

Machinery of government changes: Goods and Services Tax and Fringe Benefits Tax

This Circular provides guidance for agencies in complying with changes in GST and FBT responsibilities resulting from machinery of government changes. This Circular withdraws and replaces the previous 2011 Treasury Circular TC11-13.

Summary:

Machinery of government changes and administrative changes refer to changes to the allocation and reallocation of functions between government departments/agencies and Ministers. These changes include the creation or abolition of government departments and agencies. Machinery of government changes can have implications for agencies in meeting their Goods and Services Tax (GST) and Fringe Benefits Tax (FBT) responsibilities.

In New South Wales the Governor may make administrative changes by issuing Orders changing relevant schedules under the Constitution Act 1902 pertaining to the Government Sector Employment Act 2013 to establish, abolish and change agencies. Machinery of government/administrative changes may also be made under specific legislation applying to a particular agency including Orders pursuant to a particular Act.

Goods and Services Tax and Fringe Benefits Tax

The registration of government agencies for GST and FBT purposes has a number of consequences for agencies subject to machinery of government changes. Agencies must consider a range of matters resulting from machinery of government changes (e.g. IT, accounting, legal, tax, personnel, accommodation and industrial) which may be complex and time-consuming.

Agencies are responsible for ensuring that GST and FBT obligations are fulfilled correctly following machinery of government changes. This would be assisted by early modification of agency systems, timely advice of changes to suppliers and customers and close liaison with other agencies directly affected by the machinery of government changes.

GST

With regard to GST, the Australian Taxation Office (ATO) has provided formal Determinations that where machinery of government changes are specified in an Order changing relevant schedules under the Government Sector Employment Act 2013 the Commissioner of Taxation (the Commissioner) will exercise discretion to treat documents that are not tax invoices as tax invoices. This continues the arrangement under the superseded Public Sector Employment and Management Act 2002. The time periods for the exercise of the discretion are as follows:

- Where an Order is issued on or before the commencement date of a machinery of government change specified in the Order, the Commissioner will exercise discretion for a transitional period of three months starting from the commencement date of the machinery of government change specified in the Order.

- Where an Order is issued after the commencement date of a machinery of government change specified in the Order, the Commissioner will exercise discretion for a transitional period starting from the date of commencement of the machinery of government change specified in the Order to a date three months after the date of the Order.
- Treasury has also received an additional blanket determination for machinery of government changes under the Constitution Act 1902 that may not be reflected in changes to schedules under the Government Sector Employment Act 2013.

If agencies require more time than the periods covered by the Determination to have tax invoices compliant, they should contact the ATO directly to request an extension and explain the reasons for seeking the extension.

Where a machinery of government change is specified in an instrument issued under State legislation other than the Government Sector Employment Act 2013, the relevant parties to the machinery of government change may request the Commissioner to exercise discretion at the time when the machinery of government change takes effect.

Other matters

NSW Treasury does not provide technical or legal advice on GST, FBT or income tax. Where necessary agencies should obtain technical tax advice from their tax advisers or by contacting the ATO Business tax enquiries line on 13 72 26.

This Treasury Circular replaces the previous circular NSW TC 11/13 relating to machinery of government changes and the associated GST and FBT issues.

Attachments to this Circular:

- Attachment A: Commissioner of Taxation's Determinations (2011,2014,2017) under ss.29-70(1B)
- Attachment B: FBT Implications of Machinery of Government Changes

Caralee McLiesh
Deputy Secretary, Fiscal and Economic Group
NSW Treasury

For further information on: GST – contact Amu Premadas, State Tax Policy Branch ph. 02 9228 4661
FBT – contact Henriette Prego, Cash, Banking and Operations ph. 02 9228 3873
Email: GST_FBT@treasury.nsw.gov.au
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Australian Government
Australian Taxation Office

New South Wales Treasury
(Office of Financial Management)
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1 Farrer Place
SYDNEY NSW 2000

Reply to: PO Box 3001
PENRITH NSW 2740
Our reference: 1011815682897
Contact officer: Don Eldridge
Phone: 13 28 69
Fax: 1300 650 128
Your reference:
Portal receipt number:
ABN: 55 437 667 728

13 July 2011

**Notice of GST decision
For your information**

Dear Sir

You wrote to us on 11 March 2011 asking about Machinery of Government changes and invoice discretion. This is our response, which contains:

- ▣ our decision and our reasons for making it
- ▣ an explanation of your review rights.

Our decision has been authorised by Tim Fenner.

Notice of Decision

This decision applies to:

OFFICE OF FINANCIAL MANAGEMENT

ABN: 55437667728

Question 1

With regard to Machinery of Government (MOG) changes specified in an order, issued pursuant to the *Public Sector Employment and Management Act 2002*, will the Commissioner of Taxation (Commissioner) exercise his discretion under subsection 29-70(1B) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to treat:

- (a) documents issued by the losing department or agency (containing its details) for **supplies** made by the gaining department or agency as tax invoices for the recipients of those supplies to claim input tax credits (ITC)
- (b) documents issued to the losing department or agency (containing its details) for **purchases** made by the gaining department or agency as tax invoices for the gaining department or agency to claim ITC
- (c) documents issued by the losing department or agency (containing its details) under a recipient created tax invoice (RCTI) agreement (between the losing department or agency and the suppliers) for supplies made to the gaining department or agency as RCTIs for the gaining department or agency to claim ITC, and
- (d) documents issued by the gaining department or agency (containing its details) under a recipient created tax invoice RCTI agreement (between the losing department or agency and the suppliers) for supplies made to the gaining department or agency as RCTIs for the gaining department or agency to claim ITC.

Decision 1

Yes. Where MOG changes are specified in an Order issued pursuant to the *Public Sector Employment and Management Act 2002*, the Commissioner will exercise his discretion under subsection 29-70(1B) of the GST Act to treat documents that are not tax invoices as tax invoices.

Where an Order is issued on or before the commencement date of a MOG change specified in the Order, the Commissioner will exercise his discretion for a transitional period of three months starting from the commencement date of the MOG change specified in the proclamation.

Where an Order is issued after the commencement date of a MOG change specified in the Order, the Commissioner will exercise his discretion for a transitional period starting from the date of commencement of the MOG change specified in the Order to a date three months after the date of the Order.

This discretion is exercised for the matters referred to in Question 1 in respect of a MOG change specified in an Order issued pursuant to the *Public Sector Employment and Management Act 2002*.

Question 2

With regard to MOG changes specified in an instrument issued under a State legislation other than the *Public Sector Employment and Management Act 2002*, will the Commissioner exercise his discretion under subsection 29-70(1B) of the GST Act to treat:

- (a) documents issued by the losing department or agency (containing its details) for **supplies** made by the gaining department or agency as tax invoices for the recipients of those supplies to claim input tax credits (ITC)
- (b) documents issued to the losing department or agency (containing its details) for **purchases** made by the gaining department or agency as tax invoices for the gaining department or agency to claim ITC
- (c) documents issued by the losing department or agency (containing its details) under a recipient created tax invoice (RCTI) agreement (between the losing department or agency and the suppliers) for supplies made to the gaining department or agency as RCTIs for the gaining department or agency to claim ITC
- (d) documents issued by the gaining department or agency (containing its details) under a RCTI agreement (between the losing department or agency and the suppliers) for supplies made to the gaining department or agency as RCTIs for the gaining department or agency to claim ITC

Decision 2

Where a MOG change is specified in an instrument issued under a State legislation other than the *Public Sector Employment and Management Act 2002*, the relevant parties to the MOG change may request the Commissioner to exercise his discretion under subsection 29-70(1B) of the GST Act for the matters referred to in Question 2 at the time when the MOG change takes effect.

Relevant facts and circumstances

Our decision is based on the following facts.

At the time a MOG change takes effect, the change in relation to the transferring of functions to a gaining/new department or agency, involves, among other things:

- transferring any property, assets, rights, debts, liabilities and obligations held by the losing department to the gaining department
- treating a reference to the losing department in any document or arrangement as a reference to the gaining department.

In New South Wales (NSW), the governing legislation for MOG changes is the *Public Sector Employment and Management Act 2002*, which makes provision for employment, management and governance matters relating to the public sector of the State of NSW and for other purposes.

MOG changes may also be made by other means, for example, other legislation. These MOG changes include all public sector agencies. A public sector agency includes, for example, a body corporate controlled by the government, an instrumentality of the Crown or an employing authority. However, these occur less often than MOG changes under the *Public Sector Employment and Management Act 2002*.

Under the *Public Sector Employment and Management Act 2002*, the Governor can issue an Order to establish, abolish, or change an administrative unit, being a department or attached office.

Parts of the Commonwealth, a State or a Territory may register for GST even if they are not separate legal entities.

Administrative consequences for agencies resulting from MOG changes include:

- following the MOG change, the losing agency will continue to process all of the transactions relating to the transferred functions for a number of months following the date of the movement of the financial reporting responsibilities,

a consequence of the losing agency continuing to process transactions for the transferred functions is that supplies made by the transferred functions (i.e. gaining agencies) may for a period of time continue to be invoiced in the name of the losing agency,

- the losing agencies will also have outstanding orders they have placed with suppliers that relate the operation of the transferred functions. Suppliers will raise tax invoices to the losing agency. However, the supplies under those orders will be made to the gaining agency,
- losing agencies and various suppliers may have entered into RCTI agreements that specify certain sales to be made by the suppliers to the losing agencies for use in operating the transferred functions. After the MOG change comes into effect, those suppliers then make sales to the gaining agency. The gaining agency is liable to make payments to the suppliers and can claim the GST credits. The losing agency may continue to issue documents with its ABN for sales made to the gaining agency under those RCTI agreements. However, the RCTI agreements will no longer be valid as the losing agency is no longer the recipient of the supply.

Due to the inherent risk attached with allowing RCTIs in another entity's name, The Treasury, on behalf of the NSW State Government, must ensure that the new entity will have strict processing controls in place in relation to RCTIs to ensure that they are not used by the old entity to claim GST credits.

Reasons for decision

Detailed reasoning

Question 1.

The Commissioner has discretion under subsection 29-70(1B) of the GST Act to treat as a tax invoice a particular document that does not meet the requirements for being a tax invoice.

Further to this, Practice Statement Law Administration PS LA 2004/11 *The Commissioner's discretions to treat a particular document as a tax invoice or adjustment note* provides guidance in relation to exercising of the Commissioner's discretion

Paragraph 4 of Attachment A to PSLA states:

4. The exercise of the discretions may also be sought by the supplier, but in respect of documents that are yet to issue. For example, if the supplier discovers the defect and is attempting to change its computer systems to correct the error. In the latter case, it may be appropriate to exercise the discretion in order to allow the supplier a reasonable opportunity to advise its customers and make the necessary system changes to ensure it can issue valid documents.

Similarly paragraph 9, in relation to RCTIs states:

9. The exercise of the discretions may also be sought by the recipient, but in respect of documents that are yet to issue. For example, if it discovers the defect and is attempting to change its computer systems to correct the error. Depending on the circumstances, it may be appropriate to exercise the discretions in order to allow the recipient a reasonable opportunity to advise its customers and make the necessary system changes to ensure it can issue valid RCTIs and RCANs

A MOG change at state level may occur any time, and when these changes occur, the losing government departments and agencies will have outstanding orders with suppliers. It is important that these departments/agencies ensure that they hold tax invoices for purchases made after the MOG change. Similarly, they are required to provide tax invoices for sales made after the MOG change.

However the ATO recognises that when a MOG change occurs, it takes time to implement administrative processes to account for the transfer of functions across agencies, and that resultant 'tax invoices' will contain the details of the losing government department or agency which has placed an order before the MOG change. Where this occurs these documents will not meet the requirements of a tax invoice.

Furthermore, where a document is issued by a losing government department or agency (under a RCTI agreement which the losing government department or agency and the supplier have entered into) for a supply made to the gaining government department or agency, the document will not be a tax invoice that is a RCTI.

In order for government departments and agencies and departments to implement administrative procedures as a result of a MOG change, the Commissioner will exercise his discretion under subsection 29-70(1B) of the GST Act to treat documents that are not tax invoices as being tax invoices as follows.

The exercising of the tax invoice discretion under this subsection will apply in respect of all NSW State Government departments and agencies listed in an Order, issued under the *Public Sector Employment and Management Act 2002*.

Where an Order is issued on or before the commencement date of a MOG change specified in the Order, the Commissioner will exercise his discretion for a transitional period of three months starting from the commencement date of the MOG change specified in the Order.

Where an Order is issued after the commencement date of a MOG change specified in the Order, the Commissioner will exercise his discretion for a transitional period starting from the date of commencement of the MOG change specified in the Order to a date three months after the date of the Order.

The relevant parties to a MOG change may make a further request for the exercise of the discretion where an extension of time is required beyond either of the periods referred to in the above paragraphs.

Question 2.

MOG changes may be announced under other State legislations. Where this occurs it is likely to apply to a particular agency and have a narrower application. It is also likely to result from a more

protracted planning process. Further, it is not possible to identify, in advance, the legislation or agencies affected.

Therefore, where a MOG change is specified in an instrument issued under a State legislation other than the *Public Sector Employment and Management Act 2002*, the relevant parties to the MOG change may request the Commissioner to exercise his discretion under subsection 29-70(1B) of the GST Act for the matters referred to in Question 2 at the time when the MOG change takes effect.

More information

If you have any questions, please phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for Don Eldridge on (08) 926 88104 .

When you phone us, please have the reference number **1011815682897** ready so we can quickly access your case details.

Yours faithfully,

James O'Halloran
Deputy Commissioner of Taxation

Per



(Don Eldridge)

Explanation of review rights

You can contact the person handling your case and ask the Tax Office to review the decision. A review is normally conducted by someone who was not involved in making the original decision. You may also request a review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

Reviews under the ADJR ACT

The ADJR Act provides you with two main rights:

1. You can write to the Tax Office and ask us to provide you with a written statement of:
 - the findings of material questions of fact
 - the evidence these findings were based upon, and
 - the reasons for our decision.
2. You can apply to the Federal Court of Australia or the Federal Magistrates Court for a review of our decision.

If you decide to apply to the Federal Court or the Federal Magistrates Court for a review, we suggest you seek professional advice on how to proceed. You may lodge your application at the Federal Court or Federal Magistrates Court in your State or Territory and you must lodge it within 28 days from 1 June 2011.

More information about this process, including where to lodge your application, can be obtained from the Federal Court website www.fedcourt.gov.au or from the Federal Magistrates Court website www.fmc.gov.au.



Australian Government
Australian Taxation Office

The Treasury
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SYDNEY NSW 2000

Reply to: PO Box 3524
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Our reference: 1012606745255
Contact officer: Cecilia Vun
Phone: 13 28 69
Email: GSTmail@ato.gov.au
Fax: 1300 139 031
Your reference:
Portal receipt number:
ABN: 55 437 667 728
26 March 2014

Notice of GST decision For your information

Dear Sir/Madam

You wrote to us on 24 February 2014 asking about GST and machinery of government changes. This is our response, which contains:

- our decision and our reasons for making it
- an explanation of your review rights.

Our decision has been authorised by Tim Fenner.

Notice of Decision

This decision applies to:

THE TREASURY

ABN: 55 437 667 728

Question

Will the Commissioner's Determination of 13 July 2011 continue to be valid where instead of the references being made to the *Public Sector Employment and Management Act 2002* (former Act) such references should now be made to the *Government Sector Employment Act 2013* (GSE Act) as the former Act has been repealed and replaced by the GSE Act?

In addition, you ask if the Commissioner's discretion, to treat as a tax invoice a particular document that would not generally be a tax invoice, can be exercised:

- (i) over a transitional period of three months from the effective date of the machinery of government (MOG) changes, and
- (ii) over a transitional period of four months from the effective date of the MOG changes where the MOG changes have retrospective effect?

Advice/answer

Yes. The Commissioner's Determination of 13 July 2011 will continue to be valid and we have noted that any reference to the repealed former Act is now taken as a reference to the GSE Act.

The Commissioner's discretion to treat as a tax invoice the below documents that would not generally be a tax invoice:

- (a) tax invoices issued by the new agency/gaining agency under the name of the old agency/losing agency (or agency now part of the new agency)
- (b) tax invoices received by the new/gaining agency for acquisitions that it makes from a supplier that include the details or identity of the old agency/losing agency
- (c) recipient created tax invoices (RCTIs) issued by the new/gaining agency which are subject to an RCTI agreement that are no longer valid as they are in the name of the former/losing agency

will continue to be exercised over a transitional period of three months from the effective date of the MOG changes. Where a period longer than three months is required to have tax invoices compliant, you may contact us again at the time the MOG change takes effect.

Relevant facts and circumstances

Our decision is based on the following facts.

The Treasury (you) are a New South Wales Government body. You are registered for GST.

You seek to refresh and update the Commissioner's determination dated 13 July 2011 to treat certain documents as valid tax invoices following MOG changes.

You make this application on behalf of all New South Wales (NSW) public sector agencies (including general government agencies, public trading enterprises and public financial enterprises).

The expression 'machinery of government changes' and 'administrative changes' refer to changes to the allocation and reallocation of functions between government departments/agencies and Ministers and include the creation and abolition of government departments and agencies and changes to them.

MOG/administrative changes can be made by various instruments including AAO under the *Constitution Act 1902* changing relevant Schedules in GSE Act, specific legislation applying to a particular agency and other instruments such as orders pursuant to a particular Act.

In NSW the Governor may make an AAO under the *Constitution Act 1902* that will change relevant Schedules in the *Government Sector Employment Act 2013* (GSE Act) to establish, abolish and change agencies. MOG/administrative changes may also be made under specific legislation applying to a particular agency and other legislative instruments.

A major restructure of the NSW public sector agencies took place under the MOG changes specified in the AAO 2014 made on 29 January 2014 to take effect from 24 February 2014. The AAO 2014 was amended on 19 February 2014. You have provided a copy of the relevant AAO 2014 and the amendment to the AAO 2014.

The *Public Sector Employment and Management Act 2002* (former Act) was repealed and replaced by the GSE Act. The Commissioner's determination of 13 July 2011 states that the Commissioner will exercise discretion under section 29-70(1B) of the GST Act to treat documents that are not tax invoices as tax invoices where MOG changes are specified in an Order pursuant to the repealed former Act. The purpose of this request is to seek an update to the determination to reflect amendments to the way in which MOG changes are specified pursuant to the new GSE Act.

You expect that in the majority of cases these changes will occur under AAO under the *Constitution Act 1902* pertaining to the GSE Act, and less frequently by specific legislation and other means.

Undergoing MOG changes can be challenging for agencies. You make this request because, while MOG changes can have immediate, prospective or retrospective effect, the practicalities of implementing the changes can often take several months following announcement. Agencies need to consider an enormous number of issues and deal with wide-ranging matters (for example, information technology, accounting, legal, tax, personnel, accommodation, industrial, operational), many of which can be very complex and time-consuming. You advise that the administrative consequences for agencies resulting from MOG changes and agency restructures include:

- Following MOG change, the losing agency will continue to process all of the transactions relating to the transferred functions for a number of months following the date of the movement of the financial reporting responsibilities.

A consequence of the losing agency continuing to process transactions for the transferred functions is that supplies made by the transferred functions (ie gaining agencies) may for a period of time continue to be invoiced in the name of the losing agency.

GST registered recipients of these sales can claim GST credits on their purchases. However, as the losing agency issued a tax invoice for the sales, it did not contain the name, address and the Australian Business Number (ABN) of the gaining agency. The document is therefore not a valid tax invoice and the customer cannot use it to claim the GST credits.

- The losing agencies will also have outstanding orders they have placed with suppliers that relate to the operations of the transferred function. Suppliers will make sales under those orders to the gaining agencies.

The gaining agency then uses the things purchased in operating the transferred functions and is liable to make payments to the suppliers. The gaining agency is entitled to the GST credits for the things purchased. The suppliers issue the gaining agency with a document that satisfied all the requirements of a tax invoice but it contains the name, address and ABN of the losing agency. This document is therefore not a valid tax invoice and the gaining agency cannot use it to claim the GST credits.

- When the MOG change occurs, the losing agency and various suppliers may have entered into RCTI agreements that specify certain sales to be made by the suppliers to the losing agency for use in operating the transferred functions.

After the MOG change comes into effect, those suppliers then make sales to the gaining agency. The gaining agency is liable to make payments to the suppliers and can claim GST credits. The losing agency may continue to issue documents with its ABN or identity for sales made to the gaining agency under those RCTI agreements. These documents are not RCTIs and the gaining agency cannot use them to claim GST credits. The RCTI agreements will no longer be valid as the losing agency is no longer the recipient of the supply.

Reasons for decision

Detailed reasoning

Note: In this Determination, unless otherwise stated,

- all legislative references are to the GST Act
- all reference material referred to are available on the Australian Taxation Office (ATO) website www.ato.gov.au

General:

Section 29-70(1B) provides that the Commissioner may treat as a tax invoice a particular document that would not, apart from this subsection, be a tax invoice.

Goods and Services Tax Ruling GSTR 2013/1 *Goods and services tax: tax invoices* explains circumstances in which the Commissioner may exercise the discretion to treat a document as a tax invoice

51. The Commissioner has the discretion to treat a document that does not satisfy the tax invoice requirements as a tax invoice.²⁸ This discretion can also be used to treat a document that does not meet the requirements for a recipient created tax invoice as a tax invoice. The Commissioner will exercise this discretion on a case by case basis.

52. There are a number of factors that the Commissioner will consider in the exercise of this discretion which are explained in Law Administration Practice Statement PS LA 2004/11. These factors are not exhaustive and there may be other circumstances that are relevant in a particular case.

53. When the Commissioner exercises the discretion to treat a document as a tax invoice, that document is a tax invoice as defined in section 195-1. This treatment applies for the purposes of both the supplier and recipient. The document for which the discretion has been exercised is treated as a tax invoice for the taxable supply from the date it was created.

In addition, The Commissioner has published other relevant guidelines, such as: *GST and machinery of government –frequently asked questions* (NAT73995). The guidelines include:

When a MOG change occurs, an affected government organisation can ask us to exercise the discretion. In exercising the discretion, we generally specify in the notice of decision a three month period during which certain documents will be treated as tax invoices.

These documents include:

- tax invoices issued to the losing agency for supplies received by the gaining agency
- tax invoices issued in the identity of the losing agency for supplies made by the gaining agency
- RCTIs issued in the identity of the losing agency for supplies received by the gaining agency.

These documents must comply with the other GST requirements for tax invoices.

The three month period specified in the notice of decision about treating certain documents as tax invoices usually commences on the date specified in the AAO or proclamation for the MOG changes to take place. Extensions of this time are considered on a case by case basis. Government organisations should contact us as soon as possible if they believe it may take longer than three months for them to have their tax invoices compliant.

Law Administration Practice Statement PS LA 2004/11 *The Commissioner's discretions to treat a particular document as a tax invoice or an adjustment note* includes the guidelines that exercise of the Commissioner's discretion should be considered in situations where:

- there is a creditable acquisition
- a recipient is required to hold a tax invoice to claim an input tax credit (ITC) but the document held does not meet the requirements of a tax invoice...
- the request is within the 4 year time limits...; and
- it is reasonable to exercise the discretion on the basis of the relevant facts and circumstances, and the exercise of the discretion would not be inappropriate or unnecessary.

Maintaining the Determination dated 13 July 2011:

In this case, you seek to refresh and update the Commissioner's determination dated 13 July 2011 to treat certain documents as valid tax invoices following MOG changes. You make this application on behalf of all NSW public sector agencies.

The reasons for your request are:

- The Commissioner's Determination of 13 July 2011 states that the Commissioner will exercise discretion under section 29-70(1B) of the GST Act to treat documents that are not tax invoices as tax invoices where MOG changes are specified in an Order pursuant to the repealed former Act.
- A major restructure of the NSW public sector agencies has taken place on 24 February 2014 due to MOG changes specified in the AAO made pursuant to the *Constitution Act 1902* and the provisions of the GSE Act.

In view of the above reasons, the Commissioner considers that the Determination of 13 July 2011 will continue to be valid and any reference to the repealed former Act in the Determination is now treated as a reference to the GSE Act.

More information

If you have any questions, please phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for Cecilia Vun on extension **88123**.

When you phone us, please have the reference number **1012606745255** ready so we can quickly access your case details.

Yours faithfully,

James O'Halloran
Deputy Commissioner of Taxation

Per 
(Cecilia Vun)

Explanation of review rights

You can contact the person handling your case and ask the Tax Office to review the decision. A review is normally conducted by someone who was not involved in making the original decision. You may also request a review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

Reviews under the ADJR ACT

The ADJR Act provides you with two main rights:

1. You can write to the Tax Office and ask us to provide you with a written statement of:
 - the findings of material questions of fact
 - the evidence these findings were based upon, and
 - the reasons for our decision.
2. You can apply to the Federal Court of Australia or the Federal Magistrates Court for a review of our decision.

If you decide to apply to the Federal Court or the Federal Magistrates Court for a review, we suggest you seek professional advice on how to proceed. You may lodge your application at the Federal Court or Federal Magistrates Court in your State or Territory and you must lodge it within 28 days from 24 March 2014.

More information about this process, including where to lodge your application, can be obtained from the Federal Court website www.fedcourt.gov.au or from the Federal Magistrates Court website www.fmc.gov.au.



Australian Government
Australian Taxation Office

The Treasury
Attention: Adam McIntosh
PO Box 5469
SYDNEY NSW 2001

Our reference: 1051259012793
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Phone: 13 28 69
Email: GSTmail@ato.gov.au
ABN: 55 437 667 728

10 August 2017

We are notifying you of our decision

Dear Sir/Madam

On 23 June 2017, you wrote to us requesting the Commissioner exercise his discretion under subsection 29-70(1B) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to treat as a tax invoice, a particular document that does not meet the requirements of a tax invoice. Please find below our decision and our reasons.

Notice of decision

This decision applies to:

THE TREASURY

ABN: 55 437 667 728

Question

With regard to Machinery of Government (MOG) changes specified in an Administrative Arrangements Order (AAO), issued pursuant to the *Constitution Act 1902*, will the Commissioner of Taxation (Commissioner) exercise his discretion under subsection 29-70(1B) of the GST Act to treat:

- (a) documents issued by the losing department or agency (containing its details) for **supplies** made by the gaining department or agency as tax invoices for the recipients of those supplies to claim input tax credits (ITC);
- (b) documents issued to the losing department or agency (containing its details) for **purchases** made by the gaining department or agency as tax invoices for the gaining department or agency to claim ITC;
- (c) documents issued by the losing department or agency (containing its details) under a recipient created tax invoice (RCTI) agreement (between the losing department or agency and the suppliers) for supplies made to the gaining department or agency as RCTIs for the gaining department or agency to claim ITC; and
- (d) documents issued by the gaining department or agency (containing its details) under a recipient created tax invoice RCTI agreement (between the losing department or agency and the suppliers) for supplies made to the gaining department or agency as RCTIs for the gaining department or agency to claim ITC.

Decision

Yes. Where MOG changes are specified in an AAO issued pursuant to the *Constitution Act 1902*, the Commissioner will exercise his discretion under subsection 29-70(1B) of the GST Act to treat documents that are not tax invoices as tax invoices.

Where an AAO is issued on or before the commencement date of a MOG change specified in the AAO, the Commissioner will exercise his discretion for a transitional period of three months starting from the commencement date of the MOG change specified in the AAO.

Where an AAO is issued after the commencement date of a MOG change specified in the AAO, the Commissioner will exercise his discretion for a transitional period starting from the date of the commencement of the AAO to a date three months after the date of the AAO.

This discretion is exercised for the matters referred to in Question 1 in respect of a MOG change specified in an AAO issued pursuant to the *Constitution Act 1902*.

Relevant facts and circumstances

Our decision is based on the following facts.

A Machinery of Government (MoG) change occurs when the Government at any level (Commonwealth, State, Territory and local) change the way responsibilities are managed. It can involve the movement of functions, resources and people from one agency to another.

Examples of MOG changes undertaken by the Commonwealth, a state or territory in relation to government entities include:

- abolishing a government department by transferring its functions to other government departments
- creating a government department
- merging two or more government departments
- moving functions in to or out of government departments
- changing a government department name.

Part 7 of the *Constitution Act 1902* provides for such changes upon the issuing of an AAO by the Governor. The Governor may also substitute or amend Schedule 1 to the *Government Sector Employment Act 2013* which lists the various NSW Government departments and agencies.

On 13 July 2011 the ATO issued a notice of decision (reference 1011815682897) to the New South Wales Treasury (Office of Financial Management) relating to the exercising of the Commissioner's discretion in regard to treating documents that do not meet the requirements of a valid tax invoice as a tax invoice. The discretion applied to situations affecting NSW State Government departments and agencies relating to machinery of government changes detailed in Administrative Arrangements Orders (AAO) issued pursuant to the *Public Sector Employment and Management Act 2002*.

The *Public Sector Employment and Management Act 2002* was repealed and replaced with the *Government Sector Employment Act 2013* effective from 24 February 2014.

On 26 March 2014 the ATO issued a notice of decision (reference 1012606745255) to The Treasury providing that the notice of decision issued on 13 July 2011 would continue to be valid in respect to MoG changes as a result of an AAO made under the new legislation being the *Government Sector Employment Act 2013*.

Whilst Part 7 of the *Constitution Act 1902* provides for amendments to Schedule 1 to the *Government Sector Employment Act 2013* (that is the names of Government departments and agencies and their respective agency heads), the details of the specific MoG change are contained in the AAO made under the *Constitution Act 1902*.

As a result, you have now requested the Commissioner exercise his discretion pursuant to subsection 29-70(1B) of the GST Act in respect to MoG changes specified in an AAO, issued pursuant to the *Constitution Act 1902*.

Reasons for decision

Note: In this reasoning, unless otherwise stated,

- all legislative references are to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)
- reference material(s) referred to are available on the Australian Taxation Office (ATO) website www.ato.gov.au

The Commissioner has discretion under subsection 29-70(1B) to treat as a tax invoice a particular document that does not meet the requirements for being a tax invoice.

Further to this, Practice Statement Law Administration PS LA 2004/11 *The Commissioner's discretions to treat a particular document as a tax invoice or adjustment note* provides guidance in relation to exercising of the Commissioner's discretion.

Paragraph 7 of PS LA 2004/11 acknowledges that:

- the request may be made by the supplier
- the request may be made by a recipient issuing a recipient created tax invoice
- the request may be made by the recipient before the supply has been made or a valid tax invoice sought from the supplier.

A MOG change at state level may occur any time, and when these changes occur, the losing government departments and agencies will have outstanding orders with suppliers. It is important that these departments/agencies ensure that they hold tax invoices for purchases made after the MOG change. Similarly, they are required to provide tax invoices for sales made after the MOG change.

However the ATO recognises that when a MOG change occurs, it takes time to implement administrative processes to account for the transfer of functions across agencies, and that resultant 'tax invoices' will contain the details of the losing government department or agency which has placed an order before the MOG change. Where this occurs these documents will not meet the requirements of a tax invoice.

Furthermore, where a document is issued by a losing government department or agency (under a RCTI agreement which the losing government department or agency and the supplier have entered into) for a supply made to the gaining government department or agency, the document will not be a tax invoice that is a RCTI.

In order for government departments and agencies and departments to implement administrative procedures as a result of a MOG change, the Commissioner will exercise his discretion under subsection 29-70(1B) of the GST Act to treat documents that are not tax invoices as being tax invoices as follows.

The exercising of the tax invoice discretion under this subsection will apply in respect of all NSW State Government departments and agencies listed in an Order, issued under the *Constitution Act 1902*.

For more information

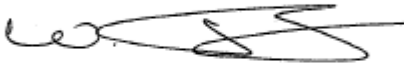
If you have any questions, please phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for Wayne Thompson on **(08) 9268 0258**.

What you need if you phone us

We need to know we are talking to the right person before we can discuss your tax affairs. We will ask for details only you or someone you've authorised would know. An authorised person is someone who you've previously told us can act on your behalf. It will help if you quote 'Our reference' which you will find at the top of the letter. If you can, please have your tax file number or Australian business number with you.

Yours faithfully,

Tim Dyce
Deputy Commissioner of Taxation



Per
(Wayne Thompson)

FBT Implications of Machinery of Government Changes

Background

Since disaggregation of the Crown's FBT return in 2001, General Government Budget Dependent entities assumed the responsibility for their own FBT obligations to the Australian Taxation Office (ATO). These entities are known as 'nominated entities' for FBT purposes. The information contained in this document relates solely to issues affecting nominated entities as a result of Machinery of government changes and restructure/changes to these entities.

Whenever these changes in structure occur, there are a number of factors that should be considered by the affected nominated department(s) and the Crown to ensure their tax obligations are met. As a nominated body is not a legal entity in its own right (for fringe benefits taxing purposes) but is part of the "body politic" i.e. The Crown, rights and obligations that would be either conferred or imposed on a nominated body as a result of treating it as an employer are instead conferred or imposed on the Crown. It is therefore important that these rights or obligations are appropriately and responsibly handled by the nominated entities to ensure the FBT obligations are met.

Topics discussed in this document are:

- what is a nominated body;
- commencement date for a nominated body;
- further disaggregation;
- creating/listing a new department (including creating/listing entities resulting from a merger);
- name change (including name changes resulting from a merger);
- nominated body ceasing to exist;
- notification of FBT liability at cessation;
- reportable fringe benefits amount; and
- general issues.

What is a nominated body?

NSW may nominate an "eligible State body" for the purposes of Part XIC of the Fringe Benefits Tax Assessment Act 1986 (C'th) (the FBT Act). An eligible State body in NSW is defined in section 135T of the FBT Act as being a "department" within the meaning of section 6 of the (now repealed) Public Sector Employment and Management Act 2002 of New South Wales (PSEMA). The FBTAA still refers to the definition in the repealed PSEMA (which was repealed in 2014), but as the Government Sector Employment Act 2013 of New South Wales (GSEA) has replaced the PSEMA, a "department" should be defined within the meaning of section 3(1) of the GSEA.

Commencement date for a nominated body

For a department to be a nominated body, the State of New South Wales (Crown) via the NSW Treasury (Treasury), must have nominated the department to the ATO on or before 21 May in the year of tax from which the nomination is to commence (i.e. for a nomination to take effect from the FBT year beginning 1 April 2018 onwards, the nomination must take place on or before 21 May 2018).

Where nomination occurs after 21 May in the year of the tax, the FBT obligations for that department rest with the Crown until the end of that FBT year, i.e. 31 March following nomination, (for example, if nomination occurred on 1 August 2017, the FBT obligations would rest with the Crown until 31 March 2018). Although the FBT obligations rest with the Crown, the nominated body must:

- liaise with Treasury FBT officer to ensure payments and information required by the Crown is met as requested;
- ensure sufficient funding is transferred to the Crown (Treasury) to enable quarterly FBT instalment payments to be made to the ATO; and

- at the end of the first FBT year, prepare and submit a fully compliant and signed FBT return to the Director, Cash, Banking and Operations, NSW Treasury by 10 May to enable NSW Treasury to prepare and consolidate the FBT return for the Crown and forward to the ATO by the due date.

Once nominated, that department remains a nominated body until the nomination is revoked, i.e. nomination is only required once.

Further disaggregation

An agency may wish to disaggregate other entities currently covered by Part 4 of the GSEA. Any such disaggregation must occur at the end of the FBT year (i.e. 31 March) with the nomination and FBT amount payable by the new department to the ATO before 21 May of the new FBT year. An agency will be unable to disaggregate a department after 21 May without the prior approval being obtained from NSW Treasury.

Once disaggregation and nomination has occurred, responsibility for compliance with the FBT regime is the responsibility of the new department. As the Crown will provide no additional funding, agencies must ensure sufficient funding is transferred to the new department to cover its FBT liability. Agencies must notify the Director, Cash, Banking and Operations, NSW Treasury when a department is to be disaggregated. This notification should include the name of the department to be nominated, the relevant legislative provision which applies and notional taxes for the newly nominated body and the “parent” department (excluding the notional tax of the department to be nominated). The notification should be forwarded to NSW Treasury by 10 May to enable NSW Treasury to inform the ATO by 21 May.

Creating/Listing a department

A new department

Where a new department is created pursuant to relevant NSW legislation and nomination is made to the ATO on or before 21 May, the new department will be a nominated body from 1 April in the year of the nomination.

Where the nomination occurs after 21 May the FBT responsibility rests with the Crown until the end of that FBT year. This means the Crown will pay the quarterly FBT instalments and lodge the end of year FBT return to the ATO. However, to enable the Crown to meet these responsibilities, the nominated body must:

- liaise with Treasury FBT officer for assistance in this process to ensure requirements are met;
- ensure sufficient funding is transferred to the Crown to enable the quarterly FBT instalment payments to be made to the ATO; and
- at the end of the first FBT year, prepare and submit a fully compliant and signed FBT return to the Director, Cash, Banking and Operations, NSW Treasury by 10 May to enable NSW Treasury to consolidate the Crown FBT return and submit the return to the ATO by the due date 21 May of the FBT year.

For example, resulting from a machinery of government change a new NSW Government department ABC is created from 1 July 2017. As ABC is created after 21 May 2017, the FBT responsibility rests with the Crown until the end of that FBT year, i.e. 31 March 2018. ABC must ensure sufficient funding is transferred to the Crown to cover the quarterly FBT payments for September 2017, December 2017, and March 2018. ABC is also required to prepare and forward its annual FBT return for the year ended 31 March 2018 to the Director, Cash, Banking and Operations, NSW Treasury by 10 May 2018. Providing the Crown advises the ATO on or before 21 May 2018 that ABC is a nominated body, ABC will be responsible for its own FBT obligations from 1 April 2018.

A new department resulting from a merger

Where a merger involves entities being amalgamated or abolished with functions being transferred to an entirely new entity, all of the entities will cease to exist. The ceased entities are required to notify the ATO and the Director, Cash, Banking and Operations, NSW Treasury, of the date they ceased to exist, and lodge a final FBT return from 1 April to the date of cessation. Payment of any outstanding FBT liability must also be made when the final return is lodged with the ATO.

Provided the merger and nomination to the ATO occurs between 1 April and 21 May, the new department will be a nominated body from 1 April in the year of nomination. However, where the merger and nomination occurs after 21 May, the FBT responsibility rests with the Crown until the end of that FBT year. This means that the Crown will pay the quarterly FBT instalments and lodge the end of year FBT return with the ATO. However, to enable the Crown to meet these responsibilities the nominated body must:

- liaise with Treasury FBT officer for assistance in this process to ensure requirements are met;
- ensure sufficient funding is transferred to the Crown to enable the quarterly FBT instalment payments to be made to the ATO; and
- at the end of the first FBT year, prepare and submit a fully compliant and signed FBT return to the Director, Cash, Banking and Operations, NSW Treasury by 10 May to enable NSW Treasury to on forward the return to the ATO.

For example, the abolishment of two hypothetical budget dependent agencies, the Office of Consumer Affairs and the Department of Labour Relations to form an entirely new agency called the Department of Consumer and Employment Affairs will result in both the Office of Consumer Affairs and Department of Labour Relations ceasing to exist. The ceased agencies are required to notify the ATO and the Director, Cash, Banking and Operations, NSW Treasury, of the date they ceased to exist and lodge a final FBT return from 1 April to the date of cessation. If the Department of Consumer and Employment Affairs becomes a nominated body on or before 21 May, it will be responsible for its own FBT obligations from 1 April in the year of nomination. However, if it becomes a nominated body after 21 May the FBT obligations for the remainder of that year will revert back to the Crown (i.e. from the date of cessation until 31 March).

If the merger results in a new department that is not an 'eligible body' pursuant to section 135T of the FBT Act, then consideration should be given to whether:

- the department should be registered separately as a "current employer" under the FBT Act (e.g. A statutory authority who is able to employ); or
- the department's FBT liability should be included in the FBT return of a nominated body preferable to that of the portfolio department.

Name change

Name change only

A change in the name of a nominated body will not result in the nominated body ceasing to exist. A nominated body which has its name changed will need to advise the ATO, and the Director, Cash Banking and Operations, NSW Treasury, of its change in name in the same manner as any other employer who changes its name. Any name change must be the same as the name published under the GSEA.

For example, changing the name of the Aboriginal Affairs Department to the Department of Indigenous Affairs will not result in the nominated body ceasing to exist.

Name change as a result of two or more entities merging

Where the name change is associated with an increase in functions as a result of another nominated body being abolished, only the department that is abolished will cease to exist. The ceased department is required to notify the ATO, and the Director, Cash, Banking and Operations, NSW Treasury, of the date that it ceased to exist and lodge a final FBT return from 1 April to the date of cessation. Payment of any outstanding FBT liability must be made when the final return is lodged with the ATO.

The nominated body which has changed its name will need to advise the ATO, and the Director, Cash, Banking and Operations, NSW Treasury, of its name change. Any name change must be the same as the name published under the GSEA. Provided there is an ongoing function within a pre-existing nominated entity which remains after the restructure, a nominated body that increases or decreases its functions and changes its name will not cease to exist.

For example, if the Department of Rivers (a hypothetical department) is abolished with its functions transferred to the Department of Land and Environment that also has its name changed to become Environment NSW, then only the Department of Rivers has ceased to exist. The Department of Rivers is required to notify the ATO and the Director, Cash, Banking and Operations, NSW Treasury of the date it ceased to exist and file a final FBT return for the period of 1 April to the date of cessation with the ATO. The Department of Land and Environment will need to:

- change its name;
- notify the ATO and the Director, Cash, Banking and Operations, NSW Treasury of the name change; and
- vary its FBT instalments to include the remaining instalments of the Department of Rivers.

Nominated body ceasing to exist

A nominated body will cease to exist when there is a substantive change in structure. For example, two agencies are merging to form a single new agency, one agency being split into two new agencies, an agency/nominated body becoming a statutory authority etc. A name change by itself will not result in the nominated body ceasing to exist.

For example, if the Department of Rivers (a hypothetical department) was abolished on 30 June 2017, the Department of Rivers would be responsible for preparing and lodging a final FBT return with the ATO for the period 1 April 2017 to 30 June 2017:

- The Department of Rivers will cease to be considered to be the 'employer' for FBT purposes at 30 June 2017;
- The abolished department must ensure on their final FBT return they answer question 2 on page 3 of the FBT return "Do you expect to lodge an FBT return for 2018-19 or future years?" Departments should tick "No";
- The FBT responsibility from 1 July 2017 to 31 March 2018 may revert to the Crown, however, Department representatives should in the first instance liaise with the Treasury FBT officer for assistance in the process to ensure requirements are met; and
- Abolished departments must ensure sufficient funding is transferred to the Crown to enable the quarterly FBT instalments to be made to the ATO.

In the case where a nominated body becomes a statutory authority, the new statutory body (a separate government body) becomes the employer and the Crown will not have an FBT liability for the remainder of the year. The statutory authority will not become liable to pay FBT instalments until it lodges its first return. However prior to a statutory authority registering for FBT they must ensure that:

- the new Statutory body can employ under the FBT Act and GSEA;
- the Statutory Authority's FBT liability may need to be included in the FBT return of a nominated body, preferably that of the portfolio department,
- liaise with Treasury FBT officer for assistance in this process to ensure requirements are met.

Notification of FBT liability at cessation

Where there is a transfer of employees and functions to either another nominated body, or to the Crown, the Crown (via NSW Treasury) is required to advise the ATO of the notional tax of the nominated entities for the year after the change. The notional tax must include both the tax that was paid by the ceased department in the year of change and the tax that was paid for the remainder of the year by either the continuing nominated body, or the Crown. Therefore, where a nominated body ceases to exist, at the date of cessation that department must advise the Director, Cash Banking and Operations, NSW Treasury the following:

- the date of cessation of the department;
- the amount of tax paid to the date of cessation;
- the amount of tax payable for the remainder of the FBT year;
- Department's tax file number (TFN); and
- Australian Business Number (ABN).

This information should be forwarded to NSW Treasury by no later than 10 May. NSW Treasury is required by the ATO to collate the data provided by completing the "Nomination or revoke an eligible State or Territory Body" and submit to the ATO by no later than 21 May of the FBT year.

Reportable fringe benefits amount

For reportable fringe benefit amount (RFBA) purposes, both the nominated body that ceased to exist and the nominated body to which the employee has transferred (or the Crown if the employee was not transferred to a nominated body) will need to separately calculate the value of the fringe benefits provided to the employee. Both the ceased department and the nominated body (or the Crown) to which the employee was transferred will apply the \$2,000 reporting threshold separately in calculating the reportable fringe benefits amount.

For example, if an employee was:

- employed by one nominated body for the period 1 April to 30 August and had a total taxable value of fringe benefits provided by this body of \$3,500; and
- was transferred to another nominated body for the period 1 September to 31 March and had a total taxable value of fringe benefits provided by this body of \$1,500

The first nominated body would include a RFBA on the employee's payment summary as the employee's total amount of fringe benefits exceeds \$2,000. The second nominated body would not include a RFBA on the employee's payment summary as the employee's total amount of fringe benefits is less than \$2,000.

General issues

Entities need to deal with all issues arising from changes in a coordinated and cooperative way, without allowing the FBT impacts to drive planning to the exclusion of other important factors. Entities have a responsibility to take all reasonable steps to minimise the impact of changes on their FBT obligations. Such reasonable steps include early modification of systems, timelines to address relevant issues and close liaison with NSW Treasury and other entities directly affected by the changes.

Communication between all affected entities is critical to the success of any changes required.