

ATO Issues Draft Ruling on GST and Dispute Settlements

The Australian Taxation Office released a draft ruling GSTR 2000/D23 on 13 December 2000 on Goods & Services Tax: GST Consequences of Court Orders and Out-of-Court Settlements.

Although the ruling is in draft form it is effective from 1 July 2000.

The key principles of GST may not always be that easy in practice. The ATO in its draft ruling distinguishes between different types of supply. Getting it wrong could cost your clients one-eleventh of the amount received from any court award or settlement.

Many settlements and court orders will not result in a transaction being a taxable supply. The draft ruling specifically excludes from GST the following actions:

- Breach of copyright
- Personal injury
- Wrongful use of property
- Property Damage
- Negligence causing loss of profits

The draft ruling states that payments made in regard to court orders or an out of court settlement may be consideration for supply and therefore may attract GST.

To assist in this the ATO distinguishes between the following types of supplies:

- earlier supply
- current supply
- discontinuance supply (a supply related to the discontinuance of legal action) and
- damages.

Broadly, earlier supply and current supply payments are taken to be consideration from an underlying supply (as opposed to concurrent supply arising under a settlement or court award). The party making an underlying supply will need to account for GST in the ordinary way.

A discontinuance supply can arise when a party has given up rights to sue for which they receive consideration. The draft ruling confirms that such transactions will not be subject to GST unless the subject of the dispute is not clearly identified.

Although the draft ruling states that in instances involving discontinuance of legal action there may not always be GST if there is no payment generated by the settlement, there will be cases in which the payout is regarded as consideration for a taxable supply. This is especially so if the underlying transaction giving rise to the litigation is a taxable supply (that is, not GST-free or input taxed) and where the party receiving the payment is or should be registered for GST purposes and the payment relates to a supply made in the course of carrying on a business.

The draft ruling states that where a settlement is reached, the components will require individual assessment, as certain elements may attract GST and other components be GST free.

The draft ruling can be found at:

<http://law.ato.gov.au/atolaw/view.htm?docid=DGS/GST2000D23/NAT/ATO/00001>

There is a separate Ruling which deals with insurance claims (GSTR 2000/36). This ruling deals particularly in regard to insurers being entitled to an input credit when making supplies in settlement of insurance claims. We understand that some insurers have inappropriately deducted GST on amounts of settlement claims paid to 3rd parties who are not the insured. There are specific provisions under *A New Tax System (Goods & Services) Act 1999* dealing with settlements under insurance claims. There is no GST payable by any party in such cases.

This ruling can be found at:

<http://law.ato.gov.au/atolaw/view.htm?docid=GST/GSTR200036/NAT/ATO/00001>

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2nd Annual Forensic Accounting Conference

Russell Munday, as chairman of the Victorian branch of the Institute's Forensic Accounting Special Interest Group, and Bruce Wilkinson attended the 2nd Annual Forensic Accounting conference held in Sydney in March 2001 by The Institute of Chartered Accountants.

The conference was attended by over 180 accountants involved in forensic accounting.

The program included an impressive array of speakers including judges, members of the Bar, solicitors and accountants. The agenda included, inter alia:

Panel Discussion on the role of expert witness / what gives the expert credibility?

Panel members included The Hon Chief Justice Alistair Nicholson, Family Court of Australia, The Hon Justice Mark Weinberg, Federal Court of Australia, The Hon Geoffrey Davies, Queensland Court of Appeal, The Hon Justice Bernard Bonjorno, Supreme Court of Victoria, and Dr Kathryn Cronin, Deputy President of ALRC.

Issues discussed included:

- Duty to court compared with duty to client.
- Hot Tubbing.
- Code of conduct for experts in the Family Court.
- Proposed government changes in relation to superannuation and family law.
- Ultimate Issue in respect to Supreme Court of Victoria cases whereby the expert cannot give evidence on this. For example in a matter concerning the liability of an auditor, the expert is restricted to evidence on what another auditor might have done.
- A joint appointed or court appointed expert eliminates appearance of partiality and may give cost savings.
- Conference by judge with experts for highly technical matters.
- Panel of experts for various jurisdictions.

Mock Trial session with The Hon Professor George Hamper QC as the judge, Hugh Selby and Dr Ian Freckelton as counsel and Cully Gower and Peter Holmes as expert witnesses.

This mock trial illustrated some key points to assist expert witnesses including: the importance of addressing the judge (not cross-examining counsel), remaining calm, being prepared some of the plays used by counsel.

Issues for Experts in Family Law – Gary Watts of Watts McCray

Gary Watts gave an overview of the basic approach to the alteration of property interests of parties in family law matters, the role of the forensic accountant (valuing business, trusts, entities, tracing hidden assets, helping compile financial evidence, advising on the tax effectiveness of settlements), proposed changes by the Family Court to the use of experts in property matters.

Damages in Commercial Litigation – Barbara McDonald, Senior Lecturer of University of Sydney and Consultant for Freehills.

The presentation covered:

- the general principles of compensation in contract and tort,
- causation and remoteness principles in contract and tort,
- economic loss cases in tort,
- apportionment and contribution,
- the plaintiff's duty to mitigate damages,
- damages for lost opportunities,
- damages for contravention the Trade Practices Act, and
- damages and account of profits in equity law.

The Role of a Forensic Accountant as an Expert Witness – Richard Douglas, Senior Counsel.

Richard Douglas discussed situations when an accountant should refuse a retainer including:

- where matters are beyond the accountant's expertise,
- where it is apparent that the factual assumptions you have been asked to make for the purposes of preparing your report are wholly devoid of substance, and
- where you are placed in a conflict between a duty to the client in providing advice and a duty to the court.

The Expert Witness in Dispute Resolution – Professor The Hon Andrew Rogers

Professor Rogers gave an overview of the recent English Civil Procedures Rules and a comparison with the Rules and Practice Notes in force in the Federal Court of Australia and the Supreme Court of NSW.

*Forensic Accounting & Insurance –
Paul Johnson of Deloitte and
Alan Penklis of Green Penklis and Lawson.*

This session illustrated the unique culture of insurance claims discussing various types of claims and policies, past and future losses, gave examples of claims and the role of the accountant

*Forensic Accounting: A Litigation Survival Guide -
Tony O'Reilly, a partner of Minter Ellison.*

The relationship between an accounting firm and its client was discussed, referring to an English case, Prince Jefri Bolkiah v KPMG, which determined that litigation support services provided by accountants was similar to those offered by Solicitors. "The House of Lords held that this meant that on most occasions forensic accountants would, like solicitors, be in a Fiduciary relationship with their clients". This imposes the obligation to avoid conflicts of interest. Therefore a firm of Accountants cannot act against a former client if there was a risk that relevant confidential information of the client might come into possession of members of the firm now acting against the client.

ASIC Rules on Projections

The ASIC recently announced tighter guidelines governing financial forecasts and projections in prospectuses.

The release of the new guidelines follows a regulatory review of prospectuses issued in 2000 and late 1999, and has been made after consultation with the Auditing Assurance Standards Board and other relevant interest groups.

The Information Release by ASIC provides additional guidance to new issuers and their advisers on the acceptable use of forecasts and projections in prospectuses. It also addresses the way in which experts should deal with forecasts and projections when preparing reports for inclusions in a prospectus.

Prior to the release of the new guidelines it was open to companies to argue that extensive use of hypothetical assumptions was acceptable under the applicable Standards, provided they were appropriately disclosed. The new guidelines will make it much harder for companies to use hypothetical assumptions in future prospectuses.

Munday Wilkinson



Our Aim

Munday Wilkinson is a boutique forensic accounting firm.

We offer the legal profession, and others, quality service and technical proficiency commensurate with that of the Big 5.

At the same time we are able to provide a more personalised service as we operate in a framework that enables us to be very responsive to our clients while at the same time delivering a high quality service in a cost effective manner.

Our Services

The partners, Russell Munday and Bruce Wilkinson jointly have over 50 years accounting experience including over 20 years specialising in forensic accounting.

In particular both partners have extensive experience in:

- Business and company valuations
- Valuations of intellectual property
- Quantification of economic losses
- Fraud audits and investigations
- Loss of earnings assessments and reviews
- Family law investigations, valuations and tax advice on settlements
- Due diligence reviews
- Professional negligence matters concerning professional advisors
- Solvency reviews
- Expert determinations
- Expert witness services.

We look forward to being given the opportunity to provide you and your clients with an independent, quality and effective forensic accounting service.

RECENT MATTERS

Since our last newsletter Munday Wilkinson, Chartered & Forensic Accountants have been continued to be involved in a large variety of matters including:

- Preparation of an Independent Accountant's Report summarising the results of our investigations in respect of misappropriation of funds from a trust account by an employee.
- Appointed by both parties to a family law matter to investigate what the family asset pool comprised of and to value the asset pool (with the assistance of property, plant & equipment and livestock valuers) and report thereon.
- The appointment by the State Chairman of The Institute of Chartered Accountants to provide a determination as to the profit achieved by a business a large real estate agent when consistent accounting policies were applied to the declared results.
- Numerous valuations for family law purposes including valuations of software developer, an accountancy practice, a legal practice, restaurants, an electrical repair business, a spruiking business, a licensed grocer, a printing business, a pre-press and image setting business, a software developer, an insurance agent, a footwear manufacturer, a prawn wholesaler, flooring importer and a door manufacturer.
- Valuation of numerous other businesses including: a telecommunication business, a traffic and transportation planning consultancy, a ten-pin bowling business, a veterinary clinic and a motor head reconditioning business.
- To provide our opinion as to the assessment of the loss claimed by the plaintiffs (being tenants) concerning alleged misrepresentations made to them by the management of a shopping centre.
- To quantify loss incurred by purchaser of property due to misrepresentations made by agent / vendor.
- Various assessment of loss reports for plaintiffs for misrepresentations or breaches of contract. Also conducted numerous reviews of claims for loss of profits for defendants.
- Preparation of Independent Accountant's Report concerning the solvency of an entity conducting an insurance broking business.
- Provided our opinion as to whether the option trading losses claimed by client of a stockbroker are born out by a comparison of the purchases and sales of options on that client's account.
- Provision of a professional opinion as to the quality and appropriateness of an audit undertaken on a failed corporate travel agency.

Double Taxation on Work in Progress Removed

On 8 March 2001, the Assistant Treasurer, Senator Rod Kemp, announced that the Government will be introducing amendments to prevent the double taxation of professional work in progress. These amendments will allow a deduction for payments on a transfer of work in progress. Thereby removing the previous double taxation.

For example, prior to this amendment a departing partner would be taxed for any payment received in respect to his share of work in progress. The same, or similar amount, was then taxed a second time in the hands of the continuing partners when the work in progress was ultimately billed. The Commissioner of taxation unsuccessfully attempted to deal with this situation in IT 2551 but, following the Crommelin case, the ruling was withdrawn on 23 September 1998.

As a bonus, the amendments will apply retrospectively from 23 September 1998, when IT 2551 was withdrawn.

Further Information

If you would like further information regarding this newsletter or our services, please contact either Russell Munday or Bruce Wilkinson at:

Munday Wilkinson
Chartered & Forensic Accountants
Level 10, 470 Collins Street
Melbourne, Victoria, 3000.

Telephone: 9621 1622 Facsimile. 9621 1522
Email: advice@mwforensic.com.au

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