with effect from 1 July 2012; and
- [ATO ID 2008/166](#): GST and motor vehicle industry incentive payments: Fleet sales support – margin support – discretionary payments.

## Addenda to GST Rulings this month

The Commissioner has issued the following addenda to the GST Rulings / Determinations this month:

- [GSTR 2003/15](#): Importation of goods into Australia. The ATO has amended the Ruling to take into account changes relating to international transport;
- [GSTR 2008/3](#): Dealings in real property by bare trusts. The addendum amends the Ruling to reflect changes made to division 153-B of the GST Act in relation to principals and intermediaries;
- [GSTD 2001/2](#): Is the sale of goods by a lessor on expiry of a lease agreement a separate supply to the lease of the goods. The addendum amends the determination to reflect the withdrawal and replacement of GST Ruling GSTR 2001/1 with GSTR 2013/2;
- [GSTD 2004/1](#): When will the requirement to hold a tax invoice or adjustment note be waived as a result of a court or tribunal decision? The addendum amends the Determination to update the date of effect and the references section;
- [GSTR 2000/10](#): Recipient created tax invoices. The addendum updates the Ruling for amendments made to division 29-C and 48-A of the GST Act. The amendments to division 29-C are in relation to tax invoices and apply to net amounts for tax periods. The amendments to division 48-A apply to the formation and membership of GST groups. Both amendments start on or after 1 July 2010;
- [GSTR 2000/34](#): What is an invoice for the purposes of the GST Act? The addendum amends the Ruling to reflect amendments to division 29-C of the GST Act in relation to tax invoices and apply to net amounts for tax periods starting on or after 1 July 2010;
- [GSTR 2000/37](#): Agency relationships and the application of the law. The addendum amends the Ruling to reflect amendments to division 153-B of the GST Act in relation to agency and intermediary relationships and apply to net amounts for tax periods starting on or after 1 July 2010;
- [GSTR 2012/3](#): GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels;
- [GSTR 2001/2](#): Foreign exchange conversions. The addendum broadly reflects the withdrawal of GST Ruling GSTR 2000/1; and

The Commissioner has issued the following addenda to Class Rulings this month:

- [CR 2013/25](#): The GST treatment of fees and charges imposed by NSW councils in relation to cemeteries, facilities, leases, legal services, libraries and sales;
- [CR 2013/32](#): The GST treatment of fees and charges imposed by NSW councils for supplies in relation to building and property development applications and other related permits and approvals;
- [CR 2013/39](#): The GST treatment of fees and charges imposed by NSW councils in relation to water, sewerage and drainage supplies; and
- [CR 2013/41](#): The GST treatment of fees and charges imposed by NSW councils in relation to enforcement activities, essential services, provision of information, use of professional and staff time and works.

The Commissioner has withdrawn the following GST Tax Advice this month as they are now longer current:

- [GSTA TPP 044](#): What action will the Tax Office take if a taxpayer recognises an underpayment and decides to make an adjustment in the current BAS is due;
- [GSTA TPP 045](#): Can I correct activity statement errors resulting from a failure to attribute increasing or decreasing adjustments to required tax periods?;
- [GSTA TPP 052](#): Will the Tax Office refund overpaid GST if a supplier makes a mistake in preparing its activity statement and incorrectly includes a supply as a taxable supply?;

- [GSTA TPP 030](#): Are tax invoices required to show the legal name of the supplier?;
- [GSTA TPP 033](#): If a supply involves some combination of GST-free, input taxed and taxable supplies, can a tax invoice simply state that GST is included in the total without stating the amount of GST?; and
- [GSTA TPP 034](#): If an agent makes a single acquisition on behalf of multiple principals, can the tax invoice held by the agent be used by each principal to support the input tax credit claim for their respective shares of the acquisition?

## Contacts



**Geoffrey Mann**  
Partner  
Melbourne  
T: +61 3 9679 3366  
E: [geoffrey.mann@ashurst.com](mailto:geoffrey.mann@ashurst.com)



**Jadie Teoh**  
Senior Associate  
Melbourne  
T: +61 3 9679 3840  
E: [jadie.teoh@ashurst.com](mailto:jadie.teoh@ashurst.com)

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at [aus.marketing@ashurst.com](mailto:aus.marketing@ashurst.com).

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. Further details about Ashurst can be found at [www.ashurst.com](http://www.ashurst.com).

© Ashurst Australia 2013. No part of this publication may be reproduced by any process without prior written permission from Ashurst. Enquiries may be emailed to [aus.marketing@ashurst.com](mailto:aus.marketing@ashurst.com). Ref: 652717348.01 13 November 2013