THE TAX INSTITUTE

1 February 2019

Mr Brett O'Neill
Australian Taxation Office
GPO Box 9977
ADELAIDE SA 5001

By email: taxcredits@ato.gov.au

Dear Mr O'Neill,

Draft Miscellaneous Taxation Ruling MT 2018/D1 Miscellaneous Tax: time limits for claiming an input tax or fuel tax credit

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office in relation to the *Draft Miscellaneous Taxation Ruling MT 2018/D1 Miscellaneous Tax: time limits for claiming an input tax or fuel tax credit* (**Draft Ruling**).

Discussion

The Tax Institute strongly recommends adopting the 'Alternative view', rather than the view adopted by the Commissioner in the Draft Ruling. The view adopted in the Draft Ruling leads to arbitrary and unfair outcomes, and perversely encourages taxpayers to adopt aggressive input tax credit claims in order to protect their entitlements.

In The Tax Institute's view, the Draft Ruling takes an overly literal interpretation to subsection 93-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) regarding cessation to entitlement of input tax credits. The provisions should be interpreted in a sensible and pragmatic way.

The Tax Institute considers that the construction in the 'Alternative view' in Appendix 2 of the Draft Ruling is the correct view of the law having regard to the broader context of the provision and the interaction with the provisions in Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**) and Subdivision 155-B of Schedule 1 to the TAA. We consider that if it was intended that the limiting provision in subsection 93-5(1) of the GST Act would effectively stymie a taxpayer's rights of review under the TAA, then the drafter would have specifically included it. The 'Alternative view' gives a more sensible and pragmatic outcome and should be adopted by the Commissioner.

As such, the provisions should instead be interpreted so that section 93-5 is read with Subdivision 155-B, Schedule 1 of the TAA to determine the period in which the input tax credit could be claimed rather than apply to retrospectively deny a credit.

Section 93-5 can still be given a sensible operation qualifying subsections 29-10(3) and (4), but not conflicting with Subdivision 155-B.

That is, section 93-5 can sensibly be read as operating where a credit has not actually become available within an approximately 4 year window, without the section retrospectively denying credits which did actually become available during that period.

By contrast, section 93-15 (where it applies) may retrospectively deny a credit –the two sections can be seen to have different intended operations because section 93-15 says "you are not entitled" to a credit, whereas section 93-5 says only that "you cease to be entitled" i.e. you have no further period within which to qualify if you have not done so already.

For example, if a cash basis taxpayer still had a brief window of time left under section 93-5 to claim the credit after the supplier's review period had expired (4 years after they gave the taxpayer an invoice), and the taxpayer received the tax invoice during that window and the taxpayer had also applied for a ruling to confirm the credit claim, then section 93-5 would not prevent an amendment under section 155-50 from being available, however long it took the taxpayer to receive the ruling. Whether section 93-15 would deny the credit would be a different issue.

The remainder of Division 93 supports this view as follows:

a) Subsection 93-10(4) clearly contemplates an input tax credit being taken into account in a "credit assessment" after the claimant's 4 year period has expired (which could arise for example if the taxpayer hasn't registered for GST within the 4 year period in the mistaken belief that their supplies were input taxed and they were below the registration threshold, so they never requested tax invoices until after the 4 years). Subsection 93-10(4) is not required to extend the operation of Subdivision 155-B in relation to periods within the 4 year period for which there is an objection, ruling request or amendment request made within that relevant period, but only for post 4 year periods. This is consistent with the interpretation above;

b) Similarly, subsection 93-10(5) is only needed where there isn't a relevant objection, ruling request or amendment request.

Many of the examples in the Draft Ruling themselves demonstrate the illogical and impractical outcome of the Commissioner's proposed interpretation of section 93-5(1).

Example 5 is one such example. It illustrates that when a taxpayer includes an input tax credit claim in an assessment during the relevant 4-year period, section 93-5 can never apply. That is, the taxpayer will still be entitled to claim the credit after the 4-year period expires, even if the claim is disallowed and reversed in an amended assessment in the

meantime., because the claim was nevertheless “taken into account, in an assessment” for the purposes of section 93-5. The message that this sends to taxpayers is that, even if they are uncertain about an input tax credit claim, it is better to make the claim up front than to wait until the Commissioner has clarified his position (e.g. by way of a decision on an objection to an assessment or a private ruling), as the latter approach would expose the taxpayer to the risk of section 93-5, whereas section 93-5 will never apply once the credits are taken up.

Such an approach may encourage taxpayers to make claims for input tax credits for which they may not be certain they are entitled. This is likely to lead to more aggressive taxpayer behaviour in some instances where some taxpayers may make claims for all possible / potential input tax credits to ensure they have been claimed ‘within time’ on the assumption they will confirm their entitlement to them at a later stage and subsequently omit to do this. This could lead to excessive overclaiming and thus have a detrimental effect on the revenue.

This approach may also have the effect that section 93-5(1) has no application as this approach would encourage taxpayers to claim all possible input tax credits, thereby ensuring all possible credits are accounted for even if incorrectly so. Is this an intended outcome of the Commissioner’s interpretation of section 93-5?

We are also concerned that where, following the Commissioner’s interpretation of section 93-5, a taxpayer may incur shortfall interest charges where the taxpayer:

a) has claimed input tax credits and does not request the Commissioner to refund those input tax credits to them; and
b) it is later determined that the taxpayer is not entitled to those input tax credits.

Such shortfall interest charges may be incurred because the Commissioner has not refunded the input tax credits, but adjusted the GST owing nonetheless. This does not seem to be a logical outcome, particularly if the taxpayer felt compelled to claim the input tax credits to avoid “missing out” on claiming them if they did not try to claim them within the relevant time period.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,

Tim Neilson
President