The Tax Summit

Session 11.2: GST – The rough edges

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1. Introduction

Great things take time. One of the remarkable projects of our time is the construction of the Sagrada Famiglia in Barcelona. Originally conceived in 1882, Antoni Gaudi took over the project in 1883 and worked on the project until his death in 1926. The project is ongoing and construction is expected to continue well into 2030. Now, the GST may not be as aesthetically pleasing as the Sagrada Famiglia but it too remains an unfinished work. It still has its rough edges – those parts of the law and the administration that are not yet finished and around which we have needed to build not only scaffolding but warning signs. Certainly there are areas where extensive safety gear should be worn before approaching.

This paper is aimed at highlighting some of those rough edges, where they are and the practical implications that they have for advisors and in house tax teams alike. Each of these issues have enormous complexity.

It is not an undertaking by the authors to emulate Gaudi’s commitment and spend the rest of their natural lives bringing into the world the perfect GST of which we dream. However, we hope to be adequate tour guides – showing an appreciation of the vision and highlighting where further work is required.

2. Apportionment

It seems somewhat odd, more than 25 years since the commencement of the GST in Australia, to be writing about the importance of input tax credits. However, it does seem that some of the basic understanding has been lost. It is an undeniable feature of the Australian GST system that an entitlement to input tax credits does not turn upon the taxpayer establishing a nexus between an acquisition and any particular supply or supplies. That is, whilst a denial of input tax credits can arise because of a relevant connection between an acquisition and the making (or the possibility of making) input taxed supplies, that denial arises in relation to an entitlement that exists and would have arisen for the taxpayer in the absence of a connection between an acquisition and the making of any supplies at all.

All that is necessary to give rise to an entitlement to input tax credits is a nexus between the acquisition that is made and the **enterprise** being carried on by the taxpayer. That existing entitlement can subsequently be lost – in whole or in part – depending on the extent to which that acquisition is connected with the making of supplies that are or would be input taxed.

This should not be controversial. And yet submissions being made by the Commissioner in recent cases have sought to impose upon taxpayers a positive obligation to prove a link between acquisitions and GST-free or taxable supplies. This is where things do get a little bit complicated.

Let's say that a taxpayer accepts that an acquisition partly relates to making supplies that would be input taxed. The taxpayer calculates the extent of that relationship is 30%. It does this by direct attribution of the acquisition to input taxed supplies to this extent. If that is the proper extent to which the acquisition relates to making supplies that would be input taxed, that is the end of the inquiry and there is no need to inquire as to what the remaining 70% relates to – provided that the taxpayer has already demonstrated that the acquisition relates to the carrying on of its enterprise and can substantiate that portion of the acquisition does not relate to the making of input taxed supplies.

This is where the reality of tax compliance diverges from the theoretical ideal. How does one really prove the absence of a connection to one thing? Logically, it is easiest to prove that x cannot be related to y because x is wholly related to z. But to argue that **you must** demonstrate that x is related to z or it must be accepted that x is related to y, is to invert the logic and confuse necessary and sufficient criteria. It is **sufficient** for a taxpayer to demonstrate that the 70% is not related to the making of input taxed supplies because the 70% is related to the making of GST-free supplies. That is a perfectly acceptable way of the taxpayer doing so. But it **cannot be** the **necessary** criterion or we depart from the fundamental principal that it is not necessary for an entitlement for an acquisition to be linked to particular taxable or GST-free supplies. It must be possible for the taxpayer to demonstrate that the 70% is not related to y through different means.

It is suggested that trying to do the opposite was the source of the Commissioner's error in *Hannover*[1].

But let us first return to the statutory construction and where all this began.

2.1 Statutory test

GST operates on the basis of net amounts. The calculation of an entity's net amount for a particular tax period is determined by reference to the:

- GST on taxable supplies;

[1] *Hannover Life Re of Australia Ltd v Commissioner of Taxtion* [2023] FCA 680 (*Hannover FCA*) and *Commissioner of Taxation v Hannover Life Re of Australasia Ltd* [2024] FCAFC 23 (*Hannover FCAFC*)

- Input tax credits for creditable acquisitions; and
- Adjustments,

that are attributable to that particular tax period.

It needs to be underscored that input tax credits are not some magic windfall gain to lucky taxpayers. They are not some concessional benefit that the benevolence of the legislature has granted to taxpayers in particular circumstances. Input tax credits are an inherent part of ensuring that the right amount of tax is raised and at the right point. There is a reason why a negative net amount for a particular tax period results in a real payment of real cash from the ATO to the taxpayer. The refunding of a negative net amount is the returning of money collected by the ATO to the economy that was **never intended to be revenue**. This is a conceptual framework that is often not properly understood by practitioners, administrators and even perhaps by members of the judiciary who are more familiar with the operation of income tax.

GST is a tax on final private consumption expenditure in Australia. Therefore, where GST is collected by the ATO on a transaction from one business to another business, that is not net revenue. It is not a transaction that is properly the subject of a tax. That money is collected to ensure compliance throughout the system. It is not an amount which is subject to tax. It is one of the reasons why there has been so much criticism of GSTs and VATs in recent years – there is a lot of "churn" through the system in order to get to the right amount of revenue. Indeed, a properly functioning retail sales tax applying to goods and services could provide the same revenue outcome as GST using single stage taxation. If only we could ensure that we could eliminate evasion at that single stage.

An acquisition will give rise to a creditable acquisition provided that certain specific conditions are met. Firstly, the acquisition needs to be acquired "solely or partly for a creditable purpose". This choice of language is important and it is important to note the precision of the language. An acquisition that is made 1% for a creditable purpose is still a creditable acquisition. The concept of the creditable acquisition is not "scaled back" to the 1% of the acquisition that is made for a creditable purpose. There is no statutory warrant to separate what is functionally a single acquisition into a "creditable acquisition" and a "non-creditable acquisition". Rather, the acquisition is a creditable acquisition because of the 1% that is made for a creditable purpose. This language is picked up in section 11-30(3) which defines the concept of "extent of creditable purpose" as "the extent to which **the *creditable acquisition** is for a creditable purpose expressed as a percentage of the **total purpose** of the acquisition. (*Emphasis added*).

Again, this language is deliberate. In *Rio*[2], the Full Court picked up on a theme raised by Davies J at first instance. At first instance, her Honour said:

> "It is the objective relationship between an acquisition and making supplies that would be input taxed with which s 11-15(2) is concerned, not the moving cause or principal purpose behind the acquisition."[3]

The Full Court expressed the same point slightly differently:

> "The terms of s 11-15(2)(a) do not depend upon the reason or purpose of the enterprise making the supply or making the anterior acquisition. The provision does not turn upon a characterisation of the purpose, or the occasion of the purpose, of the supplier but upon a characterisation of the extent to which the acquisition relates to the subsequent supply." [4]

This should not be read as though "purpose" is irrelevant to the operation of section 11-15(2)(a). Davies J was at pains to point out at first instance that:

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[2] *RioTinto Services Ltd v Commissioner of Taxation* [2015] FCA 94 (*Rio FCA*) and *Rio Tinto Services Limited v Commissioner of Taxation* [2015] FCAFC 117 (*Rio FCAFC*)
[3] *Rio FCA* at [26]
[4] *Rio FCAFC* at [8]

> "The purpose for which an acquisition was made may in some cases bear upon whether the acquisition has a relevant relationship with the making of supplies that would be input taxed, but it is the existence of a connection or relationship between the acquisition and supplies that would be input taxed that is the statutory criterion directed by s 11-15(2)(a)."[5]

Therefore "actual purpose" is not the test for determining whether or not (and the extent to which) an acquisition will be denied creditable purpose – but "connection" between the acquisition and the making of supplies that would be input taxed. However, this is not to say that "actual purpose" is not relevant to the operation of Division 11 or s 11-15(2) in particular[6].

Clearly, 11-30 anticipates that where an acquisition is partly creditable, there is a "total purpose" of the acquisition. How should this be interpreted? Is it simply:

- start with 100% (being the ITC that would be available if the acquisition was wholly for a creditable purpose);
- deduct the extent (if any) to which the acquisition FAILS the requirements of s 11-15(1) such that only the extent of the acquisition that is acquired in carrying on the enterprise survives to the next stage;
- deduct the extent (if any) to which the acquisition MEETS the requirements of s 11-15(2)(a) because there is a relevant connection between the acquisition and the making of supplies that would be input taxed; and
- deduct the extent (if any) to which the acquisition MEETS the requirements of s 11-15(2)(b) because the acquisition is (to some extent) private or domestic in nature.

In this way, the "total purpose" is notional and the determination required by s 11-30 is simply done on a "deductive" basis. This suggested to be the appropriate approach. The alternative would require an "additive" approach, which would necessitate identification of all the purposes to which the acquisition had its nexus. This tracing of acquisitions to all supplies is exactly what was not intended.

2.2 *Rio* and *Hannover*

In this context we can turn to some of the challenges of recent decisions of the Full Court on the ascertainment of creditable purpose. The proposition put to the Court in *Rio* was challenging and perhaps can be traced back to some of the arguments originally put to Lindgren J in *AXA*[7]. In *AXA*, it was put to the Court that there should be a "look through" of purpose between different entities, even where those entities were not members of the same GST group:

> AXA appeared to contend, however, that even accepting that the unit trusts, and NMAM and NMFM in their capacity as trustees of any of them, were not part of the Group, a look through approach was still appropriate. According to AXA's submission, NMLA should be treated as having made the investments directly (and thereby as having made supplies that were not input taxed). AXA's argument appears to be that the Act allows for an acquisition to be related indirectly to a supply, and that were the actual purpose of AXA in investing in unit trust was to make overseas investments, that actual purpose should be determinative.
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> In my opinion, the "look through" approach is inconsistent with the Act."[8]

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[5] *Rio FCA* at [26]

[6] It is noted that at [23] Davies J states that "Unlike the New Zealand legislation considered in *BNZ Investments*, s 11-15 does not use the language of, or require, or even direct an inquiry into purpose." Whilst this is the case, perhaps those comments should be considered in the context of the distinction between the express language in the different statutory regimes.

[7] *AXA Asia Pacific Holdings Limited v Commissioner of Taxation* [2008] FCA 1834

[8] *AXA* at [121] – [122]

We have already discussed “actual purpose” in contradistinction to the “connection” that is actually required by s 11-15(2)(a). However, the rejection of the “look through” approach in *AXA* was linked to the fact that the entity making the acquisition and the entity making the GST-free supplies were not part of the same GST group.

In *Rio,* the entities were part of the same GST group – so in appropriate cases, tracing of purpose from one entity to another entity was both permissible and necessary. Rio Tinto (the applicant in the case) was the representative member of the GST group to which Hamersley belonged. Hamersley (along with another group member) provided residential accommodation for the remote workforce. Rio Tinto accepted that the supply of the residential accommodation was input taxed. However, the argument was that the supply of the residential accommodation was in service of a broader object – the taxable/GST-free supply of iron ore. Therefore, the “intermediate” purpose should be subordinated to the “ultimate” purpose and this should be enough to interrupt (in whole or in part) the “connection” that would otherwise exist between acquisitions relating to the supply of the residential premises and the input taxed supplies. As summarised by Davies J:

> “In the circumstances, the argument went, s 11-15(2)(a) did not apply because the supply of residential premises was not the end commercial objective of the acquisitions but “merely an intermediate step” and “a necessary input” in the carrying on of Hamersley’s “enterprise” of mining and selling iron ore.”[9]

This argument was rejected, with her Honour stating:

> “It may be accepted that Hamersley’s leasing activities are wholly incidental to its mining operations and merely a means to Hamersley carrying on its business but the relevant inquiry is whether the acquisitions in question were connected with the input taxed supplies that Hamersley makes as part of its activities. On the uncontroversial facts of this case, the acquisitions in question all have a direct and immediate connection with Hamersley’s provision of the leased accommodation and that direct and immediate connection constitutes a sufficient and material relationship for the purposes of s 11-15(2)(a).”[10]

When the Full Court came to comment on this issue they agreed about the nature of the initial relationship but on one reading, sought to go further:

> “The extent of the relationship between the acquisitions and the supply of the residential premises is not to be reduced by the fact that the acquisitions may also have related to another purpose where that other purpose is only related to the acquisition wholly by and through the otherwise input taxed supply.”[11] .

Again, it is suggested that this statement needs to be read in context. It had already been determined by Davies J at first instance that as a matter of fact the acquisitions made by Hamersley were wholly related to the making of input taxed supplies. Once that determination is made as a matter of fact, there is no role for any further operation of s 11-15(2) because s 11-15(2)(a) has wholly excluded that acquisition from being made for a creditable purpose. In this context, for the Full Court to say that s 11-15 does not operate to reduce the extent of “connectedness” down from 100% to some lower amount because of some broader commercial activities to which the intervening input taxed supply is subservient, is, with respect, entirely correct.

In other words, undertake the apportionment, if the connection is wholly and solely to the making of input taxed supplies, then the acquisition is wholly excluded from being for a creditable purpose even though **the input taxed supplies** the taxpayer is making are in service of some other purpose.

Perhaps an example is of assistance. A owns a commercial property. A contracts to sell the commercial property to B. B is having trouble financing the purchase. A offers to loan B some of the money under a separate agreement. The sale of the property is taxable and the making of the loan is input taxed.

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[9] *Rio FCA* at [19]
[10] At [33]
[11] *Rio FCAFC* at [8]

In the first instance, let's assume that A engages law firm D to provide legal services for both transactions. The services that A acquires from D relate to both the making of the taxable supply and the making of the input taxed supply arising from the making of the loan. Let's ignore the operation of the FAT and the other exceptions to s 11-15(2). A's acquisition is made **partly** for a creditable purpose because it partly relates to the making of the input taxed supply and partly relates to other things – in this case, the taxable supply of the commercial property. As such, an apportionment is necessary. If we assume that D deploys different lawyers (some from the property team and some from the finance team) to the different tasks, then apportionment based on the time costs on a per lawyer basis should provide a simple and unambiguous apportionment methodology.

What would happen if A were to engage law firm E to assist on the property transaction and law firm F to act on the lending? A's acquisition of E's services is make solely for a creditable purpose and A's acquisition of F's services solely relates to the making of the input taxed supply. As such, full credits arise for the acquisition of E's services and no credits arise for the acquisition of F's services. The fact that F's services are acquired to facilitate A's supply of the commercial property to B does not, to use the words of the Full Court in *Rio* reduce the extent to which A's acquisition of F's services relates to the making of the input taxed supply by A.

Assuming all other factors (such as time charged and rates) A's input tax entitlements are the same whether A only engages D or A engages E and F.

But let's flip the example so that the principal supply is input taxed. Let's assume that A is now selling shares in a company to B (an Australian resident company) but is providing a loan to B's parent company, X that is a UK resident with no operations of its own in Australia, in order to finance B's purchase.

If we accept, as we must, that the broader taxable supply (the sale of the commercial property) does not reduce the extent to which the legal services related to the making of the loan are connected to the making of input taxed supplies, then we must also accept that the broader input taxed supply does not reduce the extent to which the legal services related to the making of the GST-free loan are made for a creditable purpose.

In the event that A engages the one firm of lawyers for both transactions, the acquisition of the legal services clearly relates – in part – to the input taxed supply. But the extent of the denial of input tax credits should not be greater than if there were two different acquisitions directly attributable to each type of supply.

However, this seems to be the approach the Commissioner sought to take on appeal in *Hannover*. As stated by the Court:

> "For the Commissioner to succeed on the first issue, he would need to show that the primary judge erred in his factual and evaluative conclusion that the overhead acquisitions did not relate solely to the making of input taxed supplies. The Commissioner sought to do this by contending that an acquisition will relate solely to the making of input tax [sic] supplies if a supply that is not input taxed is made "by and through" an input taxed supply. The Commissioner relied upon the structure of the contractual arrangements for reinsurance to show why the GST-free acquisitions supplies by Hannover to Hannover Ruck were made "by and through" the input taxed supplies Hannover made in Australia."[12]

The argument is along the lines that because the GST-free loan is made as a direct and immediate consequence of the input taxed supply of the shares, the legal services relating to the GST-free loan have their relationship only "by and through" the input taxed supply of the shares. Having succeeded in *Rio,* it appears that the Commissioner was trying to create an asymmetry – effectively arguing that a broader taxable or GST-free supply would not restore creditable purpose but a broader input taxed supply would deny creditable purpose.

This was rejected by the Court noting that "the Commissioner's reliance on the phrase "by and through" as a 'tool of analysis' is liable to distract from an application of the statute according to the terms of the statue

[12] *Hannover FCAFC* at [25]

properly construed. It is a phrase which was used in *Rio Tinto* as part of the Full Court's explanation for its evaluation of the facts. The statute does not required tracing of supplies. So far as concerns s 11-15(2)(a), the statute requires a judgment about the relationship between an acquisition and the making of supplies." [13]

As discussed above, unless the acquisition has no connection to input taxed supplies or solely relates to making supplies that are input taxed, s 11-15(2) is merely the prelude to s 11-30. We need to be able to calculate the extent of creditable purpose in order to know the correct amount of the input tax credit to claim.

Following *Hannover* we can have confidence that it is not necessary to trace to taxable or GST-free supplies to "restore" creditable purpose and there is no asymmetry between the examination of "broader purposes".

Hopefully, we can return to a world in which input tax credits are respected as a key part of ensuring that the correct amount of GST is collected and not perceived as a threat to the revenue.

[13] At [28]

3. Issues with Division 93 in practice

3.1 The issue in practice?

Prior to the enactment of Division 93 it was identified that deficiencies existed in the provisions[14] dealing with the attribution of input tax credits to tax periods. Because of the necessary flexibility that was built in to deal with the need to hold a tax invoice at the time at which an input tax credit was claimed, an unintended consequence was that indefinite deferral of of input tax credits input tax credits was possible. It was appropriate to address this in the context of consistency with other provisions and taxes in order to ensure good administration and also to provide a better level of predictability for the revenue.

The enacted provisions instigated a required 4-year cut-off but seek to limit that in given circumstances, such that there can be a mismatch between parallel liability obligations and the unusual circumstance of a liability remaining on foot, with the related entitlement to credits falling away where they had *not been taken into account in an assessment of a net amount of yours*[15].

The original view of the ATO was that this was simply a "drop dead" position, even where valid proceedings were on foot before the court. Subsequent decisions as noted below have addressed that issue, and the although the Commissioner posits the view in his ruling[16]:

> A tax credit is not taken into account in an assessment by lodging an objection, requesting an amendment (including in the course of making a voluntary disclosure), or applying for a private ruling.

He then goes on to indicate[17]:

> However, the limiting provisions do not apply to the extent that an entitlement to a tax credit for a tax period is specified in the grounds of a valid objection lodged within the 4-year entitlement period.

This is a view that leaves the alternative courses of action - requesting an amendment or applying for a private ruling - out in the cold. Knowledge and careful planning can perhaps deal with this, but taxpayers may still easily be caught up unwittingly and denied credits.

This seems unreasonable where, say for example, a voluntary disclosure is made of all facts and credit entitlements in the course of bringing a liability to account, where the Commissioner may very well bring to account the liability as indicate you are out of time on the related credits. This seems to run counter to the original statutory intention of Division 93 – encouraging taxpayers to proactively engage to determine their entitlements and to provide certainty for the revenue.

Some more detail and analysis follows.

3.2 Operation and history of section 93-5

An understanding of legislative history of Division 93 is essential to determining its proper operation. Consistent with the approach taken by his Honour Justice Moshinsky in *Coles*, the limitation on taxpayer entitlements under Division 93 was not intended to override the operation of the rights and obligations of taxpayers and the Commissioner pursuant to a review of assessments under Part IVC of the TAA. That is, the rights of a taxpayer to seek review in accordance with the scheme of Part IVC were intended to be unaffected.

[14] Section 29-10(4)
[15] Section 93-5(1)
[16] MT 2024/1 para 19(h)
[17] MT 2024/1 para 19(i)

In order to achieve this essential limitation on the operation of the Division, his Honour found that the express words of the Division must be read down. This could be achieved in a way that enabled the provisions to achieve their evident purpose: to prevent the indefinite deferral of input tax credits but without trespassing on the rights of taxpayers for a full and complete review of their assessments under Part IVC of the TAA.

There is a strong relationship between section 93-5 and section 29-10(4) of the GST Act. Indeed, as discussed above it is the problem caused by the drafting of section 29-10(4) that made the introduction of section 93-5 necessary.

The problem of the indefinite deferral of input tax credits because of the operation of section 29-10(4) was noted by the Board of Taxation in their 2008 publication "Review of the Legal Framework for the Administration of the Goods and Services Tax". Recommendation 20 of the Board of Taxation's Report was that:

> "The law should be amended to limit claims for input tax credits to a four-year period in line with the time limit on refunds and credits to clarify that a taxpayer can defer input tax credit claims (within these limits) even if they held a tax invoice at the end of the period to which the credit would otherwise be attributable."

At 3.3.24 of the Report, the Board noted that "imposing a definite four-year time limit on the ability to claim input tax credits would align the attribution rules in the GST Act with the time limit on refunds and credits provision in the TAA."

The clear and evident purpose of the Board's recommendation was to address a discrepancy in the attribution of input tax credits to tax periods. It was not linked to the ability of taxpayers to amend previously lodged returns to adjust input tax credit claims because of a change in the calculation of the extent of the creditable purpose of those acquisitions.

A direct link is drawn between the introduction of Division 93 and the Board's recommendation by paragraph 1.2 of the *Explanatory Memorandum* to the *Tax Laws Amendment (2009 GST Administration Measures) Act 2009* (**2009 EM**) which states:

> "This measure implements recommendation 20 of the Board of Taxation's Review of the Legal Framework for the Administration of the Goods and Services Tax."

At paragraph 1.7 of the 2009 EM, again the purpose of Division 93 in curing an attribution problem is clear:

> "As outlined above, the four-year period is imposed by reference to the tax period or fuel tax return period to which the credit was attributable. However, the attribution rules permit taxpayers to defer the attribution of credits until a later tax period. As a consequence there is no effective limitation period for claiming input tax credits and fuel tax credits".

Further, in paragraph 1.8 it is stated:

> "Flexibility in attributing credits should not result in input tax and fuel tax credit entitlements existing indefinitely, including where the entity's liabilities for the same period are no longer due and payable because of the four-year limitation period."

An important distinction is drawn in paragraph 1.18:

> "The changes apply only to input tax credits for fully and partially creditable acquisitions (including reduced input tax credits) and fuel tax credits. Other entitlements and liabilities such as input tax credits for creditable importations, adjustments and taxable supplies are subject to separate attribution rules that do

> not allow deferral. As such, they are currently subject to effective limitation that provide certainty within an appropriate period."

Again, it is suggested by the authors that this makes the purpose of Division 93 clear – it is there to remedy the risk to the revenue arising from the **perpetual deferral** of input tax credits that was facilitated by the drafting of section 29-10(4).

Although Division 93 was subsequently amended in both 2012 and 2014. Those amendments do not alter this position.

3.3 Mismatch between GST Act and TAA

In this context, it is necessary to consider the potential for a mismatch between Division 93 and the review mechanisms under the TAA. That is, the possibility that rights might arise for a taxpayer under the operation of the TAA – such as Division 155 of Schedule 1 to the TAA – and yet those rights may be rendered otiose by the operation of Division 93 under the GST Act.

Section 29-10(4) attributes an input tax credit to a tax period in which that input tax credit is claimed – even if the acquisition is only "partly creditable". Section 29-10(4) asks the question of whether the GST return for the period "does not take into account an input tax credit". In respect of a partly creditable acquisition for which the relevant amount of the input tax credit was claimed in that GST return, the answer must be "no". That is, the input tax credit indeed **was** taken into account in the calculation of the net amount. It is true to say that a full input tax credit was not claimed but the input tax credit arising from the creditable acquisition was taken into account.

This accords with the language of section 29-10(4) and the definition of "input tax credit". In accordance with section 195-1, an input tax credit is defined by **section 11-20.** This states:

> "You are entitled to the input tax credit for any *creditable acquisition that you make."

As such, the scheme of the Act draws an important distinction between the **input tax credit** itself and the **amount of the input tax credit**. The "input tax credit" is what arises from the creditable acquisition. As noted earlier, an acquisition is a creditable acquisition within the scheme of the operation of Division 11 even if the acquisition is only partly creditable. The "amount of the input tax credit" is defined by section 11-25 for acquisitions that are not "partly creditable" and the "amount of the input tax credit" for partly creditable acquisitions is the result of the calculation in section 11-30(3).

In this sense, whether or not an input tax credit has been "taken into account" in the meaning of section 29-10(4) is a binary question – either it has or it has not. The amount of the input tax credit that has been claimed or is claimable is a wholly separate question.

In this context it is helpful to consider the comments of Moshinsky J in *Coles*. His Honour's comments are immediately directed to section 47-5 of the *Fuel Tax Act* but are equally applicable to a consideration of section 93-5. It is worth setting out para [139] of his Honour's judgement in full:

> "Coles's second contention is that s 47-5 of the Fuel Tax Act, when understood in its historical context, is designed to place a four-year limit on the process of claiming a fuel tax credit in a later fuel tax return (the situation dealt with in s 65-5(4)); and that s 47-5 is not intended to affect the objection and appeal processes dealt with in Pt IVC of the Tax Administration Act. In my view, there is some force in this contention. For the reasons given by Coles in its submissions, summarised above, there is a persuasive argument that: s 47-5 is intended to prevent an ongoing entitlement to claim credits in a later return where a return has not been lodged or credits not claimed; Div 155 of Sch 1 to the Tax Administration Act

> provides for a separate dispute resolution mechanism (i.e. objection and review) once a return has been lodged or a default assessment issued; and once a return has been lodged and objected to, there is no scope for the operation of s 47-5 to disentitle a taxpayer to fuel tax credits as the rights of the Commissioner and the taxpayer are, relevantly, preserved and protected by ss 14ZY, 14ZZP and 14ZZQ of the Tax Administration Act and s 155-60 of Sch 1 to that Act. Acceptance of the Commissioner's submissions would present the difficulty that a taxpayer could lawfully object to an assessment and find that, when a court came to consider the matter outside of the four-year period, an entitlement to a fuel tax credit would be denied, notwithstanding that the credit was attributable to the period to which the assessment and objection related. For example, it may be that, in relation to a contentious issue concerning a fuel tax credit, a taxpayer wishes to self-assess on the basis of the Commissioner's position on the issue, and then object against the deemed assessment. In this scenario, if the Commissioner's submissions are correct, the taxpayer's entitlement to the fuel tax credit would depend on whether or not the matter was determined (by the Commissioner or on review or appeal) within the four year period. Thus, while I accept that s 47-5 is expressed in unqualified terms, consideration of the legislative history, including that it was introduced during the period when a self actuating system applied, is generally supportive of Coles's contention."

Let us assume that a taxpayer lodged a GST return within the requisite period claiming input tax credits for the acquisitions that has made with an extent of creditable purpose of 30%. Subsequently, within the period of review determined for that assessed net amount under Division 155 of Schedule 1 to the TAA, the taxpayer wants to amend its return and increase the amount of the input tax credit claimed for those creditable acquisitions based on an extent of creditable purpose of 40%.

The simple fact is that when the original assessment was made following the lodgement of the GST return, the input tax credits **were taken into account** and the attribution triggered in the section 29-10(4) sense.

As such, it could be argued that there is simply no warrant for section 93-5 to limit the taxpayer's entitlement to increase the amount of the input tax credits that have already been "taken into account" in assessments by the Commissioner. There is a proper and valid limitation on the ability of a taxpayer to amend returns under Division 155. That should be the effective limitation – the language of Division 93 allows for an interpretation that supports such a result and that interpretation should be preferred.

3.4 Section 93-5 must not negate valid Part IVC processes

It is clear from the legislative history and *Coles* that the role of section 93-5 is not to deprive a taxpayer of their Part IVC rights. Where are Part IVC process is available, it is because the taxpayer has lodged a relevant return and claimed the relevant input tax credit.

One of the mechanisms that is provided for by Part IVC is the ability of a taxpayer to seek consent from the Commissioner to lodge an object outside the time limits for objections usually imposed by section 14ZW. Section 14ZW(2) states:

> "If the period within which an objection by a person is required to be lodged has passed, the person may nevertheless lodge the objection with the Commissioner together with a written request asking the Commissioner to deal with the objection as if it had been lodged within that period."

Further, section 14ZX(3) states:

> "If the Commissioner decides to agree to the request, then, for the purposes of this Part, the objection is taken to have been lodged with the Commissioner within the required period."

This is not an unstructured discretion. It is an important power administered in accordance with the statutory guidance and administrative law principles. The exercise – or non-exercise- of the Commissioner's discretion under section 14ZW(2) is reviewable by the Administrative Review Tribunal[18]. If the Commissioner were to refuse to exercise the discretion, the aggrieved taxpayer could successfully demonstrate to the Tribunal that the justice of the situation necessitates the grant of the discretion by the Commissioner and order accordingly.[19]

In *Brown*[20], Hill J considered the exercise of the discretion under section 14ZW and the elements to which the decision maker should have regard in doing so. At [59] his Honour stated:

> "What is required is the balancing of the delay; the explanation for it; the circumstances which give rise to it and such prejudice if any as may be shown to exist to the Commissioner against the prejudice which may arise to a taxpayer who has by reason of the failure to object in time lost the right to a review of the assessment. In this balancing process the Commissioner or Tribunal on a review will be guided by what the justice of the case requires. The balancing process should be approached on the basis that while it has entrusted the Commissioner a power to extend that time in appropriate circumstances. The decision maker should not lose sight of the fact that s14ZW is an ameliorating provision designed to avoid injustice."

It would be rather odd if, having exercised a discretion in order to avoid injustice, that injustice should nonetheless persist because the Commissioner were to treat the objection has having been lodged within time for the purposes of Part IVC and not lodged within time for other purposes – including Division 93 of the GST Act.

However, this is the view taken by the Commissioner in MT 2024/1: that only where an objection is lodged within the period set out in section 93-5 will the objection prevent an input tax credit entitlement from "ceasing" under that section[21]. It is difficult to see how this view can stand with the observations of Moshinsky J in *Coles* in which his Honour emphasises that the interpretation of section 93-5 should be done consistently with the principal that the it should not to be used to deprive a taxpayer of the review and appeal processes in Part IVC.

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[18] Section 14ZX(4)
[19] See *Brown* and see also *Hojlund v Chief Commissioner of State Revenue* [2021] NSWCATAD 143 at [35]
[20] *Brown v Federal Commissioner of Taxation* [1999] FCA 563
[21] At [73]

4. Enterprise

Another part of the GST law that is critical in ensuring that the correct amount of GST is collected is the concept of "enterprise". This extremely broad concept is the key to participation in our GST system. The definition also has implications for the operation of the margin scheme. Of course, because of the way in which GST operates, sometimes the Commissioner is seeking to bring entities into the GST system – arguing that the entity is carrying on an enterprise and sometimes the Commissioner is seeking to keep entities out of the GST system – arguing that they are not carrying on an enterprise.

4.1 Role

There are extensive papers that have been written about the concept of enterprise and the way in which it differs from the income tax notion of business. In brief terms, an entity is only able to be registered for GST purposes if that entity is carrying on an enterprise. Below certain turnover thresholds, an entity that is carrying on an entity may choose to register for GST purposes but is not obliged to. Above those turnover thresholds, an entity is required to be registered and, indeed it is an offence not to become registered when an entity is obliged to do so.

The scope of enterprise is critical not only as a condition to participate in the GST system but also in determining whether or not particular supplies are taxable supplies and particular acquisitions are creditable acquisitions. We have already seen that s 11-15(1) operates such that an acquisition will only be made for a creditable purpose where the "thing" is acquired "in carrying on your enterprise". Similarly, s 9-5 requires a similar nexus between a supply and the enterprise of the entity making that supply such that the supply "is made in the course or furtherance of an enterprise" that the entity carries on. Both of these provisions highlight the possibility that an entity that is carrying on an enterprise and is registered for GST purposes might make acquisitions that have insufficient nexus to that enterprise to be entitled to credits and might make supplies that have insufficient nexus to the enterprise to be a taxable supply.

This is not simply theoretical. In *San Remo Heights*[22], Senior Member Olding found that the sale of property by an entity that was registered for GST purposes and carrying on a grazing and leasing business were not supplies made in the furtherance of those enterprises:

> "On the uncontested evidence in this matter, I am satisfied that the sales have no connection with the property rental or grazing enterprises – no specific connection was suggested by the Commissioner – and were not made in the course or furtherance of either or both of those enterprises."[23]

However, Senior Member Olding then went on to find that the sales activity was an enterprise in its own right.

More recently, Senior Member Lazanas (as she then was) noted in *Lance*[24] that:

> "… an entity can carry on more than one enterprise. An entity can also carry on some activities that are an enterprise and some that are not in connection with the carrying on of an enterprise."[25]

The examples on which Senior Member Lazanas drew from the *Explanatory Memorandum* in support of this point involve individuals. It is always easier to see that a natural person has a "business persona" and a "personal persona". It is less easy to identify circumstances in which a company might have a "private commodity" the realisation of which is unrelated to the enterprise carried on by the company.

[22] *San Remo Heights Pty Ltd v Federal Commissioner of Taxation* [2020] AATA 4023
[23] At [26]
[24] *Lance v Commissioner of Taxation* [2024] AATA 11
[25] At [17]

4.2 Some people want to be in

If there is a contest between a taxpayer and the Commissioner in which the taxpayer is seeking to establish that the taxpayer is carrying on an enterprise, it is almost always a battle over the availability of input tax credits.

It just seems to be wrong to look at this area of the law without considering a case dealing with horse breeding. The 2008 decision of Member Frost (as he was at the time) in the case of *D'Arcy*[26] is a good example. Mr D'Arcy formed the view that his activity in thoroughbred horse breeding amounted to the carrying on of an enterprise. He was registered for GST purposes and lodged BASs on that basis. There was some scale to the activity, Mr D'Arcy held interests in up to 8 mares that produced 22 progeny, all but one of which was sold. The Tribunal noted that Mr D'Arcy's "expenses have far outweighed his receipts. Of course, that result in itself is not determinative of the question whether he has been carrying on activities "in the form of a business"."[27]

However, of more significance was the fact that:

> "… his entry into these activities appears to have been ill-considered (at least in the context of a proposed business activity) and was not likely to return a profit within any reasonable timeframe. The activities have not been approached in a businesslike way. Almost nothing has been produced to the Tribunal in the way of books of account and records."[28]

This is a persistent problem. When taxpayers lose the argument about whether or not they are carrying on an enterprise, it seems to be more a reflection of the "how" rather than a precise analysis of the "what". In *Guru 4U*[29], although the activities might have amounted to the carrying on of an enterprise, those activities could not actually be attributed to the company[30] and so could not support the argument that the company was the one carrying on an enterprise.

An exception might be *Educational*[31] in which Deputy President McCabe described the taxpayer's "activities to progress the claimed enterprise" as "desultory"[32] as well as noting that there was "in reality, no evidence of any system or any degree of planning"[33]. Perhaps this was suggesting that not only had the taxpayer failed to discharge the burden of establishing that the activities were conducted in a "businesslike way" but perhaps there was an inadequate level of activity at all. This was certainly the position in *Dotrac*[34] where Deputy President Frost noted that in order to be carrying on an enterprise "an entity must *do* something".[35] (Emphasis original). The Tribunal went on to state:

> "I have been unable to identify what, if anything, the applicants were doing in relation to either of the properties."[36]

A subsequent decision of Deputy President Frost in *Private Tutor*[37] brings us closer to the current position. In that case, the Tribunal found that the taxpayer was carrying on an enterprise, overturning the Commissioner's decision to deregister the entity.

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[26] *Gregory D'Arcy v Commissioner of Taxation* [2008] AATA 708
[27] At [22]
[28] At [22]
[29] *Guru 4U v Commissioner of Taxation* [2014] AATA 740
[30] At [74]
[31] *Educational Pty Ltd v Commissioner of Taxation* [2011] AATA 445
[32] Interestingly, the same term was used by the Full Court in Statham v FC of T to describe the farming activity in that case regarding whether the sale of the property gave rise to income or profits arising from a profit-making undertaking or scheme.
[33] *Educational* at [20]
[34] *Dotrac Pty Ltd v Commissioner of Taxation* [2014] AATA 336
[35] At [48]
[36] At [49]
[37] *The Private Tutor v Commissioner of Taxation* [2013] AATA 136

> "In my view, the Commissioner was distracted by the financial results as reported by the taxpayer in his BASs. Those results indicated that the activities were not profitable, and that they were unlikely ever to be so."[38]

The problem as identified by the Tribunal was not the absence of an enterprise or even a profit motive, but rather the taxpayer's attempt to allocate expenses to the enterprise activity that had nothing to do with the enterprise. Once these acquisitions lacking the relevant nexus to the enterprise were excised, "a profit is the only possible outcome – not a sizeable profit, but a profit nevertheless."[39]

The finding against the taxpayer's entitlements to the credits was not based on the absence of an enterprise but on insufficient connection between the acquisitions (expenditure) and the enterprise that was in fact being conducted.

More recently, the Courts have had occasion to consider the position of a company in the middle of what could be described as a family office and whether the company was making acquisitions in the course of carrying on an enterprise.

The facts in *Konebada*[40] involved the trustee of a trust (in that capacity, the taxpayer) that had an established business of providing management services to family entities undertaking particular investments. The directing mind of the taxpayer was Mr Lewski who was a tax agent. There were a range of litigious matters in which various members of the family were embroiled. Mr Lewski instructed lawyers to advise and appear in relation to those proceedings and the costs were borne by the taxpayer. The case considered whether or not the taxpayer was entitled to input tax credits for the GST included in the costs which it incurred.

At first instance, Hespe J considered the two key questions to be:

- whether the taxpayer had made an acquisition of the services at all; and if it had
- was the acquisition made in carrying on an enterprise by the taxpayer.

The taxpayer was clearly carrying on an enterprise. However, the scope of that enterprise was the subject of contention.

As noted by her Honour:

> "The Applicant's description of its relevant enterprise was somewhat fluid and amorphous. By its written submissions, it was contended that the Applicant carried on an enterprise which involved it managing litigation, tax, legal, regulatory compliance and commercial matters for the Lewski Family Group and/or involved the procurement of legal services for members of the Lewski Family Group. The Applicant received distributions, fees and dividends. It was submitted that the Applicant acquired the Litigation Services and Other Services while carrying on its enterprise of providing services and information to the members of the Lewski Family Group."[41]

Importantly, there was no formal agreement for the provision of services relating to the conduct of the litigation nor was there any arrangement for a fee to be paid to the taxpayer that was commensurate with the costs incurred or the work done for the members of the Lewski Family Group. On the facts, it was concluded that:

> "The Court finds that the Applicant did not carry on a business or providing litigation consulting services or a business of receiving and disseminating advice or formulating and making recommendations based on advice it received to members [of] the Lewski Family Group in respect of litigation proceedings. The

[38] At [49]
[39] At [50
[40] *Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation* [2023] FCA 257 (*Konebada FCA*) and *Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation* [2024] FCAFC 42 (*Konebada FCAFC*).
[41] *Konebada FCA* at [115]

> evidence does not support a finding that the Applicant carried on a business of providing or disseminating legal advice or of managing professional services for members of the Lewski Family Group. The Court does not have before it contemporaneous records that satisfy it that the Applicant's activities extended to it providing such services. There was no acquisition of services by the Applicant in carrying on an enterprise of providing services and information to the members of the Lewski Family Group."[42]

The fact that the context was a family group did not assist.

> "The Applicant contended that it was not unusual for intra-family group dealings to be conducted informally and it was not for the Commissioner to dictate how the Applicant might choose to conduct its affairs. So much may be accepted. However, if a taxpayer chooses to conduct its affairs informally, there may be practical consequences for its ability to prove its case." At [131]

The appeal to the Full Federal Court on this point emphasised the "in the form of" point – that these words in the definition of "enterprise" "to include, within the definition "activities in the form of a business but not carried on as a business".[43] The Full Court accepted that these words extended the definition further than it otherwise would have but that "the words of extension do not have the necessary reach to bring the activities of Konebada within the definition of "enterprise"."[44]

It should therefore not be assumed that the Courts will accept that the scope of the enterprise being conducted by an entity will expand to cover all supplies or, more importantly, all acquisitions being made by an entity. This is so, even where there is an established enterprise being carried on by the entity. In the absence of:

- Appropriate agreements for the provision of services;
- Businesslike conduct, including the maintenance of proper records and the systematic undertaking of all the of the steps comprising the alleged enterprise; and
- Some form of return for the entity making the acquisition (in the context of a 'procurement enterprise' a repayment of the costs plus a margin),

An entity may struggle to discharge its burden of proof that the acquisitions that the entity makes have a sufficient nexus to an enterprise to sustain a claim for input tax credits.

4.3 Some people want to be out

As discussed above, there is also a long history of litigation where taxpayers seek to stay outside the GST net on the basis that they are not carrying on an enterprise and the Commissioner seeks to drag them in.

In *Touram*[45] in 2008, the taxpayer successfully argued that the sale of the property in question was sufficiently separate to the rest of their activities but the Commissioner ultimately prevailed on the basis that the way in which the taxpayers went about realising the value of the land was an enterprise of its own – an activity involving the acquisition of the land with a view to selling it in due course for a profit and in a business-like way.

The property development fact pattern tends to dominate these arguments. Which is not surprising because the costs leading up to the realisation of the assets involve relatively modest input tax credits when compared to the GST payable on the eventual sale. This does not mean that the amounts incurred are small. In the *Collins Retirement Fund*[46] case, the works involved to realise the asset in question were in excess of $4.5m.

[42] At [125]
[43] *Konebada FCAFC* at [71]
[44] At [75]
[45] *Touram Pty Ltd ATF the GKA Family Trust v Commissioner of Taxation* [2008] AATA 1167
[46] *Ian Mark Collins & Mieneke Mianno Collins ATF The Collins Retirement Fund v Commissioner of Taxation* [2022] AATA 628

That case, rather cleverly (but unsuccessfully) sought to escape GST on sale not by challenging the existence of an enterprise but rather registration by arguing that the sale of the land was the mere realisation of a capital asset. The taxpayer also sought to argue that the sale was made in ceasing to carry on the development enterprise. Again, this argument accepted the existence of the enterprise but sought to exclude the proceeds of the sale of the lots from triggering and obligation to register because the sales would be the cessation of the development enterprise (invoking s 188-25(b) of the GST Act).

This was ambitious – and wholly rejected by the Tribunal.

> "I am, with respect, quite unable to see how it could be said that the Sales would be made solely as a consequence of ceasing to carry on the land development enterprise. That enterprise did not cease before the last of the Sales were completed." [47]

> "The sale of land is the central objective of a land development enterprise and occurs as part and parcel of – as a consequence of – the ongoing conduct of the enterprise. The sales do not occur as a consequence of the enterprise ceasing."[48]

In the 2024 decision of the Tribunal in *Lance*[49], the scale of the operations and the way in which the sale was conceived, prepared for an implemented were found by the Tribunal to be wholly consistent with the carrying on of an enterprise.

There is a sense of "if it's profitable it's an enterprise and if it's not, it isn't" about the cases. It may be that poor planning that results in a profit is more likely to result in a finding that there is an enterprise than the same extent of poor planning that results in a loss. However, all things being equal, businesslike conduct is more likely to result in a profit than desultory conduct – so we are always dealing with biased samples.

The key is always in maintaining contemporaneous records of actions and intentions and planning for precisely what needs to be substantiated to support your contention.

4.4 Some people shouldn't be in

It is worth noting at this point that it is perhaps too easy for people to access the GST system. We should raise the bar – both in terms of threshold tests of businesslike conduct and perhaps also in terms of a minimum turnover.

This could have the advantage of effectively "input taxing" small business, treating them as consumers and denying them input tax credits. Whilst this might seem harsh, it reflects the reality that both taxpayers and the ATO struggle with compliance at the small business level. If businesses were unable to register for GST purposes unless they could demonstrate – say $2m or more of turnover – the system may be better able to cope with the compliance checks necessary for collecting GST and ensuring appropriate access to input tax credits.

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[47] At [72]
[48] At [73]
[49] *Lance v Commissioner of Taxation* [2024] AATA 11

5. BTR, retirement villages and the *commercial residential premises* impasse

5.1 What's the fuss about?

The distinction between what might be *residential premises*[50] that are *input taxed*[51] and *commercial residential premises*[52] has long been a focussed topic of technical discussion with the Australian Taxation Office (ATO), the subject of a number of cases of the topic, and some legislative reform, but with the divide between the ATO and taxpayers/advisors remaining unresolved on a number of fronts.

The essence of the difference in construction and lease/provision of accommodation being simply:

- For *residential premises* – no GST recovery on construction and operation, with no GST liability on rent or accommodation charges received.

- For *commercial residential premises* – there would be full recovery of GST incurred on construction and operation, with a liability for GST on rent or accommodation charges received.

  As *commercial residential premises* the discount available in respect of *long-term accommodation*[53] may be available.

An unfinished argument - pending any further Federal Court decisions - spanning some two decades in regard to independent living units (ILU's) in retirement villages, it has gained some increased coverage with the rise of Build to Rent (BTR) developments to meet housing demand, where the upfront capital cost of GST not recoverable seen as a material barrier to investment and supply of such stock.

Embroiled in the mix and subject to differing views over the past two decades are other property interests such as:

- Student accommodation – resisted for a long time by the ATO under the matter was largely settled in *ECC Southbank*[54], although there was very close and somewhat narrow focus on the accommodation being "similar to a hostel".

- Holiday apartments in a larger hotel style complex, where the unusual fact patterns in *South Steyne*[55] provided some precedent – that the supply of the accommodation only, without all the features of a hotel, could not be *commercial residential premises.* That fact patterns are not common, and typically individually owned apartments in short stay/holiday facilities are provided direct to guests through an agent, who also facilities – for a fee to the owner – all or many of the features of a hotel. The principles of agency may be expected to apply here and there is one PBR[56] on multiple units on that issue. Whether there would be success on a single unit is unknown, but we would be curious, if for some reason such an owner wanted to take it on (and had the resources or funding to do so).

- Other holiday accommodation in the form of holiday houses. Typically, these would not have the required features of a *hotel, motel hostel or boarding house* or something *similar* as single houses but may do so if part of a larger group of buildings, where common services and equivalent features exist.

Outside of this, it has long been the position of both the Australian Taxation Office (ATO) and Treasury that *residential premises* that might border *commercial residential premises* should stay out of the GST system so as to not burden individual property investors with the requirements of registering and accounting for GST. In

[50] Section 195
[51] Section 40-65
[52] Section 195-1
[53] Division 87
[54] ECC Southbank Pty Ltd as trustee for Nest Southbank Unit trust & Anor v Commissioner of Taxation [2012] FCA 795
[55] South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation [2009] FCAFC 155 & [2009] FCA 13
[56] EDITED VERSION OF GST PRIVATE RULING Authorisation Number: 79082

addition, it is of political and/or policy concerns that renters, retirees etc be saddled with the additional cost of GST in their accommodation costs, although may be somewhat naïve and perhaps is not always the case.

One may very well ask, what is the actual mischief, and on a choice basis if something has many of the features of *commercial residential premises* and the owner wishes to approach it in a business like and commercial manner, why should they not have the choice to be in the GST system?

Why not BTR and ILU's in Retirement Villages?

It is the 8th factor in the Commissioner's ruling[57] that is the largest sticking point for these kinds of assets – status of guests. In short, the Commissioner sees anything other than short stays and limited rights of occupancy as not being eligible. Something somewhat at odds with *boarding houses* as discussed below, and certainly at odds with the proliferation of removable structures on what may be loosely considered *caravan parks & camping grounds*, which there seems to be an inordinately high tolerance.

Absent the ATO's seemingly intractable position on the status of guests issue, is suggested that there are cogent arguments that many on the asset classes noted above, and particularly BTR projects and retirement village ILU's, should appropriately fall within the existing definition of *commercial residential premises* - see further comments below. Although this could be made more certain simply by extending the definition to expressly include these types of properties this would seem highly unlikely in the current climate, but never say never!.

Many carry the characteristics you would normally associate with *commercial residential premises* absent the ATO view – they look like and feel like hotels/resort style accommodation and/or are run on a commercial basis with many common facilities and services.

Could it, should it be sufficient to have 7 of the 8 factors? In the view of many, including me, that would make sense.

As a result, the supply such accommodation could be excluded from section 40-35 and Subdivision 40-C and hence be a *taxable supply*. As *commercial residential premises* the discount available in respect of *long-term accommodation*[58] would be available as the legislation stands.

Realising the policy objective

Developers/Operators will be entitled to full input tax credits having made relevant acquisitions for the purpose of making taxable supplies. As a consequence, the investment decision/supply side of the policy equation is enhanced.

In a market starved of supply of suitable housing, backed by grand claims and imperatives to "fix the housing crisis" by governments at both State & Federal level.

Focussing on BTR style arrangements (which logically also encompasses retirement village accommodation) the GST input tax credits would 100% available at the time of construction, when the development is most cash needy. As for any construction and leasing of *taxable* premises and the GST is "paid" back over time in a manner that matches cash receipts, albeit – at a reduced rate for eligible *long-term accomodation.*in *commercial residential premises.* This in itself is a significant up front benefit to Developers/Operators and reduces significantly finance costs as retirement villages are a highly capital-intensive project, typically with long delays before any recovery and income occurs.

Although residents will suffer a "direct" GST cost in the sense that they will pay an express GST amount to the property owner, the recovery of GST on capital costs, and the meeting of GST liabilities over time, matched to cash flow can deliver a housing cost that is comparable to *input taxed* arrangements, where GST embedded in capital costs up front impacts the required commercial return.

[57] GSTR 2012/6
[58] Division 87

For those engaged in BTR or similar construction that do not wish to incur an additional level of – albeit discounted – tax and complexity, the option clearly exists for them to elect to remain *input taxed* under the existing provisions[59].

5.2 What is the Mischief?

The ATO, remain firmly of the view that the majority of BTR style assets are *residential premises and* are excluded from *commercial residential premises* until such time as the Federal Court determines otherwise.

Part of that is due to some level of caution on extending the interpretation and part is the acknowledged advantage that could be taken if all GST is claimed on construction and then:

- GST is charged at 50% of the normal GST rate for *long term accommodation*[60];and/or
- The property owner/operator may after the expiration of *adjustment periods*[61] elect to be input taxed, relieving them of further GST liability on leased fees and potentially of sale, if not otherwise registered.

In reality, it would be very difficult for a BTR owner of any substance to either be unregistered or remain unregistered and/or outside adjustment events on their full history and operations as they approach any sale.

This is primarily due to these being such large undertakings, often constructed in stages and/or over many years. Even where complete there will be items that have been subject to GST credit claims in repairs, maintenance and refurbishments etc that would not make deregistration a simple and painless task.

The reality is that most acquisitions and/or progress claims on construction may well exceed $500,000 and hence be subject to 10 *adjustment periods.* This would require the owner to remain registered for GST and/or making taxable supplies for a minimum of 10 -11 years.

Beyond that it may be noted that the property may not be sold as *input taxed residential premises* for a further 5 years and will be *new residential premises* under the 5-year rule[62].

Perhaps the mischief may not be as odious as the ATO & Treasury would perceive?

I also find it difficult to reconcile the ATO view, and what they see as the view of Treasury in light of the specific provisions regarding *long-term accommodation in commercial residential premises*, noting in particular:

- The meaning of *commercial accommodation*[63]:

  Commercial accommodation *means the right to occupy the whole or any part of *commercial residential premises, including, if it is provided as part of the right so to occupy, the supply of:*

  (a) cleaning and maintenance; or

  (b) electricity, gas, air-conditioning or heating; or

  (c) telephone, television, radio or any other similar thing.

- The meaning of *long-term accommodation*:

  (1) Long-term accommodation *is provided to an individual if *commercial accommodation is provided, for a continuous period of 28 days or more, in the same premises:*

  (a) to that individual alone; or

[59] Section 87-25
[60] Section 87-5
[61] Division 129
[62] Section 40-75
[63] Section 87-15

(b) to that individual, together with one or more other individuals who:

(i) are also provided with that commercial accommodation; and
(ii) are not provided with it at their own expense (whether incurred directly or indirectly).

………………………………

(3) **Commercial residential premises are* ***predominantly for long-term accommodation*** *if at least 70% of the individuals who are provided with *commercial accommodation in the premises are provided with commercial accommodation as *long-term accommodation.*

The conditions of which are easily met by BTR projects and an operating retirement village.

Is it all good for the owner/developer/Operator – what is the downside?

Apart from the hassle of registering and tracking your GST credits and liabilities – which I would suggest is well outweighed by the cash flow benefits of receiving credits contemporaneous with large outgoings – there is the requirement to charge GST on lease or licence fees, whether upfront, periodic or on "exit" as with deferred management fees in a retirement village context.

This is however moderated by the liability arising in the period that the lease or licence fees are received or receivable.

Perhaps the most critical issue to consider is the restrictions that may apply in regard to future GST treatment, and particularly on sale, noting where the *supply* is or substantially is of *long term accommodation* and eligible for the 50% reduction in the GST liability[64], the owners/supplier may choose to not apply Division 87, the consequences of this being the lease/licence is *input taxed.*

(i) That change of use may trigger one or more *adjustment events[65]* and care needs to be taken with the relevant acquisition values and *adjustment periods* both on construction and material expenses subsequent to that. Noting, acquisitions:

>$1,000 to >$5,000	2 *adjustment periods* (2+ years)
$5,000 to <$500,000	5 *adjustment periods* (5+ years)
$500,000 or more	10 *adjustment periods* (10+ years)

(ii) The same would apply to any choice to deregister, the provisions[66] for which point back to the same *adjustment periods.*

(iii) The sale of the property within 5 years of commencing the *input taxed supply* by way of lease or licence will remain the sale of *new residential premises* and will be taxable as the conditions[67] have not been satisfied.

(iv) This may be manageable for a supply of a BTR style property, **provided** the purchaser is either happy to make ongoing supplies as *commercial residential premises* or is prepared to wear the GST cost, either embedded or through the *adjustment[68] event* where made as a *GST-free supply of a going concern.*

(v) For the sale of a retirement village with ILU's, this is not manageable where the provisions GSTR 2011/1 are seen to apply. As much as we may consider that ruling to not be the more correct position

[64] Section 87-5
[65] Division 129
[66] Division 138
[67] Section 40-75
[68] Division 135

at law, absent going to the FFC to argue the alternate, this will result in *consideration* including both the contract sale price of the property as well as the value of “resident loans”, which would typically dwarf the contract value and result in a GST liability in the range of 50% or more of the contract price and cash received.

In reality the disposal of either BTR or retirement village assets that qualified as *commercial residential premises* then opted out of being *taxable supplies* after some 10+ years require a long-term view and are unlikely to be sold with 15+ years, more likely 16+ for certainty.

Where they are sold as either a *taxable* or *GST-free supply* within that period, everything kicks off again and another 16+ years in the GST system many be expected.

The reality is that both the ATO and investors should have a good hard think abut these issues and model the outcomes. The final position for the ATO is not as bad for the revenue as they have suggested in the past, and is not similar in reality to the ordinary construction and leasing of property that is *taxable*.

The ATO resistance, particularly on BTR projects is hard to fathom in the context of the proposed style of product ought to be constructed and the current issues and policy with housing supply.

We look forward to some progress on the update to encompass BTR in GSTR 2012/6 due “late 2025”, and provide some greater certainty for investors, which may be on a large scale.

That would be attractive to those investors who are prepared to take a long-term view in the sector/s which would be of great benefit to the housing supply equation.

5.3 More Detailed Comments on "Commercial residential Premises"

Some historic comments largely drafted almost a decade ago.

The personal view of the writer is that Many BTR developments and most ILU's observed in retirement village with full facilities as demanded by today's residents, would already fall within the definition of *commercial residential premises* as follows:

(a) a hotel, motel, inn, hostel or boarding house; or

*(b) premises used to provide accommodation in connection with a *school; or*

*(c) a *ship that is mainly let out on hire in the ordinary course of a *business of letting ships out on hire; or*

*(d) a ship that is mainly used for *entertainment or transport in the ordinary course of a *business of providing ships for entertainment or transport; or*

*da) a marina at which one or more of the berths are occupied, or are to be occupied, by *ships used as residences; or*

(e) a caravan park or a camping ground;or

*(f) anything similar to *residential premises described in paragraphs (a) to (e).*

*However, it does not include premises to the extent that they are used to provide accommodation to students in connection with an *education institution that is not a *school.*

I would regard many of the facilities I have observed as centralised commercially based facilities that have many if not all the features of hotels, motels caravan parks etc and are accordingly something "similar" as noted under paragraph (f).

It is accepted that they are NOT the "same", but clearly the legislation does not specify "same" it specifies "similar".

The ATO in its current ruling on this issue[69] continues to specify eight criteria, drawn from the original ruling[70] that it sees as determinative in this test:

(i) Commercial intention;

(ii) Multiple occupancy;

(iii) Holding out to the public;

(iv) Accommodation is the main purpose;

(v) Central management;

(vi) Management offers accommodation in its own right;

(vii) Services offered;

(viii) Status of guests.

[69] GSTR 2012/6

[70] GSTR 2000/20

It is suggested that all bar perhaps the final criteria is easily satisfied by an ILU in a fully commercial retirement village.

Where do the factors in both GSTR 2000/20 and now 2016/6 derive from? In the first instance they were drawn from UK cases where the VAT provisions had similar requirements to be "similar" not to anything listed but rather:

"(a) the provision of accommodation in a hotel, inn,boarding house or similar establishment or of holiday accommodation in a house, flat, caravan or houseboat ;"[71]

Amongst a range of other items, but noting:

"Holiday accommodation " includes any accommodation advertised or held out as such."

Not quite on foot of course but a good starting point for legislation that had no precedent. Although now overtaken by Australian cases adopted in GSTR 2012/6 in is nonetheless worth reading some of the key decisions such as *The Lord Mayor and Citizens of the City of Westminster (1988) 3 BVC 847* and *Namecourt Ltd v. The Commissioners (1984) 2 BVC 208,028 (1984) VATTR 12 22.*

It might be observed that "status of guests" in the manner addressed by the ATO did not always feature prominently and other factors were given weighting. The ATO addresses status of guests now as follows:

> "Predominantly, the occupants are travellers who have their principal place of residence elsewhere. The occupants do not usually enjoy an exclusive right to occupy any particular part of the premises in the same way as a tenant."[72]

Although this may clearly have application to isolated assessment of "similar" to a "hotel" it is not beyond experience and reason that hotels have long term guests that have no other principal residence. For those that may remember, Peter Clyne was such a person. There are also other items in the non-exhaustive list provided in the definition of *commercial residential premises*[73] that routinely have long term guests – ships used as residences, caravan parks etc come to mind. It is also not unusual for long term residents with no other residence to occupy boarding houses & hostels longer term.

Interestingly the 8 factors have now been embodied "almost in law" by reference in the Explanatory Memoranda to the so called "*Marana* amendments"[74] at para 15.12:

> *"15.12 These amendments do not change the definition of `commercial residential premises'. The GST treatment of accommodation in hotels, motels, inns, hostels and similar premises which exhibit similar characteristics (which may include: being run with a commercial intention, having multiple occupancy, holding out to the public, being used for the main purpose of accommodation, having central management, being offered by management in its own right, providing services, and where individuals have the status of guests) is not altered*."

Where to from here

Although the analysis of and references to the more relevant Australia cases listed in 2012/6 – *ECC Southbank*[75], *Marana*[76], *Meridien Marinas*[77] and even the *South Steyne* terrible twins[78] are worthwhile to review

[71] *Schedule 6* to the *Value Added Tax Act 1983*
[72] GSTR 2012/6 at 12
[73] Section 195-1 definition
[74] Tax Laws Amendment (2006 Measures No. 3) Bill 2006
[75] ECC Southbank Pty Ltd as trustee for Nest Southbank Unit trust & Anor v Commissioner of Taxation [2012] FCA 795
[76] Marana Holdings Pty Ltd v Commissioner of Taxation (2004) 141 FCR 299
[77] Meridien Marinas Horizon Shores Pty Ltd v FC of T [2009] FCA 1594
[78] South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation [2009] FCAFC 155 & [2009] FCA 13

and consider, at the end of the day the ATO position draws back to narrow interpretation of “similar to” and a reliance on specifics, but most notably “status of guests”.

It is interesting to consider whether the change to the definition of residential premises through the “*Marana* amendments to include “regardless of the term of occupation” is a two edged sword that applies to *residential premises* as a whole including *commercial residential premises* as subset. This was raised by Counsel in *ECC Southbank* but was not given air in the final judgement.

Funnily enough I disagree with the interpreted meaning and application of quoted in the ruling interpretation, however that is unlikely to change. I will not explore that today, but we could easily discuss for a few hours.

The key difference comes down to what is “similar to” and the reliance that may be placed on the ATO identified factors.

Retirement villages are now specifically addressed the GSTR 2012/6[79] in a perhaps less than unequivocal manner:

> 48. *Although Sparkling Bay has some characteristics in common with a hostel or boarding house, it also has several factors that weigh against its being sufficiently similar to these for it to be considered to be commercial residential premises. These include the lease itself, and the rights and responsibilities of the parties to the lease. The overall impression of Sparkling Bay is that it is not commercial residential premises. Retreats Pty Ltd's supplies of villas to residents are input taxed under paragraph 40-35(1)(a).*

For BTR, as at the date of this paper the ATO has indicated[80] that they will be updating GSTR 2012/6 to:

“provide further clarity on how the existing law applies to modern build-to-rent developments and assist taxpayers to determine whether their premises are residential premises or commercial residential premises….”

However, in the next paragraph, they also indicate:

“The Commissioner's view outlined in GSTR 2012/6 remains unchanged and is not being reviewed. The intent of the draft update is to clarify and expand on the existing principles.”

There is some prospect however that clarity will be provided on products and accommodation arrangements that really do come very close to *hotels, motels hostels and boarding houses.*

For retirement village ILU’s in particular, there is perhaps more difficulty. The question that arises as to what the status of residents is. Certainly, they have a 99 year lease and legal interest in the premises on paper, but is this the reality? With an average tenancy of 10-12 years and a continuum of rollovers on a similar basis, is it not just simply a licence with a longer term – all things being relative?

Whilst Retirement Villages have many features of “hotels” the “status of guests” issue will be an ongoing sticking point for the ATO. Clearly the definition requires only “similar to” and not “same as”, but the weighting on this factor remains. But what about Boarding Houses? In NSW *general boarding houses*[81] are defined as:

> (2) Boarding premises are a **"general boarding house"** if the premises provide beds, for a fee or reward, for use by 5 or more residents (not counting any residents who are proprietors or managers of the premises or relatives of the proprietors or managers).

Tenants NSW goes further in its Fact Sheet - Boarding Houses Act | Tenants' Union (https://www.tenants.org.au/factsheet-boarding-houses-act) as follows:

> *“General boarding houses are boarding premises that:*
>
> - *provide boarders and lodgers with a* ***principal place of residence***

[79] GSTR 2012/6 at 48
[80] https://www.ato.gov.au/about-ato/ato-advice-and-guidance/advice-under-development-program/advice-under-development-gst-issues
[81] Section 5(2) – Boarding Houses Act 2012 (NSW)

- *have beds for five or more residents (not counting the proprietor, manager or any relatives of proprietor or manager if they also reside at the premises)*

Almost all registrable boarding houses are general boarding houses."

[Bolding is mine for emphasis]

You will note that many of the typical features set out in both the Act and the Fact Sheet/s are common to Retirement Villages. Almost uncannily so.

Whilst it is acknowledged that Retirement Villages under the NSW Act and Aged Care are specifically excluded from this definition for the purposes of being registrable boarding houses for the purposes of that legislation[82] it is clear that they may arguably be 'similar to' boarding houses.

The purpose to "provide boarders and lodgers with a principal place of residence" stands in direct conflict with the ATO view and focus on "status of guests" requiring, in the Commissioner's view – "Predominantly, the occupants are travellers who have their principal place of residence elsewhere". It is also noted that boarding house guests are afforded the right of quiet enjoyment of the premises and largely a room at least that provides exclusive occupation – again in direct conflict with the ATO view on the eighth factor.

It is suggested that 7 of the 8 criteria are clearly satisfied and that a retirement village is definitively run on a commercial basis. Logic leads you to the conclusion that it should be included, and technical analysis also gets you there.

What about Wynnum Holdings?

This was a somewhat messy case, with numerous other threshold issues and perhaps not the most ideal fact pattern. It is observed that the findings of Deputy President Frost on the *commercial residential premises* issue fall in line with the Commissioner's submissions and do not really challenge them at all. They certainly do not address to any level the issues noted above and I do not consider the findings to be the better view. They are certainly not binding but will perhaps be of some influence.

Frost surmises his position as follows[83]:

76. Clearly enough, there are factors that tend towards a conclusion that the property is commercial residential premises for the purposes of the GST Act. Factors that tend that way are set out in [72] above. But there are factors that tend away from such a conclusion. Those factors are:

- *that occupants agree to occupy the units in the Complex for a "Periodic Term", often for months or years at a time;*
- *that a "condition report" is prepared at the commencement and conclusion of the term of occupation;*
- *that a cleaning fee is imposed when an occupant leaves;*
- *that the possibility of alterations to the unit by the occupant is contemplated;*
- *that the possibility of keeping pets is contemplated; and*
- *that occupants must separately arrange and pay for the connection of telephone, electricity and gas services to their units.*

77. Those factors are, in my view, when taken together, quite out of place in the context of hotels, motels, inns, hostels and boarding houses, or premises similar to them. Their presence renders it impossible to conclude that the property is, or at any relevant time was, commercial residential premises.

I do not see any of the factors noted above to carry any material weight on the issue. He then sets out some limited analysis of GSTR 2020/20 and the "eight factors" stumbling on the last one "status of guests. It is noted that the absence of that eighth factor may not be determinative, but then to observe somewhat paradoxically:

82. On that basis, it is fair to conclude that, even though the eighth attribute is not exhibited in the case of the property under consideration here, the property may still be capable of being considered commercial residential premises if the enquiry went no further than to have regard to the attributes set

[82] Section 5(3)(k) & (l) – Boarding Houses Act 2012 (NSW)

[83] *WYNNUM HOLDINGS NO 1 PTY LTD & ANOR v FC of T, Administrative Appeals Tribunal of Australia, 14 September 2012* [2012] AATA 616 – paragraphs 76-77.

> *out in the ruling.* ***That would not be the right outcome****. Perhaps what that demonstrates is how difficult it is to prescribe the factors that are relevant to the enquiry, when the enquiry is, as Nicholas J said in ECC Southbank, a question of "impression" and "degree".*

Bolding and underline is mine for emphasis.

6. Division 165

6.1 Anti-avoidance in transaction tax

There is a real difficulty in administering a general anti-avoidance provision within the operation of a transaction tax. It is for this reason that we actually have a range of specific anti-avoidance provisions within GST.

For example, Division 72 operates to ensure that if you are making a supply to an associated entity that cannot claim credits, you have to account for GST on that supply based on the “GST inclusive market value” irrespective of the consideration actually provided for that supply. But Division 72 has nothing to say about undervalued supplies being made to “non-associates” nor does it have anything to say about undervalued supplies being made to associates who can claim full input tax credits for those acquisitions.

Likewise, Division 66 includes rules seeking to avoid abuse of the second-hand goods credit. The amount of the second-hand goods credit is limited to 1/11th of the consideration provided for the acquisition of the second-hand goods or 1/11th of the sale price of those goods on subsequent disposal by the dealer. This followed experience in other jurisdictions where unregistered vendors would sell goods to dealers purportedly at massively overvalued prices enabling the dealers to access an inflated second-hand goods credit.

Both of these examples demonstrate that the risk to GST sits not in the ordinary business to business transactions but in the interface between non-participants in the GST system (entities that are not registered for GST purposes) or with participants that are treated as consumers (because of a policy choice to deem those persons to be making input taxed supplies). In most B2B transactions, GST is neither a benefit nor a cost and therefore there should be little incentive to engage in avoidance.

6.2 Avoidance/evasion

What GST does pose is a real risk of evasion. Tax and credit systems like GST are a bit quaint in 2025. The notion of little slips of paper being passed between suppliers and recipients to document the GST payable by the supplier and the credit available to the recipient does seem antiquated. As we move towards e-invoicing the current challenges may well be addressed. However, we need to be realistic about this. We can make it harder for evasion – but history has taught us that the ingenuity of those who seek to evade tax should never be underestimated.

As noted by Justice Hill in one of his many excellent papers on our GST system:

> “Legislation can not deal easily with evasion, other than to impose penalties upon those who are caught in the act. An anti-avoidance provision is framed to deal with something else – namely – the negation of an arrangement which is legally effective to avoid the tax, but which carries with it something else which the legislature regards as stamping it with avoidance.”[84]

If people are determined to ignore the law, passing more laws will not change their behaviour.

That “stamp” of avoidance within our system is to be found in the core concepts of “scheme” and “GST benefit”. However, even then something more was to be required. These terms were quite happily within the original draft of Division 165. Yet, there was disquiet about the possibility that the Division could have too broad an application. As stated in the *Supplementary Explanatory Memorandum*[85]:

[84] Hill, Graham – “GST Anti-Avoidance – Division 165” (1999) 2(5) Journal of Australian Taxation 295
[85] To the *A New Tax System (Goods and Services Tax) Bill 1998*

> "Queries have been made about the scope of the current Division 165. It has been suggested that the Division may have unintended effects and may apply to transactions not intended to defeat the GST law. In particular, it has been suggested that the exercise of an explicit option under the GST law may trigger the anti-avoidance provisions.

…

> Request 79 substitutes a new section 165-1 to explain what the Division is about, point out that it is aimed at artificial and contrived schemes. Examples are given of activities the Division is not intended to cover."[86] [at 1.118 to 1.120]

Those examples are:

- election of monthly tax periods;
- bringing an existing childcare facility within the scope of another Act so as to access a concession under the GST Act;
- adopting a statutorily available mechanism for the calculation of tax liability;
- changing the time at which a transaction takes place so as to avoid GST.

The first and third are probably redundant given the introduction at the same time of s 165-5(1)(b) which excludes operation of Division 165 where "the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law …".

The second is interesting given the operation of s 165-5(3) which denies protection that would otherwise be provided by s 165-5(1)(b) where the scheme was carried out for the dominant purpose of "creating a circumstance or state of affairs" and "the existing of the circumstance or state of affairs is necessary to enable the choice … to be made".

If the childcare centre fills out the forms to be approved under the relevant Commonwealth program and **automatically** becomes entitled to make GST-free supplies, it would fall within the example and should expect to avoid sanction under Division 165. However, if in those same circumstances, the GST law was to provide them with an **option** to make GST-free supplies then the making of that election would not be protected by s 165-5(1)(b) because the childcare centre created the circumstance (approval under the Commonwealth program) that enabled the making of that election.

This is obviously wrong. However, it is a risk and a design failure of the Division. As noted by Justice Hill in the same article as discussed above:

> "Fourth, there is the need to ensure that the anti-avoidance section does not become section one of the legislation. What does that mean? It means that the section should not need to be consulted each time any transaction is entered into to ensure whether it applies. It is, ultimately there, not to tax the ordinary transaction, but the extraordinary transaction."[87]

6.3 The breadth of the concept of GST benefit

Part of the challenge is the way in which the definition of "GST benefit" is constructed in s 165-10(1). It does not take much imagination to understand the risks to the revenue that can arise in the context of a tax and

[86] At [1.118] to [1.120]
[87] Fn.42

credit system. There are the permanent differences – less tax, bigger credit – and the timing differences – later tax, earlier credit.

The problem is that the calculation of the correct amount of tax or the correct amount of the input tax credit in the absence of the scheme is a complex matter. Take the childcare centre above – it clearly "gets" a GST benefit from the scheme that involves the centre being approved under the Commonwealth program enabling them to choose to make GST-free supplies. That squarely falls within s 165-10(1)(a):

> "an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme"

Making GST-free supplies instead of taxable supplies will definitely do that.

Let's take another very common example. A owns commercial property that is occupied by B. B is a member of the same economic group and part of the same GST group as A. There is no lease, no licence and no consideration paid by B to A for B's occupation of the lease. A wants to sell the property to C. B wants to remain in occupation for 6 weeks after completion of the sale. Immediately prior to the sale, A grants B a month to month lease for commercial rent that is actually paid. A sells the property as a GST-free going concern to C and immediately after completion, C notifies B of the termination of the lease in 6 weeks time.

Again, there is clearly a GST benefit – being the difference between the GST payable on the taxable supply that A would have made in the absence of going concern treatment and zero being the GST payable in accordance with the going concern treatment. That benefit arises from the scheme involving the documentation of the otherwise undocumented occupation arrangement with B. Although the GST-free treatment arises because of an agreement available under the GST Act, this is no defence in the light of the creation of the state of affairs that allowed that agreement to be made.

Perhaps you have no sympathy for A – after all it is clearly artificial to do this. But consider Example 15 from GSTR 2002/5 in this light:

> Example 15: supply of alternative leased premises
>
> 97. Apothecary Co conducts a pharmacy business from leased premises located on an arterial road. Newfellow Co enters into negotiations to acquire the pharmacy business but does not want to operate from the same premises as are currently used. A new shopping centre operated by Centre Co is about to open in the same suburb and Newfellow Co has indicated that it would prefer to operate the pharmacy business from a site within the new shopping centre.
>
> 98. Apothecary Co enters into a tripartite agreement with Newfellow Co and Centre Co under which (i) Apothecary Co will sell its pharmacy business to Newfellow Co; (ii) Newfellow will enter into a lease of premises from Centre Co; and (iii) Centre Co will grant a lease in favour of Newfellow Co. The granting of a lease of premises within the shopping centre is a condition precedent to the sale of the pharmacy business.
>
> 99. As the agreement for a lease of alternative premises is enforceable by Apothecary, Apothecary has supplied a right to occupy suitable premises to Newfellow. Apothecary will not be required to supply the premises which it currently occupies as a 'thing necessary for the continued operation' of the pharmacy business.

If documentation of an existing arrangement could be sufficiently artificial, why would the procurement of an entirely new arrangement be the same?

6.4 The need to understand the "real benefit"

VCE[88] is the best example of a case that shows what anti-avoidance in GST is about. This case involved the deliberate manipulation of the GST accounting rules and contractual terms in order to provide a massive timing benefit for the taxpayer: bringing forward input tax credits and deferring GST payable. In essence, the input tax credit claimed by the taxpayer – even if it had not been artificially inflated in amount – created an economic benefit to the taxpayer that was the true objective of the arrangement. The paying of GST and the claiming of the input tax credit were mere constructs to obtain an economic benefit that was to the advantage of the taxpayer.

This highlights the difficulty with the current definition of GST benefit – the arrangements in *VCE* could possibly have satisfied all four limbs of the definition. However, the real economic benefit was simply the bringing forward of the input tax credit entitlement that was out of all proportion to the GST being paid at the time.

In many ways, the problem of the breadth of the GST benefit definition could be solved by proper regard for the factors in section 165-15(1), particularly (g) which refers to:

> "Any change in the avoider's financial position that has resulted, or may be reasonably expected to result, from the scheme"

This should allow the analysis of dominant purpose and principal effect to focus on the GST benefit that gives rise to the **economic benefit** rather than just the entitlement to an input tax credit that is commensurate with the amount expended to the supplier.

Let us say that a barrister walks into a computer store and sees a printer that she likes. The printer is $1100. The barrister decides that is too much and is about to walk out when she realises that because she is registered for GST purposes, she can claim an input tax credit and the real cost is only $1000. On that basis, she decides to buy the printer.

The purchasing of the printer is a scheme. The purchasing of the printer results in a GST benefit (the input tax credit) that would not have been available if the scheme had not been entered into. The input tax credit – the GST benefit – was a deciding factor in whether or not the scheme was entered into. But to say that the barrister purchased the printer for the dominant purpose or principal effect of "getting" that input tax credit would have to be daft. Wouldn't it?

6.5 The Gold Conundrum

Much ink has been spilled and will continue to be spilled on the various cases that have been run dealing with the interaction of the GST and the gold industry. The cases themselves remain before the Courts and have huge implications for the taxpayers involved. However, following the introduction of Division 86, the same situation cannot arise in the gold industry.

That being said, it is important to analyse the way in which these cases have been run on behalf of the Commissioner. It is suggested that the problems arise because the cases involve an attempt to use the general anti-avoidance provision to recover GST from the entity claiming input tax credits where the real problem is the failure of other people to remit the GST payable on the taxable supplies that they made. That is, evasion, not avoidance and evasion by others, not the taxpayer against whom the anti-avoidance mechanisms have been invoked.

[88] *VCE v Commissioner of Taxation* [2006] AATA 821

The case of *ACN154*[89] (which the author has had significant involvement in) was the subject of a decision of the AAT in 2019 which has now been overturned by the Full Court and sent for rehearing. So, if we confine the immediate discussion to the errors in that original AAT decision, we can be relatively safe. In the original AAT decision, it was stated that:

> "The Commissioner submitted that, in the present case, in relation to the wider or narrower 'scheme' and taking account of the matters referred to in s 165-15(1), one or more of the following listed entities, whether alone or with others, entered into or carried out the scheme or a part of the scheme. Moreover, these entities entered or carried out the scheme with the sole or dominant purpose of the applicant getting a GST benefit from the scheme which was the input tax credits for its acquisitions and for which the applicant paid the GST-inclusive prices to the Division 165 Supplying Entities."[90]

That is, the Commissioner's case (as reported in the decision by the Tribunal) was that the refiner getting the input tax credit was the "sole or dominant purpose" of the scheme – even though they acknowledged that the refer had paid the GST-inclusive price for those goods to the supplier.

What was the analysis of the factors that led to this extraordinary conclusion? In the Tribunal's view the fact that the "authors of the fraud" (those that did not remit the GST on the taxable supplies that they made) "benefited from the tax evasion" (because they failed to remit their GST liability even though the full GST inclusive price had been paid to them) "that is beside the point for present purposes".[91]

Let us just ponder that conclusion in the present circumstances. Section 165-10(1)(h) requires the ascertainment of dominant purpose or principal effect to be done in the light of:

> "Any change that has resulted, or may reasonable be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider …"

The Tribunal was refusing to have regard to the benefits of the evasion achieved by the non-remitting entities notwithstanding the obvious change in the evaders' financial position and notwithstanding the Tribunal's express acknowledgement that the evaders achieved a financial benefit from the evasion. This was an express link in the Tribunal's logic finding that the dominant purpose of those entities was not to achieve the financial benefit from their evasion but rather that those entities had the dominant purpose of providing the refiner with the benefit of an input tax credit. That input tax credit was only equal to the GST component of the GST inclusive price that the Tribunal fully accepted had been paid by the refiner to those very entities.

On the Tribunal's own findings, that input tax credit could never have been an economic benefit to the refiner as part of the scheme. The scheme necessitated that the refiner pay a GST inclusive price to the supplier. The refiner paid that amount **prior** to the claiming of an input tax credit. There was no element of "timing benefit" or "funding benefit" of the kind observed in *VCE.* Rather, the refiner received an input tax credit equal to amounts already expended as a direct result of the imposition of GST on the supply of goods to the refiner.

In many ways, the Commissioner's case came down to the argument that the refiner would have only paid a GST inclusive price to its suppliers because the refiner expected to get an input tax credit equal to the GST included in the amount paid to those suppliers.

> Further to our conclusion at [269] above, we are satisfied the dominant purpose of the entities listed at [264] above was to create an entitlement to claim input tax credits in the applicant. Without that, the applicant would not pay GST-inclusive prices for the scrap gold. The objective purpose of the Division 165 Supplying Entities was to make sales to the applicant that were taxable supplies by them and creditable

[89] *ACN 154 520 199 Pty Ltd (in Liq) v Commissioner of Taxation* [2019] AATA 5981 (*ACN154 AAT No.1*) against which an appeal was allowed by the Full Federal Court in *ACN 154 520 199 Pty Ltd (In liq) v Commissioner of Taxation* [2020] FCAFC190 (*ACN154 FCAFC No.1)* and which was reheard as *HMNF v Commissioner of Taxation* [2023] AATA 4067 (*ACN154 AAT No.2*) which allowed the taxpayer's challenge to the Commissioner's assessments and against which the Commissioner has appealed to the Full Federal Court.

[90] *ACN154 AAT No.1* at [264]

[91] At [277]

> acquisitions by the applicant. It was the input tax credits which were critical to the scheme in both of its formulations.[92]

If one ignores the non-remittance of GST by the supplier, how are things any different to the position of the barrister buying a printer? The barrister would only pay a GST inclusive price of $1100 because of the expectation of an input tax credit of $100. Can it be said that the computer store sought to justify the charging of a GST inclusive price by “creating” an entitlement to an input tax credit in the barrister?

Undeniably the real mischief and the real economic consequence was the non-remittance of GST. The input tax credit – commensurate with the amount paid on account of GST and received after the expenditure was incurred was not an economic benefit created by the scheme. It resulted from the ordinary operation of GST.

Why should the barrister’s input tax credit for her acquisition of the printer be put in jeopardy because the computer store failed to remit the GST payable on its supply of the printer?

We should end with the words of Justice Hill:

> “But, on the other hand, there is a sense that the breadth of a provision such as Div 165, perhaps not applied with the full rigour of the law, but generally only where the smell test is not satisfied, tends to give the Commissioner a discretion to tax, a discretion which may change from Commissioner to Commissioner. That is not desirable. There is a hard line to draw. Time will tell on what side of the line Div 165 falls.”[93]

Evasion is a separate problem to avoidance. Evasion requires enforcement – collecting GST from the non-remitting entities. In the words of the second Tribunal that upheld the taxpayer’s appeal and rejected the Commissioner’s invocation of Div 165:

> The Commissioner would not be seeking to deny the Contested ITCs if he had been able to recover the unpaid GST from the suppliers. There is nothing in the text of Division 165, or extraneous materials, or in the jurisprudence relating to Division 165 or Part IVA of the1936 Assessment Act upon which it was plainly modelled, to indicate Division 165 was intended to be invoked, where it would not otherwise be applied, as an alternative to recovery of liabilities owed by other entities.[94]

That decision of the second Tribunal setting aside the Commissioner’s assessments is the subject of an appeal by the Commissioner which has been heard and reserved. If the Commissioner is successful, the orders sought by the Commissioner would result in a third determination of these matters by the Tribunal (now the ART).

[92] *ACN154 AAT No.1* at [280]
[93] FN.42
[94] *ACN154 AAT No.2* at [213]