

TAX BULLETIN

An update publication for our clients

February 2012

ATO to get expanded powers to withhold refunds

The Government has released exposure draft legislation which, if passed in its current form, will provide the ATO with expanded powers to withhold refunds claimed by taxpayers and is likely to affect the cash flow position of many businesses. The new provisions are intended to apply across all taxes but will have particular impact on refunds of GST claimed in Business Activity Statements.

Since the commencement of GST the Commissioner of Taxation (“Commissioner”) has administered the GST legislation on the basis that he has the right to verify the correctness of a lodged BAS before paying a refund amount. That verification has usually taken the form of a review of input tax credit claims and the tax invoices that support those claims.

However, in the recent case of *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCAFC 142 (“*Multiflex*”) the Full Court of the Federal Court of Australia found that neither the GST legislation nor the *Taxation Administration Act 1953* (“TAA”) gives the Commissioner the right to delay the payment of BAS refunds while he undertakes enquiries to verify the entitlement to the refund. The Full Federal Court held that the Commissioner is obliged to pay a GST refund within the time it takes to undertake the necessary administrative steps to process the taxpayer’s return and make the payment, despite any concerns the Commissioner may have regarding the validity of the refund claimed.

Since the decision in *Multiflex*, the Commissioner has altered the way that BAS GST refunds have been processed. Refunds have been paid promptly within the administrative time limits and the payment has often been accompanied by a letter from the ATO advising of their intention to continue reviewing the entitlement to the refund and to seek recovery of the refund amount at a later point in time if necessary.

Yesterday the Government announced that the TAA will be amended to allow the Commissioner to withhold BAS refunds pending satisfactory verification checks.

In our view, the proposed amendments set out in the exposure draft legislation go beyond the refund verification practices of the Commissioner prior to the *Multiflex* case and are likely to unnecessarily delay the payment of refunds to taxpayers in some cases. For example, under the proposed legislation -

1. The Commissioner would have the right to retain a BAS refund if the Commissioner is satisfied that it would be reasonable to require verification of the information in the BAS. There are no guidelines on matters to be taken into account by the Commissioner to determine whether it is reasonable to require verification. The verification is not limited to input tax credit claims but can relate to any part of the information in the BAS.
2. If the Commissioner decides to retain the BAS refund, the taxpayer must be advised of that decision before the day that interest would otherwise become payable. There is nothing in the current proposal about when the Commissioner must commence his enquiries to verify the information in the BAS. In one of the examples in the proposed Explanatory Memorandum the Commissioner does not commence his verification enquiries until 44 days after the taxpayer has lodged the BAS.



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3. The Commissioner must notify the taxpayer of his decision to withhold the refund within 30 days of the lodgement of the BAS. However, once that notification has been made, the Commissioner then has a further 60 days to retain the refund while he undertakes his verification enquiries.
4. The 60 day period can be extended by the Commissioner giving a further notice to the taxpayer in circumstances where he is satisfied that it would be reasonable to require further verification of the information contained in the BAS. In making this decision, the Commissioner must have regard to a number of factors set out in the exposure draft legislation, including the impact of retaining the amount on the entity's financial position but also whether retention is necessary for the protection of the revenue.

In summary, if the legislation proceeds in its current form the ATO will have the power to withhold BAS refunds for up to 90 days from the date the BAS is lodged and that 90 days can be extended at the discretion of the Commissioner taking into account factors that are all based on a subjective assessment by the Commissioner. Although the draft legislation provides taxpayers with a right of appeal against a decision by the Commissioner to retain a refund, that right of appeal is arguably worthless in these circumstances given that it is only likely to result in the payment of the refund being further delayed.

Pitcher Partners will be consulting with Treasury on the proposed legislation and we intend to raise our concerns regarding the issues referred to above and the impact the new powers are likely to have on the cash flow position of our clients.

Further Information

Please ask either your regular Pitcher Partners tax contact or any of the contacts in the Pitcher Partners firms below for further details on the issues raised in this Tax Bulletin:

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