

# Tax Insight



## No supply, still no GST

### At a glance

- ▶ Qantas entitled to a GST refund as a result of passengers with pre-purchased tickets who never actually boarded their flights
- ▶ Businesses should identify instances where pre-payments have been received in respect of supplies ultimately never made
- ▶ Act promptly to preserve entitlement to GST refunds for past tax periods
- ▶ How Ernst & Young can help

The recent Full Federal Court decision in *Qantas Airways Ltd v Commissioner of Taxation* [2011] [FCAFC 113](#) ('*Qantas Airways*') confirmed Qantas' entitlement to a GST refund arising where passengers had pre-purchased tickets but had not boarded their flights.

Although this case is likely to be appealed to the High Court, businesses should now be reviewing their own operations to investigate whether, like Qantas, they may be entitled to claim GST refunds for supplies that have never eventuated. Further, businesses should act immediately to ensure that GST refunds do not expire due to the four-year rule.

We recommend that you meet with your Ernst & Young advisor to discuss the Federal Court decision, impacts for your business, and next steps.

### *Qantas Airways*

The recent Full Federal Court decision in *Qantas Airways* confirmed Qantas' entitlement to a GST refund arising from a refund claim lodged on 30 June 2008 describing how:

- ▶ Qantas had incorrectly remitted GST in respect of pre-purchased airfares, where the individuals had not boarded the flights for which they had made a booking
- ▶ As the individuals had not boarded their flights, Qantas had not supplied to those individuals the thing, being the flight, for which they had paid
- ▶ Qantas had not made any taxable supply to those individuals, notwithstanding that the airfares had been pre-paid

The Commissioner of Taxation ('Commissioner') had argued that Qantas had made a taxable supply when it accepted a passenger's reservation for a flight. Qantas, on the other hand, argued that the act of transporting a passenger was the relevant supply for which consideration was provided and that if this supply did not occur, no taxable supply was made.

Although Qantas' argument was initially rejected in the Administrative Appeals Tribunal, the Full Federal Court found in favour of Qantas. In finding that Qantas had not made taxable supplies in the relevant circumstances, the Full Federal Court spent much time examining for what, exactly, the consideration had been provided, reasoning that:

- ▶ The consideration provided (i.e. the fare paid) by a prospective passenger is paid for their flight, not for the antecedent supplies made in preparing to carry that passenger.
- ▶ The "purpose", "substance" or "object" of each flight booking was to be carried on a plane - where carriage was not provided, no supply was made for the consideration provided.

## Refund opportunities may abound

If they have not already done so, businesses should now be reviewing their own operations to consider possible instances where they have remitted GST in respect of arrangements without actually making the supply for which the consideration was provided. *Qantas Airways* provides but one example of a situation where a business has received pre-payments for supplies which may never have eventuated. Depending on the relevant contractual arrangements, other instances where no supply is made for the consideration provided may include:

- ▶ Payments received for hotel accommodation where the patron never presented themselves and/or cancelled their booking
- ▶ Pre-payments received for venue hire where the function was cancelled
- ▶ Pre-purchased tickets for events which patrons never attend
- ▶ Payments for goods that are never collected or services that are never provided where a refund is never sought

Needless to say, this list is not intended to be definitive.

## Prompt action should be taken

As may have been expected, the Commissioner has sought leave to appeal the decision of the Full Federal Court to the High Court of Australia. However, taxpayers should not wait for any potential High Court judgment before reviewing what refund opportunities arise in the wake of the *Qantas Airways* case, lest the four-year rule cause potential GST refunds to expire.

It should also be noted that although legislative amendments were made following the *KAP Motors* GST case to restrict payments of GST refunds, taxpayers should still be entitled to claim back GST that has been remitted in respect of arrangements where the relevant supply has not eventuated.

## How can we help?

Ernst & Young's Indirect Tax advisors can assist you to identify instances where, applying the logic of *Qantas Airways*, consideration may have been received in circumstances which have not, in fact, given rise to a GST liability. Further, Ernst & Young can assist you to notify the ATO of any GST refund entitlement you may have before that entitlement expires. To discuss the impact of the *Qantas Airways* decision for your organisation, please contact one of the Ernst & Young advisors named below.

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