THE TAX INSTITUTE

VIC 7th Annual Tax Forum

17 -18 October 2019 | Crown Promenade, Melbourne

THE TAX INSTITUTE

SESSION 12C:

Some Unexpected GST Issues that GST Specialists Come Across

Presenter:

Ken Fehily, CTA, Fehily Advisors Pty Ltd

THE TAX INSTITUTE

Objectives of this presentation

- To provide attendees with a snapshot of the types of matters that Context of the issues raised: cross the desk of a specialist GST consultant/advisor
  - Do not relate to the lodgment of BASs or similar compliance tasks of a BAS or tax agent
  - Are often referrals by a taxpayer's accountant, lawyer or other professional such as insolvency practitioners and business brokers (or mate at the pub or real estate agents!)
  - Conceptual issues at a high level versus an in depth analysis of only a few topics; a whole menu of ideas for you to ponder
- They are all real events, not just academic possibilities. Each one, without exception, has been a fee generating event for the incumbent advisors and myself in the last 12 months

Objectives of this presentation

- It's my expectation that you will each have moments during this presentation where you think to yourself:
  - Oh oh, I did that, but that was a nay nay
  - Wow, if only I'd known about this before
  - I knew I shouldn't have listened to what that person told me
  - I have some clients that can really benefit from this
  - I wonder if I can go back retrospectively, or wonder if the ATO can go back retrospectively
  - Why didn't the ATO mention this to me ?

THE TAX INSTITUTE

Topics to be covered

1. Surely Tax Invoices are not still a problem
2. Are Charities subject to GST?
3. 15 year old ‘new residential premises’
4. Joint Ventures versus Partnerships
5. Tripartite arrangements
6. Food

Topics to be covered

7. Health supplies
8. Farmland or Going Concern
9. Insolvency
10. Potpourri of GST issues
11. Taxation of Zombies and Vampires

1 Surely Tax Invoices are not still a problem

THE TAX INSTITUTE

- An *invoice* (can trigger a GST liability) is different to a *tax invoice* (to claim a GST credit)
- Suppliers do not have to automatically issue a tax invoice
  - Can be requested, and must respond within 28 days (or seek Commissioner's discretion)
- All information required to be on the tax invoice must be provided by the supplier or its agent
  - Can be in separate documents, but all must be provided by the supplier or its agent
- Commissioner's discretion must relate to a specific document
  - Could be a list or class
  - Can't deem a document to exist

THE TAX INSTITUTE

1 Surely Tax Invoices are not still a problem

- Tax invoices issued by agents of non-registered non-resident suppliers
  - Must still have name of recipient
  - Can have other names on it
- Must be held at the time of lodging BAS to claim credits
- Insurance supplies - GST payable on the amount charged, less the stamp duty
- Landlords charging monthly rental, but recovers outgoings and changes of rent
- Developers not getting Tax Invoices from lawyers and PEXA at settlement
- Charged GST by overseas suppliers under the new rules applying from 1 July 2018

THE TAX INSTITUTE

2 Are Charities subject to GST?

- How many of you are on Boards or Committees, or auditors or advisors of Charities?
- Referring to a DGR or Endorsed Charity or Government School
- Charities deemed to be carrying on an Enterprise
- Special rules regarding ‘sub entity’ splits, registration threshold, cash/accrual threshold
- Voluntary registration often better than not being registered at all:
  - if GST credits would exceed GST payable (see next slide)
  - Can seek up to 4 years retrospective registration and up to 4 years of refunds
- Raffles, bingo and donated second hand goods GST free (but not auctions)
- Election to ‘input tax’ fund raising activities

THE TAX INSTITUTE

2 Are Charities subject to GST?

- Nominal consideration (subsidised) supplies:
  - Accommodation (consideration less than 75% of market value or 75% of cost)
  - Non Accommodation (consideration less than 50% of market value or 75% of cost)
- Consideration does not include donations, other grants or (taxable) sponsorships
- Cost allocations
  - no statutory rules re allocation or apportionment, but must be fair, reasonable and consistent
- Prices do not have to be reduced by the 10% saved
- Note Division 142 (from first tax period after 31 May 2014) re: refunds

3 15 Year old new residential premises

- Input taxed “but only *to the extent* that the property is *residential premises to be used *predominantly* for residential accommodation”, but not if new residential premises
- Not ”new residential premises” if:
  - *“the period of at least 5 years … only been used for making input taxed supplies*
  - any 5 year period from the time when they first became residential premises (occupancy certificate is a normal proxy)
- If you simply try to sell at any time (i.e. not input taxed rental), that is an ‘application’ (in contrast to ‘intent’) and the 5 year period restarts

THE TAX INSTITUTE

3 15 Year old new residential premises

- 2016 started building to sell as new residential premises (claim all GST credits and taxable NRP when sold)
  - Mid 2018 - Occupancy certificate granted
  - Early 2019 - failed settlement, so tried to resell
  - Mid 2020 took off the sale market and rented on a year by year basis (from then, only claim a proportion of GST credits and start repaying GST under Division 126 adjustments each June)
  - Rented 2021 to 2024, and try to sell again in 2024 while still renting (dual intention, continue partial credit claims and continue Division 126 adjustments)
  - Mid 2026 finally sold (8 years after occupancy certificate)
  - 5 year test never reached. Input taxed application started mid 2020 but finished 2024 by trying to sell
  - Permanent loss of credits, but full GST payable on sale

THE TAX INSTITUTE

4 Joint Ventures versus Partnerships

- Partnerships include general law partnerships and tax law partnerships income tax definition)
  - Joint Ventures taken by ATO to be the normal concept of Joint Venturers sharing output, and each individually dealing with its own share of the expenses, output and income
- Notwithstanding that JV Agreements state that a partnership is not formed (but refer to the Partnership Act, income tax definition of tax law partnerships, and the facts)
- Partnerships specifically defined to be entities, and Joint Ventures specifically defined to not be entities
- Lawyers commonly prepare JV Agreements, but accountants then prepare partnership financial accounts, register partnership for GST and lodge partnership income tax returns

4 Joint Ventures versus Partnerships

- Why does it matter so much?
  - Partners can be deemed to make supplies to Partnership (e.g. contribute land to a development)
    - Subject to GST and possibly miss making an election to use the margin scheme
  - Partners jointly and severally liable to GST
    - Partners often not registered for GST
  - JV participants not jointly and severally liable to GST
    - JV participants and manager all have separate GST registrations, but all can elect to jointly register for GST as a reporting mechanism only (not as a taxpayer), but causing joint and several GST liabilities, but can then enter into an indirect tax sharing agreement (not available to partnerships)

THE TAX INSTITUTE

5 Tripartite Arrangements

- Gym charges you $66 (includes GST) for a PT session
  - Trainer 1 not registered for GST
  - Trainer 2 registered for GST (has another sports product enterprise)
  - Trainers both get 50% (but of $60 or $66?)
  - How does trainer charge gym, or how does gym pay trainer?
- Is it different if Trainer charges you direct? If so, do both charge you $60 or $66?
  - How does gym charge trainer for use of facilities, and how much?
- Who gives who Tax Invoices, and for how much?

5 Tripartite Arrangements

- Consider:
  - Recent brothel case – *HKBY and FCT* [2018] AATA 4770
  - Medical practice
    - Charge a patient for consultation; GST free
    - Charge by doctor to medical practice; taxable
    - Doctor gets 50% of bulk billed consult fees and 70% of full charge consultations
    - Who bills who what, what includes GST and what doesn’t, and who provides tax invoices?
- Other tripartite arrangements with agencies, overseas suppliers, distributors, sub-contracted installation fees, third party ongoing maintenance suppliers, with all getting a ‘cut of the action’

6 Food

- Food: is all GST free, unless it's:
  - A live animal (unless crustaceans or molluscs)
  - Food is for consumption on premises (the place of supply, or grounds surrounding a café or the whole of a football ground, garden, showground, amusement park, or similar area with a clear boundary or limit). What happens if you take away?
  - Hot food for consumption away from premises. What happens if you meet and chat to someone on the way out and all consumed before you leave?
  - A Beverage
  - Food listed in Schedule 1
- Beverages: all taxable, unless in Schedule 2 (i.e. opposite to food)

THE TAX INSTITUTE

6 Food

- Schedule 1 (foods that are taxable):
  - Food *marketed* as a prepared meal (unless it's soup)
    - Is laksa a soup?
  - What does marketed mean?
    - Lasagna, frozen: picture of lasagna, or lasagna with vegies on a plate, or a serving suggestion on a bed of rice on back of packaging
    - Salad (in a container with a pouch of mayo and a fork, or just a fork, or just mayo, or with a fork outside container with rubber band, and maybe separately charged for)
  - What is a beverage? Is it anything you can masticate without chewing?

THE TAX INSTITUTE

6 Food

- Interesting to note that food is ‘knocked out’ of GST free status if it’s *marketed* as a complete meal, or if it’s a beverage, but not if it’s *marketed as a beverage*
- Is custard a food or beverage, and if a food, can it be marketed as a complete meal?
- Is yoghurt a food or beverage, and if a food, can it be marketed as a complete meal?
- What if the custard or yoghurt is sold:
  - In a long life pour top container? (Do you drink custard straight out of the pour top when nobody is looking?)
  - What if it’s in a tub, squeeze tube, jug, pourable long life pack, large bottle?
- Does it matter if it’s 1 litre (vs 1 kilo) and serving size is 275 grams (vs 275 mls)?

7 Health Supplies

- When law being developed, use was made of a pre-existing authoritative proxy – Medicare and the *Health Insurance Act* 1973
- Extended to supplies by a "recognised professional" but only if specified in a list (in s 38-10 (1)) (i.e. moving towards private health cover 'extras') including nursing, dental, dietary, optometry, pharmacy, physiotherapy, psychology, social work, pharmacy, chiropractic, but also acupuncture, naturopathy, Chinese herbal medicine
  - What would you have put in, or taken out of, the list? Should the list change (it's over 20 years now; consider Ubers/taxis)
- Recently action by Health Minister on feminine hygiene products; a global movement (from a tax design perspective, was it a medicine, or was it about moral fairness?)

THE TAX INSTITUTE

7 Health Supplies

- Medical aids and appliances that meet all 3 of the following requirements;
  1) “specifically designed for for people with an illness or disability”, AND
     - Need not treat the condition (e.g. phones with big buttons)
     - Only for those having existing condition. Not for supplies for prevention
  2) “not widely used by people without an illness or disability”, AND
     - What does “widely mean”? Not mainly. Not predominantly. Not more than 50%
     - Refer to packaging, public marketing, where it’s sold, recommended by health practitioners, sales channels, warranty cards, knowledge of market, feedback
  3) Specifically listed in Schedule 3
- Becomes ‘unconditionally GST free, regardless of who sells and who uses

7 Health Supplies

- Schedule 3
- Category column 2 (category) is "non-operative"
  - Item 22: Category, Continence: Aid or Appliance: protection for beds
  - Item 37: Category, Diabetes: Aid or Appliance: needles and syringes
  - Item 47: Category, Hearing/Speech: Aid or Appliance: visual/tactile alerting devices
  - Item 58: Category, Mobility Disability: Aid or Appliance: motor vehicle modifications
  - Item 62: Category, Bedding for Disabilities: Aid or Appliance: electronically operated adjustable beds
  - Item 82: Category, Positioning for Disabilities: Aid or Appliance: night-time positioning equipment modifications

THE TAX INSTITUTE

8 Farmland or Going Concern

FARMLAND	GOING CONCERN
GST free	GST free
Election cannot be made to treat as GST free or not	Must be a written election by both parties, before settlement (no discretion to extend)
Land has been used by anyone for a farming *business*	Used by supplier in carrying on an enterprise
Used in farming business for a complete unbroken 5 years preceeding settlement	Must be reasonably necessary to carry on an enterprise, no time specified
Purchaser must have *intention* that land will be used to carry on any farming business	Purchaser must be *capable* of continuing operation of same enterprise immediately upon settlement, but need not intend to continue
Nothing else need be supplied (but can include a little house that would otherwise be input taxed)	Supplier must provide purchaser with everything needed to continue operation, regardless of whether already held

THE TAX INSTITUTE

8 Farmland or Going Concern

FARMLAND	GOING CONCERN
Intention for anyone to continue must be satisfied, but no adjustment event for the reason of not being able to proceed to farming, or changing intent	Capability for purchaser to continue must be satisfied, but could have intention to shut down the enterprise immediately after settlement
It is one of the options in contracts for sale of land, but a missing farmland election is irrelevant	It is one of the options in contracts for sale of land, but the election must exist in writing in that contract or elsewhere
Division 135 adjustment for subsequent use for input taxed or personal use	Division 135 adjustment for subsequent use for input taxed or personal use
If intent not genuine, then supplier has liability to a supply that was always taxable	If all things necessary for purchaser to continue to operate not met, then supplier has liability to a supply that was always taxable

THE TAX INSTITUTE

9 Insolvency

- Representatives:
  - Trustee in bankruptcy
  - Liquidator or Receiver
  - Controller under *Corporations Act* 2001
  - Administrator or Manager
  - Administrator of deed of company arrangement
- Incapacitated Entity
  - Individual who is bankrupt
  - Entity in liquidation or receivership, or has a Representative (per above)

9 Insolvency

- The Representative:
  - Has its own personal GST obligations and entitlements for actions or events occurring in and during its representative capacity
  - The vast majority of GST issues, errors, risks and opportunities are the very same issues that effect every GST registrant. Take extra caution in understanding who 'makes a supply'
- In practical terms, there are only two specific provisions relevant to Representatives:
  - Division 105: Supplies in satisfaction of debts (aka mortgagees in possession)
    - No need to register and need not be carrying on an enterprise
    - Not if the supply by the incapacitated entity would not be a taxable supply;
    - Still liable to GST, must pay the GST, must lodge a BAS, make adjustments
    - Division 105 overrides Division 58

9 Insolvency

- Division 58 imposes special rules (Division 58 overridden by Division 105) including, but not limited to:
  - Representative must register for GST if incapacitated entity was registered or required to be registered
  - Actions or omissions of Representative taken to be actions or omissions of the incapacitated entity, but …
  - The Representative is liable to pay GST, or claim GST, if the acts occurred in the Representative's capacity, unless:
    - The incapacitated entity received the consideration prior to appointment, or the supply involved the redemption of a face value voucher issued prior to the appointment
    - Reverse for acquisitions paid for prior to appointment

9 Insolvency

- Representative has same ‘status’ as incapacitated entity (e.g. continued ability to use margin scheme)
- Representative must notify Commissioner of supplies and adjustments for which the incapacitated entity has the liability or entitlement (e.g. Representative makes supply, but consideration received by incapacitated entity prior to appointment)
- Representative is authorised and required to pay its GST liabilities out of money received, and is not liable to civil or criminal proceedings for doing so (might be inconsistent with Deed of Appointment)
- Other rules concerning acting on cash basis, bad debts, laybys, etc..

THE TAX INSTITUTE

10 Potpourri of GST issues

- While you must start consideration of GST with the contracts and agreements, but that is only the start. Then look at the facts:
  - Partnerships vs JVs
  - commercial settlement deeds with pass on clauses but no action (the lawyers and accountants both think the other will look after it)
  - Litigation Funding not always financial supplies
  - Cannot contract out of GST (note ‘liability’ to pay can be contractual or statutory)
- Statutory Interpretation: FACTS – CONTEXT – FACTS
  - Recommend sign up to “ATO interpretation NOW!” Episodes 1 to 50 already issued

THE TAX INSTITUTE

10 Potpourri of GST issues

- Adjustments are new GST events. You do not go back to adjust; you increase or decrease GST now because you did something before (important for 4 year period of review)
- Make 'incentives' on sales GST effective
  - Make sale for same price, but reduce GST payable by supplying a basket of taxable and non-taxable supplies (eg. cash cards, overseas trips, stamp duty, school fees, etc)
- Apportionment and allocations only need to be fair and reasonable
  - Mixed use properties and margin scheme
- Converting trade creditors/debtors to loan accounts constitutes consideration
- Most "build to rent" is actually "build to sell to rent"

THE TAX INSTITUTE

11 Taxation of Zombies and Vampires

Zombies, the Undead, Vampires, and Ghosts and annulment of death - a solution for phoenixing

- Toby Fehily, Acuity, “Taxation of Zombies” and “Economics with a Vampire”
- USA “Center for Disease Control” and preparedness for a Zombie apocalypse
- “Death and Taxes and Zombies” by Professor of Law, Adam Chodorow
- Very serious potential mitigation for illegal phoenixing

Don’t take chances by rolling the dice on GST

THE TAX INSTITUTE

Thank you

Please complete your evaluation forms and return them to the registration desk.

THE TAX INSTITUTE

Disclaimer: The material and opinions in this paper are those of the author and not those of The Tax Institute. The Tax Institute did not review the contents of this presentation and does not have any view as to its accuracy. The material and opinions in the paper should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests.

THE TAX INSTITUTE