

JOINT SUBMISSION BY

**CPA Australia, The Institute of Chartered Accountants in Australia,
The Institute of Public Accountants, The Tax Institute
and Taxpayers Australia**

Draft Goods and Services Tax Ruling GSTR 2011/D3

Goods and Services Tax: GST and loyalty programs

Date: 3 October 2011

The Professional Bodies welcome the opportunity to comment on Draft Goods and Services Tax Ruling GSTR 2011/D3 (the Draft Ruling):

We generally consider the Draft Ruling to be a well considered and a pragmatic ruling regarding what is recognised to be a complex interpretative area of Goods and Services Tax (GST).

Nonetheless we have some specific concerns in relation to certain elements of the Draft Ruling which are outlined below.

Specific Comments

1. Accrual of points by members

Upon accrual of points by a member on an acquisition of eligible goods or services, a supply of rights is made to the member. In paragraph 52 of the Draft Ruling, it is stated that the member pays nothing for the points and therefore there is no supply of rights to the member for consideration in the earn transaction. This view implies that the points have no value when initially supplied to the member.

However, we note that it is recognised that payments are made by program partners to the operator for points (the points fee), which implies that the points do in fact have a value in a commercial context.

Therefore, we consider the better view to be that the points do have a value and, hence, are issued to the member for consideration in the earn transaction. This view would be in accordance with the principles established in *Case 6/2007* [2007] AATA 1550 (Food Supplier).

Under this alternative view, despite the fact that the points are issued to the member for consideration, we consider that it is still possible and appropriate for the Commissioner to maintain the view (outlined in paragraph 54) that the supply of the points is ancillary and incidental to the principal supply of the eligible goods or services to the member. Hence, the points should be recognised as such and follow the GST treatment of the principal supply made to the member.

2. Contribution amounts paid into a Trust

Paragraph 58 of the Draft Ruling states that points fees and other fees paid by the program partner are consideration for supplies made by the loyalty program operator to the program partner. It also states that, under arrangements where the points fee is payable by the program partner to an entity nominated by the operator (such as a trust which funds the provision of rewards to members), the points fee is consideration for a supply by the loyalty program operator to the program partner. In this regard, the Commissioner presumably takes

the view that amounts received by the trust are constructively received by the loyalty program operator.

We note that there will be a range of different structures involving a trust which are adopted by different taxpayers for the operation of loyalty programs. In this regard, a trust may exist within a structure to protect the reward entitlements of members (i.e. in case of an Ansett type insolvency), in which case the members are the primary beneficiaries of the trust. In other structures, the beneficiaries may be program partners.

Furthermore, we are aware of loyalty program arrangements where a trust is established for the benefit of the program members (to the extent of the provision of rewards) and for the operator (with respect to certain operational expenses). Under this arrangement, points fees are payable by program members into the trust as a contribution. As mentioned above, amounts paid as points fees are held in the trust primarily for the benefit of loyalty program members.

Under this type of an arrangement, a separate participation fee is payable by the program partner to the loyalty program operator for the services of administration of the program. Further user-pays fees are also payable by program partners to the program operator for services supplied by the operator.

We consider that there will be circumstances where a participation fee payable to the operator is consideration for the administration of the scheme. The participation fees and user-pays fees represent payments in consideration for taxable supplies of administering the program, as there is sufficient nexus between the payments and the supply of services by the operator.

Under the same loyalty program arrangement, points fees payable into a trust will not represent consideration for any supply unless sufficient nexus can be established between the payment and a supply made by the operator. Points fees may therefore merely represent contributions into a trust, which are then held for the benefit of the program members and not also consideration for a supply by the operator or any other party.

This principle is supported by the recent Full Federal Court decision in *Qantas Airways Limited v Commissioner of Taxation* [2011] FCAFC 113.

On this basis, the example in paragraph 31 of the Draft Ruling, and the comments in paragraph 58, are too general in nature and may not be appropriate in relation to all arrangements involving payments into a trust.

Adoption of a generalised approach such as this, based on one example of a loyalty program structure only, could result in an incorrect GST treatment of certain payments in relation to loyalty program structures currently in place.

We therefore note that the issue in relation to payments made into a trust would be better dealt with on a case by case basis, considering individual circumstances of specific arrangements, and not be covered by a public ruling dealing with general principles.

3. Alignment with GSTR 2002/3 Goods and services tax: Prizes (GSTR 2002/3)

GSTR 2002/3 considers loyalty programs operated by gambling suppliers. In paragraph 191 of GSTR 2002/3, the points are stated to have a monetary value. However, under the Draft Ruling points issued are not transferable or redeemable for money. This appears to be one of the key differences between the class of arrangement considered in GSTR 2002/3 and that considered in the Draft Ruling.

Commentary should, however, be provided to clarify how the Draft Ruling interacts with the GSTR 2002/3, to the extent that the rulings discuss points awarded as part of a loyalty program and redeemed for monetary and non-monetary prizes.

In this regard, it should be considered whether additional commentary should be included into the Draft Ruling to deal with issues arising under GSTR 2002/3, or a clarifying statement made in the Draft Ruling that GSTR 2002/3 continues to apply in conjunction with the Draft Ruling.

4. Transitional relief

We consider that transitional relief should be granted to taxpayers with pre-existing commercial arrangements in place which have been entered into based on the views previously taken by the Commissioner which are different to the views expressed in the Draft Ruling. We note that this is consistent with the practice adopted in relation to GSTR 2011/1, GSTR 2011/2 and that adopted in the exposure draft legislation introduced on 23 September 2011 on the GST treatment of residential premises.

The absence of such transitional relief disadvantages taxpayers that have entered into commercial agreements based on the existing analysis of the GST treatment of such supplies.