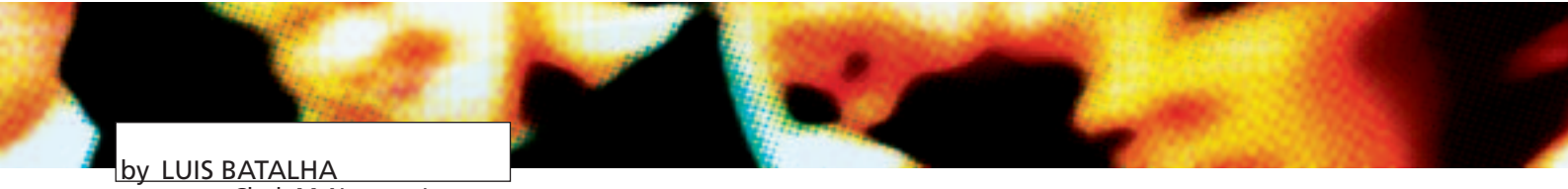

by LUIS BATALHA
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GST on exports of rights – the debate continues …

In this article Luis Batalha responds to the ATO's clarification of GSTR 2003/8 and its scope

INTRODUCTION

Firstly, I would like to thank Mr Robert Olding for his insightful comments (see September 2003 edition) on an earlier article Swetha Swamy and I co-authored (see June 2003 edition). It is great to see that both practitioners and the ATO are reading, and more importantly, critically analysing articles published. For the betterment of our tax system, it is imperative that taxpayers' advisers (and, to a lesser extent, taxpayers themselves) and the ATO engage in debate about tax issues. Mirroring Mr Olding's own comments, such debates ought to be encouraged and they ought to be engaged in a public forum. It is primarily for that reason that this article has been written in response to Mr Olding's reply to the original article.

The ATO should be complimented for clearly articulating and recognising the issues relating to GST on exports of rights in GSTR 2003/8. However, as is the case here, often debate between the ATO and taxpayers centres on the manner in which issues are resolved. Mr Olding's article, however, also raised a number of other general issues, quite apart from those relating to GST on exports of rights.

GENERAL COMMENTS ON GST RULINGS

In many respects, GSTR 2003/8 is no different to other recent GST rulings the ATO has issued. Before specifically commenting on the issues raised in Mr Olding's response to the original article, I thought this would be an opportune time to make some preliminary comments, of a general nature, on the ATO's GST rulings. The general comments made, in my opinion, tie in well with some of the particular comments made in reply to Mr Olding's response.

Specifically, the concerns I have with the ATO's GST rulings, and I believe I am probably speaking on behalf of a number of tax practitioners also, are as follows:

- The ATO's GST rulings are generally too long. An example of this, though still in draft form, is the ATO's recently released draft ruling GSTR 2003/D3 on reduced credit acquisitions. Though admittedly in a different context, that draft ruling spans an, in my view, unnecessary 143 pages. Understandably, GST rulings often deal with complex issues and the practical guidance provided in them is invaluable. However, the length of the rulings is sometimes not so much a product of the complexity of the subject matter, but rather of unnecessary repetition and restatement of the law. Where possible the Commissioner's views should be expressed as concisely as possible. Practitioners who make an effort to summarise such rulings engage in a difficult exercise and one that involves a significant degree of subjective interpretation. In engaging in the exercise, practitioners should ask themselves the question – why hasn't the ATO summarised its views further?

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- A related issue is that of "audience" for the GST rulings. For example, when a tax practitioner reads the text of s 9-5 of the GST Act in a GST ruling, the practitioner surely gets the impression that the ruling is intended to be read by taxpayers. Speaking from the perspective of a tax practitioner, I find it difficult to imagine a lay taxpayer reading a 143-page GST ruling on reduced credit acquisitions and not feeling somewhat overwhelmed. With a clearer identification of the real audience for such rulings, the rulings could improve significantly. Without sounding patronising, isn't the real audience for GST rulings tax practitioners?

- Another issue, tied also to the issue of audience, is that the rulings often, but not always, state the obvious. Where a difficult hurdle is reached, the ATO often chooses to resort to such phrases as the "outcome will vary from case to case, depending on the fact circumstances of the particular situation." Whilst honest admissions of a varying result are to be admired, in my view, the purpose of ATO rulings ought to be for the Commissioner to express a view. Only where a view, one way or another, is expressed does a ruling serve a worthwhile purpose.

None of the above comments should be interpreted as a suggestion that the ATO's GST rulings are not useful. They certainly are. Further, the ATO appears to be making conscious efforts to improve them. A notable improvement in the structure of GST rulings, for example, is the shift to the end of the ruling of examples. Another improvement is the use of diagrams and tables.

Now for some specific comments on Mr Olding's response to our original article.

MEMBERSHIP SUBSCRIPTIONS

In making the statement in the original article that "the ATO takes the view that, *in general,* such supplies will involve a supply of rights", this was our interpretation of para 101 in GSTR 2003/8 which states that "supplies of membership subscriptions can be difficult to characterise as there may be elements of services, rights or goods provided by the supplier". Although perhaps not entirely clear from our original article, our statement was intended to be consistent with the ATO's expressed view. The words used in our statement should be interpreted as follows:

- "in general" – to mean, not in all cases, and depending on the circumstances; and
- "such supplies will involve a supply of rights" – to mean, not exclusively a supply of rights, but possibly also a supply of other things, such as goods and services.

Further, membership subscriptions highlight the central problem with such supplies – that is, that such supplies usually involve a combination of a supply of a right, a supply of services and possibly also a supply of goods. Accordingly, the real issue is one of apportioning the consideration provided between those different types of supplies. In my view, the resort to phrases that suggest that the GST outcome varies from case to case are unnecessary. This much will be obvious to tax practitioners. It is better to suggest a basis for splitting the supply into its different components and then requiring the consideration to be apportioned on the same basis.

LEGAL SERVICES

I agree with Mr Olding that there are two different approaches that can be taken to the treatment of legal services in the context of supplies made in relation to rights. Also, I agree with Mr Olding's examination of the issues involved. However, on the so-called alternative view, would it not be possible to overcome the "anomaly" referred to by limiting the supply of associated legal services "made in relation to rights" to those where the rights themselves are GST-free?

BOOKS

As with computer software, the supply of a "book" could be viewed as a case of a supply of goods as well as a supply made in relation to rights. Again, as with the membership subscriptions, it may be a case of such supplies involving a combination of a supply of a right and a supply of goods and consideration needing to be apportioned accordingly.

Further, a GST outcome should not differ depending on whether intangible property rights are embodied in a tangible form or are simply provided in an intangible form.

INTENTION TEST VS ACTUAL USE

As noted earlier, a supply may involve both a supply of goods and a supply made in relation to rights. This links well to the issue of exporting and whether it should be an intention test or an actual outcome test. To some extent I agree with Mr Olding's point that the wording for exports of rights and exports of goods is different suggesting that a difference in approach is warranted. However, an alternative way to interpret the difference in wording is that it simply reflects a difference between the tangible and the intangible and the way language is moulded to cater for that difference.

CONCLUSION

Again I would like to thank Mr Olding for clarifying the ATO's views on GSTR 2003/8. In many ways, the clarification simply reinforced my existing awareness of the difficult issues confronting the ATO and practitioners in such complex areas. Accordingly, it is beneficial to practitioners, to receive further elaboration from the ATO on specific areas of difference. However, some of the issues Mr Olding's article raises have alerted me to the following:

- summaries are necessarily short, and substance and meaning is sometimes lost in the process of summarising. The real question is who should be responsible for such summarising?
- where a view either way is difficult to express, then perhaps more time should be spent on coming to a view, rather than resorting to a "particular facts and circumstances" stance. There is little benefit to taxpayers' advisers (or taxpayers) in reading lengthy admissions on the complexity of a subject matter followed by obvious conclusions that suggest the outcome will vary from case to case. ◆

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