



Australian Government
Australian Taxation Office

Executive Summary SFCT Evaluation Intel Bulletin Precious Metals

Evaluation of the Serious Financial Crime Taskforce Intelligence Bulletin
'Targeting fraud in the precious metals refining industry'

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Background

The Gold Bullion Risk refers to a series of arrangements originally identified by ITX audit activity in 2012. The risk centres on networks of industry participants, including refiners, bullion dealers, gold kiosks, dealers and buyers that are engaged in business activities which form part of a supply chain involved in gold recycling arrangements, seeking to exploit the GST rules in relation to precious metals. Participants alter pure gold bullion bars and coins (GST-free items) to gold *dore* (also known as scrap gold), which is taxed at 10%, in order to fraudulently claim GST credits whilst failing to remit GST to the ATO.

ITX considers the Gold Bullion Risk to be the largest current risk to the GST system.¹ At a Senate Estimates Committee hearing on 1 March 2017, Senator John Williams estimated lost revenue as a result of the fraud to be between \$650m - \$1b.

On 12 October 2016, the Serious Financial Crime Taskforce (SFCT) released its first Intelligence Bulletin; 'Targeting fraud in the precious metals refining industry'.²

The purpose of this brief is to evaluate the impact the Intelligence Bulletin has had on ITX claims.

Findings

At a Senate Estimates Committee hearing on 1 March 2017, Second Commissioner Neil Olesen testified that the ATO had introduced a voluntary reverse charge mechanism and had released an Intelligence Bulletin which appeared to be reverting refund arrangements in relation to the gold industry back to the levels seen in earlier periods. Senator John Williams cited statistics showing that from 2011 to 2016, scrap gold market turnover in Australia grew from \$150 million a year to \$1.8 billion a year. Deputy Commissioner Tim Dyce confirmed that since the ATO has been withholding GST refunds, there has been a significant drop.

A decrease in GST claims can be observed in recent months. Although total refunds did not reach the same levels as those seen in September 2013 (where refunds totalled \$15,044,322), in August 2016 refunds totalled \$13,377,928. There was a decrease in total refunds in September 2016, however, the greatest decrease occurred in October 2016, where refunds totalled \$309,858. Overt action, whether in the form of compliance activity, refund retention, or the release of intelligence products, has been shown to deter industry participants, as demonstrated following action in October 2013, June 2015 and September 2016, where GST refunds sharply decreased.

The success in decreasing GST claims cannot solely be attributed to any one factor. It is potentially too early to determine whether the Voluntary Reverse Charge Agreement or the recent Administrative Appeals Tribunal (AAT) case have had an effect on the behaviour of

¹ PGH Criminal Law Investigations Gold Bullion Briefing, Adrian Clutterbuck, 27 May 2016.

² <https://www.afp.gov.au/sites/default/files/PDF/IntelligenceBulletinGoldBullion.pdf>

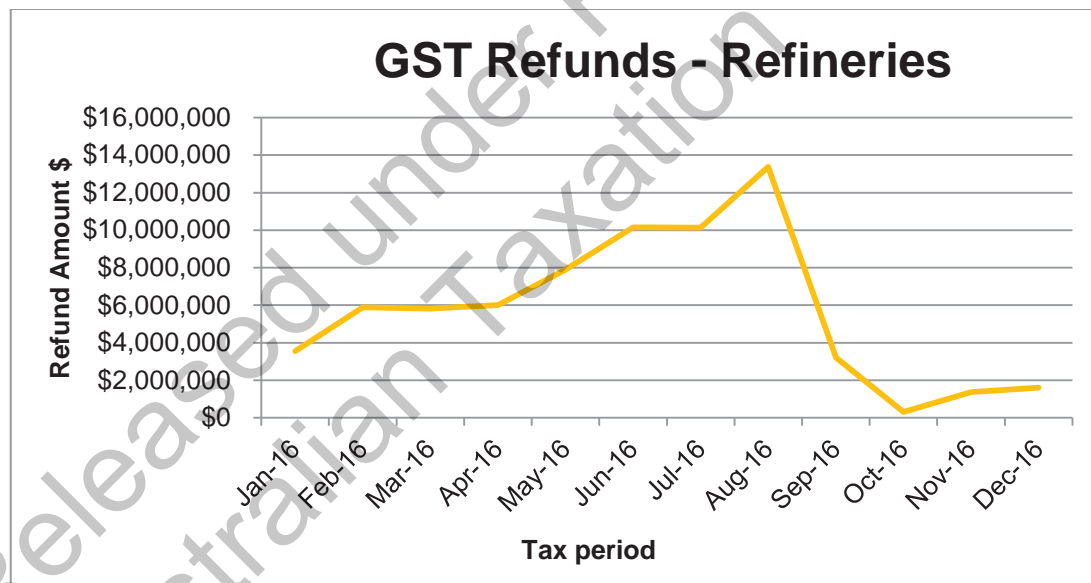
participants within the gold industry. However, a noticeable change in behaviour has been observed from September 2016, which could be attributed to either the SFCT's Intelligence Bulletin or the ATO's decision to undertake a refund retention strategy in relation to all entities claiming a GST refund.

Financial Impact

Refineries have been the largest contributors to lost revenue. ^{s37}

Based on the lodgment program, we would expect to see a decline in GST refunds for monthly lodgments beginning in September 2016 if the Intelligence Bulletin was effective in reducing GST claims. The following chart depicts the refunds claimed by refineries during the 2016 calendar year. Of significance is the decrease in refunds since September 2016, and in particular October 2016.

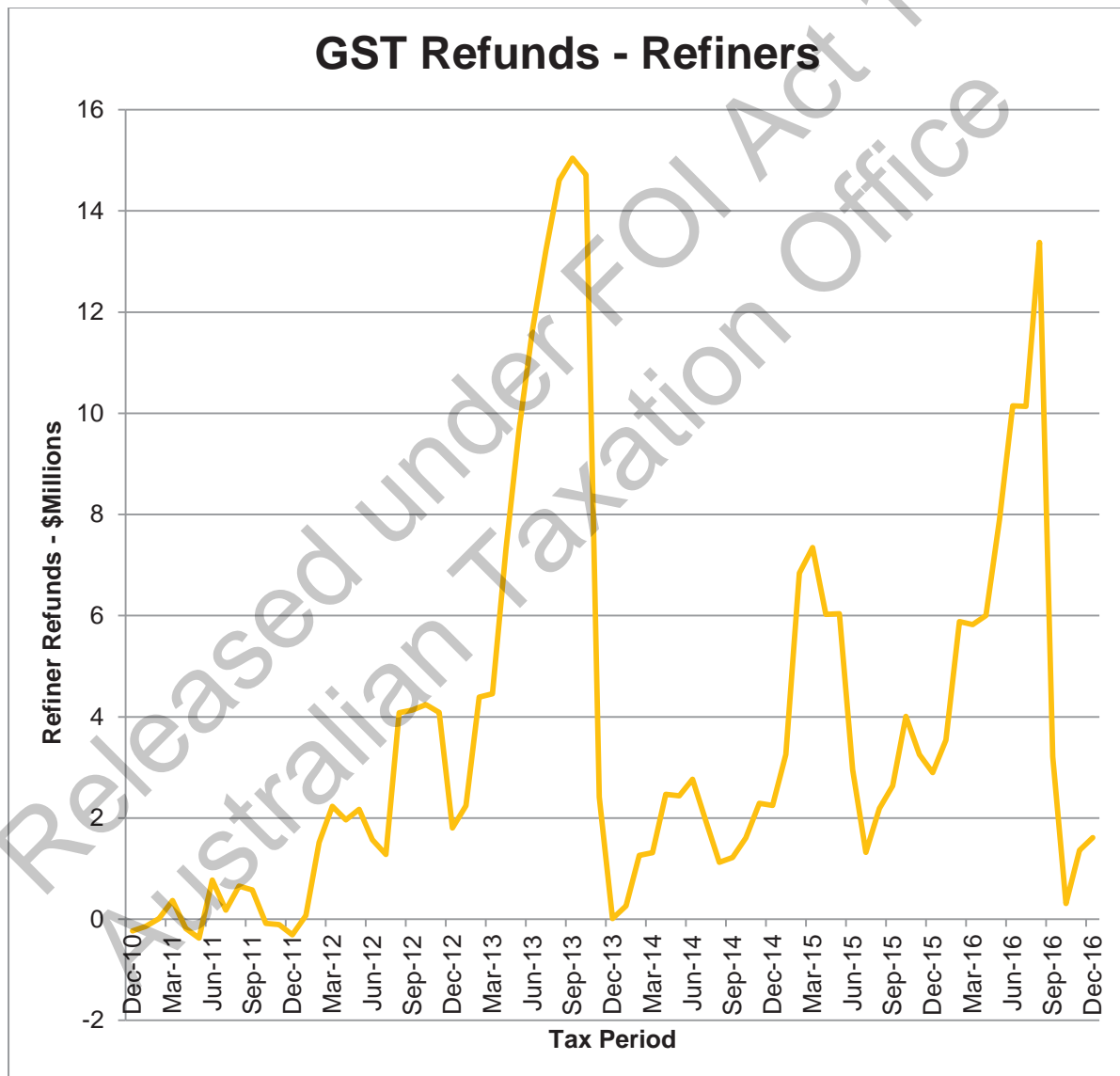
s38



The following chart depicts the total refunds of refineries over the past six years. There was a substantial increase in refunds during 2013, which appears to have been somewhat controlled during Operation Nosean. In October 2013, amended GST assessments and garnishee notices were issued to corporate entities linked to a syndicate involved in gold bullion trading activities. Numerous 3E search warrants were executed by the AFP on various premises in New South Wales and Victoria on the same day that the amended assessments were issued. The immediate effectiveness of these activities across industry participants was evident in the subsequent BAS lodgments. ^{s38}

In June 2015, another sharp decrease in GST refunds was observed. In 2014, engagement activities coordinated under the Precious Metals Project commenced. Initial application of the compliance engagement strategy indicated visible disruption which was evidenced through reported decreases in GST refunds. At December 2015, total liabilities raised following reviews and audits ^{s38} was in excess of \$104m.⁴

Another significant increase in refunds occurred during 2016, which sharply decreased in late 2016, possibly as a result of the SFCT's Intelligence Bulletin and/or ITX's refund retention strategy.



s37

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Discussion

There are potentially four key elements that may have contributed to a recent decrease in GST claims:

- Refund Retention Strategy (July 2016)
- The SFCT Intelligence Bulletin (12 October 2016)
- The Voluntary Reverse Charge Agreement (1 January 2017)
- The recent AAT case (10 February 2017).

Refund Retention Strategy

In July 2016, the ATO applied a refund retention strategy in relation to all entities in the gold industry, and each refund was investigated.

At a Senate Estimates Committee hearing on 1 March 2017, Second Commissioner Neil Olesen testified that the ATO was 'continuing to hold [refunds] that would otherwise have been due'.

Intelligence Bulletin

On 12 October 2016, the SFCT released its first Intelligence Bulletin; 'Targeting fraud in the precious metals refining industry'.

Communication Activities

The communication activities in relation to the Intelligence Bulletin aimed to support the SFCT objectives by:

- Informing the community and ATO staff that the SFCT is targeting fraud in the precious metals refining industry
- Deterring potential participants specifically from using schemes to exploit the GST rules using artificial arrangements
- Providing a call to action to support the community to report tax evasion and crime to the ATO and other SFCT agencies.

The channels used for the distribution to key audiences included:

- ATO website
- AFP website
- Media release
- External ATO newsletter
- Internal communications
- Public Relations (Third party newsletters and coverage)

Media release

A media release 'Gold bullion fraud targeted by Serious Financial Crime Taskforce' was issued and published on ato.gov.au on 12 October 2016⁵. The media release provided a link to the SFCT Intelligence Bulletin on the AFP website. The publishing of the media release was timely and closely coordinated with the publishing of the SFCT Intelligence Bulletin on the AFP website.

The AFP website page view for the period 17-19 November 2016⁶ was 124.

ATO website

The following summary provides the ATO website statistics for the media release for a 48 hour period after being published.

⁵ <https://www.ato.gov.au/media-centre/media-releases/gold-bullion-fraud-targeted-by-serious-financial-crime-taskforce/>

⁶ Unable to obtain page views for 12-14 October 2016

ATO website page	Release Date	Number of views ⁷	Number of visits ⁸
		12/10/2016 – 14/10/2016	12/10/2016 – 14/10/2016
Gold bullion fraud targeted by Serious Financial Crime Taskforce	12/10/2016	647	532

ATO newsletters

The summary below identifies the potential reach for the external ATO newsletters.

Publication	Date of issue	Potential reach per publication
Tax Professionals newsletter -Issue 41	19/10/2016	41,843

ATO internal newsletters

PGH, PG&I and ITX staff were informed about the SFCT Intelligence Bulletin on gold bullion fraud. A link directed staff to the Commissioner's statement.

The summary below identifies the potential reach for internal ATO newsletters.

Publication	Date of issue	Number of BSL staff
PGH Connect	19/10/2016	1,916
PG&I Update	19/10/2016	1,244

Media coverage

The media release generated some media pick-up, including:

- Brisbane's Courier Mail: ATO to stamp out golden GST loophole⁹ (12 October 2016), and
- The Australian: Gold scam a \$610m hit to taxpayers as ATO tries to stop GST fraud¹⁰ (26 December 2016).

⁷ A **view** is recorded each time a page is loaded. If someone clicks the same page 10 times while using the website, this is counted as 10 views. Views should only be used as a measure of the volume of traffic, but not necessarily as an indication of how many 'people looked at the page.

⁸ A **visit** is recorded once per person (per page) each time they look at a website. If someone looks at the same page 10 times, this is only one visit. Visits should be used as an indication of how many 'people' have looked at the page, noting that if someone leaves the website and comes back, a new visit will be recorded.

⁹ <http://www.couriermail.com.au/business/ato-to-stamp-out-golden-gst-loophole/news-story/8007a4e2c8d12a113b9d548622cfbd64>

¹⁰ <http://www.theaustralian.com.au/national-affairs/treasury/gold-scam-a-610m-hit-to-taxpayers-as-ato-tries-to-stop-gst-fraud/news-story/fd5cfef76eac2c4b7fa384e0f25cf35e>

Third party coverage

The ATO's media release and newsletter (Tax Professionals newsletter) generated significant 'niche' third party coverage as follows:

- The Tax Institute – TaxVine Membership Newsletter 39, issued on 14 October 2016
- Gold bullion fraud targeted by Serious Financial Crime Taskforce¹¹
- Serious Financial Crime Taskforce targets GST 'exploitation'¹²
- Gold Bullion fraud targeted by Serious Financial Crime Taskforce¹³
- Australia Tackling Precious Metals GST Fraud¹⁴
- Australia Tackling Precious Metals GST Fraud¹⁵
- The Great Australian Gold Scam¹⁶
- Canberra IQ from Thursday, 13 Oct 2016¹⁷
- Banking and Finance News from Banking Day¹⁸

Voluntary Reverse Charge Agreement

On 28 December 2016, The Australian reported that 'refiners across the country had received a letter from Deputy Commissioner Tim Dyce offering a new 'reverse charge' option that allows buyers of gold to remit GST to the government on behalf of the sellers, in an attempt to stamp out the practice.'¹⁹ This article follows on from another story published in The Australian on 26 December 2016 outlining how the scam operates and makes mention of the Intelligence Bulletin.²⁰

The ATO website²¹ describes the benefits of a voluntary reverse charge agreement as:

- Addressing industry concerns about delays in refunds
- Making it easier for sellers and buyers to meet their GST obligations as the seller does not physically collect GST on the sale and the buyer has no refund to claim
- Decreasing the compliance risk rating for the seller and buyer, meaning the ATO will make few enquiries about sales, purchases and claims
- Promoting a level playing field, so members of the precious metals industry meet their GST obligations fairly.

At a Senate Estimates Committee hearing on 1 March 2017, Commissioner Chris Jordan and Deputy Commissioner Tim Dyce told Senator John Williams that the ATO is looking at a

¹¹ <http://www.carrazzo.com.au/our-services/business-start-ups/6222-gold-bullion-fraud-targeted-by-serious-financial-crime-taskforce>

¹² <http://www.accountantsdaily.com.au/tax-compliance/9601-serious-financial-crimes-taskforce-targets-gst-exploitation>

¹³ https://article.wn.com/view/2016/10/12/Gold_Bullion_fraud_targeted_by_Serious_Financial_Crime_Taskf/

¹⁴ http://www.tax-news.com/news/Australia_Tackling_Precious_Metals_GST_Fraud___72489.html

¹⁵ http://www.lowtax.net/news/australia-tackling-precious-metals-gst-fraud_72489.html

¹⁶ <https://hotcopper.com.au/threads/the-great-australian-gold-scam.3137603/>

¹⁷ <http://www.canberra.iq.com.au/search/search.cfm?q=gold+bullion>

¹⁸ https://www.bankingday.com/search.php?pagesize=20&sub_search=9&stream=1&articles=All&keyword=gold+bullion

¹⁹ Fool's gold payoff in bullion-dollar scam, S. Martin, The Australian, 28 December 2016.

²⁰ Gold scam a \$610m hit to taxpayers as ATO tries to stop GST fraud, S. Martin, The Australian, 26 December 2016.

²¹ <https://www.ato.gov.au/Business/GST/In-detail/Rules-for-specific-transactions/Option-to-reverse-charge-in-the-precious-metal-industry/>

compulsory reverse charge; similar to what has already been implemented at the administrative level, and something that has worked in other jurisdictions. The risks are being much better managed by industry as a result of this.^{s38}

Administrative Appeals Tribunal

A recent Administrative Appeals Tribunal case²² exposed the gold bullion scheme. The finding confirmed the Commissioner's view regarding the appropriateness of the arrangements.

The issue in this case was whether the taxpayer had made creditable acquisitions of gold *dore*. The Commissioner contended that the taxpayer had purchased gold bullion, smelted it into *dore*, and falsely claimed a GST credit for the purported acquisition of gold *dore*. The taxpayer was not able to discharge the onus of proof to show that it bought the gold in *dore* form (taxable).

Conclusion

At a Senate Estimates Committee hearing on 1 March 2017, Second Commissioner Neil Olesen testified that the ATO had introduced a voluntary reverse charge mechanism and had released an Intelligence Bulletin, which appear to be reverting refund arrangements in relation to the gold industry back to the levels seen in earlier periods. GST claims have decreased in recent months, however, the success in decreasing GST claims cannot solely be attributed to any one factor.

A noticeable change in behaviour has been observed from September 2016, which could be attributed to either the SFCT's Intelligence Bulletin or the ATO's decision to retain refunds relating to all entities claiming a GST refund.

²² Eastwin Trade Pty Ltd and Commissioner of Taxation (Taxation) [2017] AATA 140 (10 February 2017)

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Precious Metals Industry

IMPROVING INDUSTRY COMPLIANCE

GST OPTIONS PAPER

April 2016

SENSITIVE (INTERNAL USE ONLY)

GST Evasion Risk & Strategy
Jasmine Edwards x33780
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1 INTRODUCTION

- 1.1 The global precious metal industry has generally relied on accreditation of refiners as the first point of supply into the market of purified and standardised precious metal. The most widely relied upon accreditation is administered by the London Bullion Market Association (“LBMA”) which represents the de facto standard for the quality of gold and silver¹. The ‘*Industry Catalogue of Gold Bars Worldwide* (ICGB)²’, sponsored by the World Gold Council³ and international gold refiners, details the world’s most traded gold bars and bullion coins. The Platinum and Palladium Market (LPPM)⁴ administers the standards for platinum and palladium, of which Australia has no listed refiners.
- 1.2 Precious metal produced by LBMA members is internationally traded and recognised in the market as meeting particular standards, including fineness and accuracy of stated weights and trading practice standards. Accepted refiners of gold and silver bars are listed on the “LBMA Good Delivery List” which has been developed in order to facilitate the international distribution and acceptability on technical grounds of standard bars produced by those refiners and their hallmarks. The regulatory and monitoring functions (including assurance activities) applied to LBMA members provides investors with confidence in the provenance (source) of precious metals on the international and domestic market.
- 1.3 The most common benchmark for the price of gold (and other precious metal) is the **gold spot price** determined by representatives from five bullion-trading firms of the London Bullion Market. Gold is traded continuously throughout the world based on the intra-day spot price⁵. In order to be tradeable on the international bullion market, precious metal must be in a specified investment form such as bullion (wafers, bars or ingots) or coins, and have the character of the metal only, and trade by reference to the spot price.
- 1.4 Issues within the precious metals industry were exposed following intelligence and other activities conducted by the Australian Federal Police (AFP), Australian Crime Commission and ongoing ATO compliance activity. There has been significant community and media interest⁶, particularly following the execution of Search Warrants by the AFP in October 2013 on key industry players and other participants, certain matters are currently subject to litigation in the Federal Court and Administrative Appeals Tribunal.
- 1.5 Some industry participants have expressed concerns regarding a lack of level playing field and an inability to combat trading practices and collusion, which is facilitating non-compliance. Concerns in respect of industry practices include the opportunity for fraud, given the ease in which the form and fineness of precious metal can be altered. These practices seek to disguise transactions that meet the definition of ‘precious metal’ in order to manipulate the GST system and have consequently produced a thriving artificial scrap gold market. Additional evidence suggests that the industry is vulnerable to individuals with organised crime links⁷.
- 1.6 This paper will consider regulatory frameworks, industry pricing, trading practices and the current GST legislative framework in Australia and will further provide an evaluation of other jurisdictional frameworks and issues. This paper will also pose a number of questions and propose draft options for further consideration.

¹ <http://www.lbma.org.uk/about-us>

² <http://www.goldbarsworldwide.com/index.html>

³ <http://www.gold.org/>

⁴ <http://www.lppm.com/>

⁵ Prevailing international market price for the metal at the time a trade is made; spot prices are volatile.

⁶ <http://www.smh.com.au/national/rivers-of-gold-raids-take-shine-off-alleged-scam-that-has-cost-taxpayers-an-estimated-200m-20140712-3btv8.html>

⁷ http://www.austrac.gov.au/sites/default/files/documents/typ13_full.pdf ; <http://www.fatf-gafi.org/documents/documents/ml-tf-risks-and-vulnerabilities-gold.html>

2 INDUSTRY LANDSCAPE

- 2.1 The precious metals industry in Australia has increased in size, it is speculated that this is due to gold spot price inflations following the global financial crisis. As a result, new industry entrants have entered the market, which include unaccredited refiners, dealers, cash gold buyers (including kiosks), amalgamators and individuals (investors and persons engaged in acquiring precious metal for immediate on-sale). The industry population is currently estimated to include 350-500 participants.
- 2.2 In Australia, both accredited and unaccredited refiners are trading in gold and silver in the precious metals industry. Gold Corporation (also known as the “Perth Mint”) has historically been Australia’s only LBMA accredited refiner⁸ which is 100% owned by the State Government created under its own act of Parliament (Gold Corporation Act 1987⁹). In December 2015, ABC Refinery (division of Pallion Group Pty Ltd¹⁰), was appointed to the LBMA Gold Delivery list¹¹. There are 5 other independent refiners operating in Australia, which are not LBMA accredited.
- 2.3 Refiners activities include the acquisition and processing of doré product (*ie pre-processed material containing gold, silver and platinum*) from miners, high value secondary sourced product (*ie scrap and jewellery*) or industrial by-products (*ie dental, photo finishing, jewellers lemel and other industrial scrap*). Various processes are implemented depending on the composition of received material for the extraction of impurities and purification. Refiners offer various analytical and manufacturing services including the production of granules, or investment form products (*ie bar, ingot, plate, wafer or coins*) which are hallmarked to guarantee purity or fineness. Finished products are sold for trading and for manufacture (*ie granules to jewellers*). Refiners may enter agreements with suppliers to purchase the precious metal content (referred to as ‘outturn’) and apply to metal accounts in the clients name, or in the case of an LBMA accredited refiner, provide for transfer to another LBMA accredited member (referred to as ‘loco swap’).
- 2.4 Traders include banks, bullion dealers, commodity brokers and stockbrokers that generally deal in gold, silver or platinum in the market. Bullion dealers are typically companies that retail bullion domestically and internationally. The main retailer in Australia, is Gold Corporation, who facilitates retail investment in precious metal by supplying coins, ingots, bars and other products for sale through the Perth Mint. Gold Corporation also produces commemorative and numismatic coins and coin blanks (or rounds) to international mints. Other bullion dealers also exist there are no regulatory requirements required, it is evident that the principal market is domestic, supply to international markets or customers represents a small percentage of turnover.
- 2.5 Other intermediaries include scrap dealers, amalgamators, gold buyers, kiosks and enterprises including jewellers and individuals that engage in buy backs ranging from unwanted jewellery to products in bar, ingot, plate, wafer or coin form. Scrap dealers and amalgamators have limited dealings with the general public and generally source product from wholesalers or other GST registered industry participants. Buyers operate independently or as part of a scrap dealer or amalgamator business and source product such as unwanted jewellery (precious metal content) from the general public. Buyers can include gold kiosks, pawn shops, jewellers and other businesses with a dealer’s licence as prescribed by state based legislation governing pawnbrokers and second hand dealers¹². Individuals may operate independently or in conjunction with other industry participants.

⁸ See Perth Mint’s information on ‘Accreditation’ at <http://www.perthmint.com.au/education-accreditation.aspx>.

⁹ http://www5.austlii.edu.au/au/legis/wa/consol_act/gca1987188

¹⁰ https://en.wikipedia.org/wiki/Pallion_Group

¹¹ <https://www.abcrefinery.com/resources/media-articles/abc-refinery-appointed-to-lbma-good-delivery-list-for-gold>

¹² **NSW:** Pawn Brokers and Second-hand Dealers Act 1996; **VIC:** Second-Hand Dealers and Pawnbrokers Act 1989; **QLD** Second-hand Dealers and Pawnbrokers Act 2003; **WA:** Pawnbrokers and Second-hand Dealers Act 1994; **SA:** Second-hand Dealers and Pawnbrokers Act 1996; **TAS** Second-Hand Dealers and Pawnbrokers Act 1994; **ACT:** Pawnbrokers Act 1902 and the Second-hand Dealers Act 1906; **NT:** Consumer Affairs and Fair Trading Act

3 LEGISLATION AND RULINGS

3.1 The relevant legislation, rulings and references include the following:

(a) GST (A New Tax System (Goods and Services Tax) Act 1999)

Section 38-385 - GST Free supplies of 'precious metal'

A supply of * precious metal is GST-free if:

- (a) it is the first supply of that precious metal after its refining by, or on behalf of, the supplier; and
- (b) the entity that refined the precious metal is a * refiner of precious metal; and
- (c) the * recipient of the supply is a * dealer in precious metal.

Note: Any other supply of precious metal is input taxed under section 40-100.

Section 40-100 - Input Taxed supplies of 'precious metal'

A supply of * precious metal is input taxed.

Note: If the supply is the first supply of precious metal after refinement, the supply is GST-free under section 38-385.

Division 66 – Second-hand goods

- (1) If you acquire * second-hand goods for the purposes of sale or exchange (but not for manufacture) in the ordinary course of * business, the fact that the supply of the goods to you is not a * taxable supply does not stop the acquisition being a * creditable acquisition.
- (2) However, this section does not apply, and is taken never to have applied, to the acquisition if:
 - (a) the supply of the goods to you was a * taxable supply, or was * GST-free; or
 - (b) you * imported the goods; or
 - (c) the supply of the goods to you was a supply by way of hire; or
 - (d) Subdivision 66-B applies to the acquisition; or
 - (e) you make a supply of the goods that is not a taxable supply.
- (3) This section has effect despite section 11-5 (which is about what is a creditable acquisition).

Section 195-1 - definitions of terms referred to in the legislation

"precious metal" means:

- (a) gold (in an investment form) of at least 99.5% fineness; or
- (b) silver (in an investment form) of at least 99.9% fineness; or
- (c) platinum (in an investment form) of at least 99% fineness; or
- (d) any other substance (in an investment form) specified in the regulations of a particular fineness specified in the regulations."

"refiner of precious metal" means:

an entity that satisfies the Commissioner that it regularly converts or refines *precious metal in *carrying on its *enterprise.

"dealer in precious metal" means:

an entity that satisfies the Commissioner that a principal part of *carrying on its *enterprise is the regular supply and acquisition of *precious metal.

"second-hand goods" does not include:

- (a) * precious metal; or
- (b) goods to the extent that they consist of gold, silver, platinum, or any other substance which, if it were of the required fineness, would be precious metal;

(b) Rulings and References

GST Ruling 2003/10 Goods and Services Tax: What is 'precious metal' for the purposes of GST?¹³

"Summary of what is in an investment form"

Para 29 To summarise the above, for gold, silver or platinum to be in an investment form for the purposes of the GST Act, it must be in a form that:

- is capable of being traded on the international bullion market, that is, it must be a bar, wafer or coin;
- bears a mark or characteristic accepted as identifying and guaranteeing its fineness and quality; and
- is usually traded at a price that is determined by reference to the spot price of the metal it contains.

Explanatory Memorandum to A New Tax System (Goods and Services Tax) Act¹⁴

"Precious metals"

1.11 Following extensive consultation with industry it has been determined that the precious metal provisions do not reflect the way precious metals are mined and supplied in Australia. This Bill amends the precious metal provisions to reflect the following:

- Where a precious metal producer retains title of the precious metal (the refiner is effectively an agent), the refiner does not make the first supply of the precious metal, and the transaction is not GST-free under the current provisions. Item 16 amends section 38-385 of the GST Act to allow the first supply of precious metal to be provided by an entity on whose behalf the refining has been done;
- The current provisions limit a GST-free supply to where a dealer acquires the precious metal for investment purposes. The restriction to investment purposes is unnecessarily restrictive and will be deleted [*item 54*];
- In order to ensure that the correct supply of precious metal is GST-free or input taxed, the definition of precious metal has been amended to refer to sales of precious metals in an investment form. Investment form means precious metal sold in a coin, wafer, bar or other tradeable form which has an internationally accepted hallmark. In the case of gold, this means a hallmark that has been approved by the London Bullion Market and means that the gold can be traded on the international bullion market. [*Items 65 and 66*]

1.12 The amendments will ensure that the precious metal provisions contained in the GST Act better reflect the way the precious metals industry currently operates. "

Chapter 8: Precious metal refining (Mining and Energy Industry Partnership – issues register)¹⁵

On 31 January, 2003, special principles were implemented which deal with mined supplies of doré (*i.e. gold, silver or platinum in crude form extracted by mining*). The principles outline that GST is not required to be charged (no taxable supply) where doré is supplied from a miner to a refiner

Classes of Recipient Created Tax Invoice Determination (No. 17) 2000

RCTI's can be issued for a taxable supply of precious metal by a recycler that is the recipient of a taxable supply, providing the requirements are satisfied¹⁶.

(c) Attachment A: Legislative Framework

A diagram of the current legislative framework is provided (excluding the principles of Chapter 8).

¹³ <https://www.ato.gov.au/law/view/document?DocID=GST/GSTR200310/NAT/ATO/00001>

¹⁴ Explanatory Memorandum to the Bill for the *A New Tax System (Indirect Tax and Consequential Amendments) Act (No. 2) 1999*, which added the words 'in an investment form' to the definition of precious metal – *Paragraph 1.11*
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr950_ems_27489b8f-867c-4b6d-9bfd-66756d0cee61%22.

¹⁵ <https://www.ato.gov.au/business/gst/in-detail/gst-issues-registers/mining-and-energy-industry-partnership---issues-register/>

¹⁶

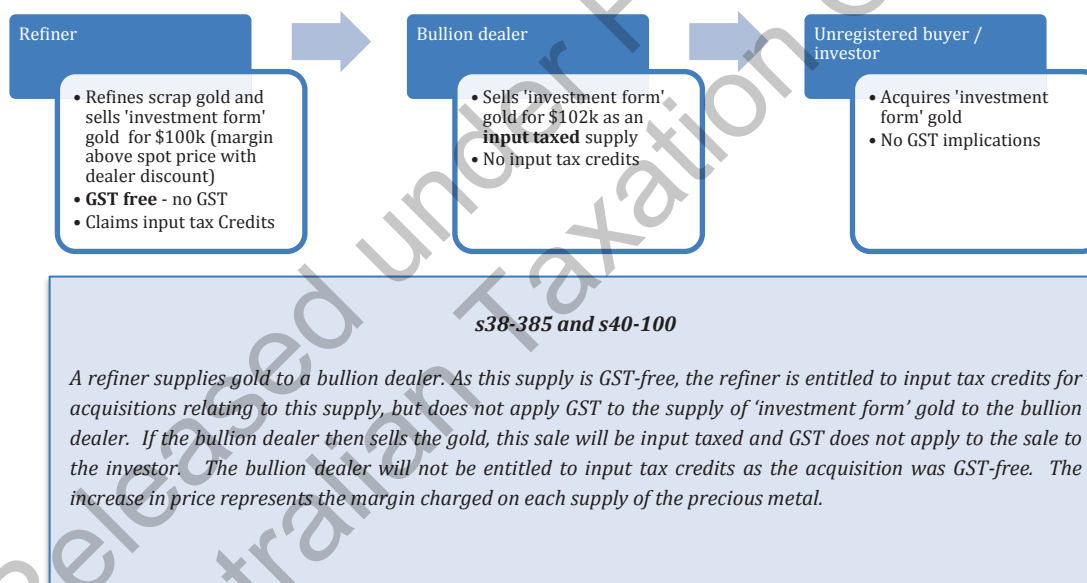
<http://law.ato.gov.au/atolaw/view.htm?rank=find&criteria=AND~AD~basic~exact&target=F%20FI&style=html&sdoid=GLD/RCTI200017/00001&recStart=1&PiT=99991231235958&recnum=18&tot=25&pn=ALL::FI>

4 RATIONALE FOR CURRENT GST TREATMENT

GST-free and input taxed

- 4.1 The supply of 'precious metal' – defined as gold, silver or platinum of a certain fineness in an 'investment form' – is GST-free under section 38-385 if it is the first supply after refining and the recipient is a dealer of precious metals (GST is not payable on the supply and input tax credits can be claimed on acquisitions relating to the supply). Any other supplies of precious metal where section 38-385 does not apply are input taxed under section 40-100 (GST is not payable on the supply and no input tax credits can be claimed on acquisitions relating to the supply)¹⁷.
- 4.2 'Investment form' is not defined in the GST Act. The Explanatory Memorandum (EM) to the bill that added the words 'in an investment form' states: '*investment form means precious metal sold in a wafer, bar or other tradeable form which has an internationally accepted hallmark. In the case of gold, this means a hallmark that has been approved by the London Bullion Market and means that the gold can be traded on the international bullion market*'.¹⁸
- 4.3 The policy rationale for the different treatment between the initial and subsequent supplies is to reflect that precious metal prices are internationally fixed (spot price) which means dealers cannot pass on the GST on sales of precious metal. Making the first supply after refining GST-free ensures there is no GST embedded in the price of that supply. Subsequent supplies of precious metals are input taxed and the fixed price of precious metal continues to be unaffected because there is no GST on the supply.

Example 1



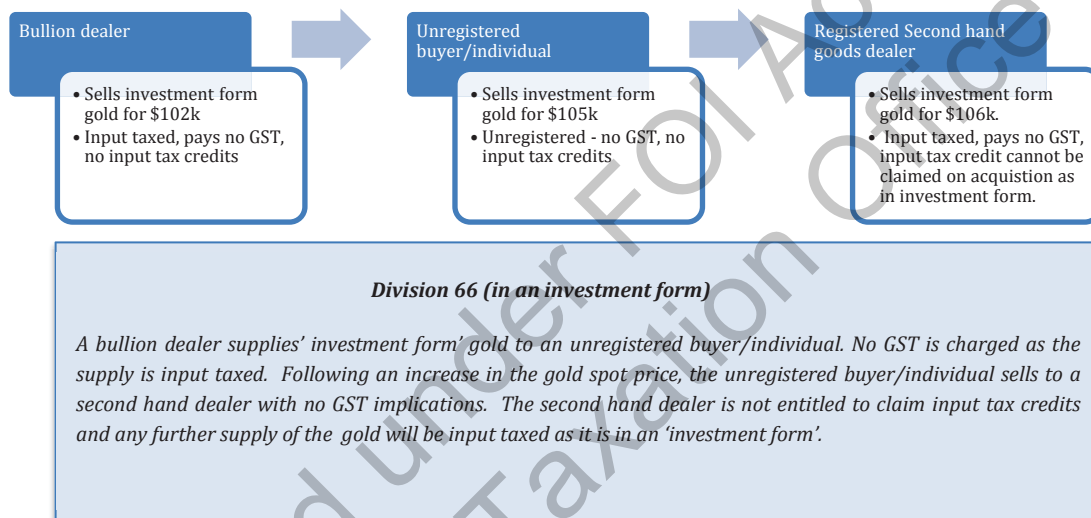
¹⁷ Rationale for input taxed treatment is that precious metal is a form of investment similar to shares and as a commodity is a form of 'financial supply'

¹⁸ Explanatory Memorandum to the Bill for the *A New Tax System (Indirect Tax and Consequential Amendments) Act (No. 2) 1999*, which added the words 'in an investment form' to the definition of precious metal – *Paragraph 1.11*

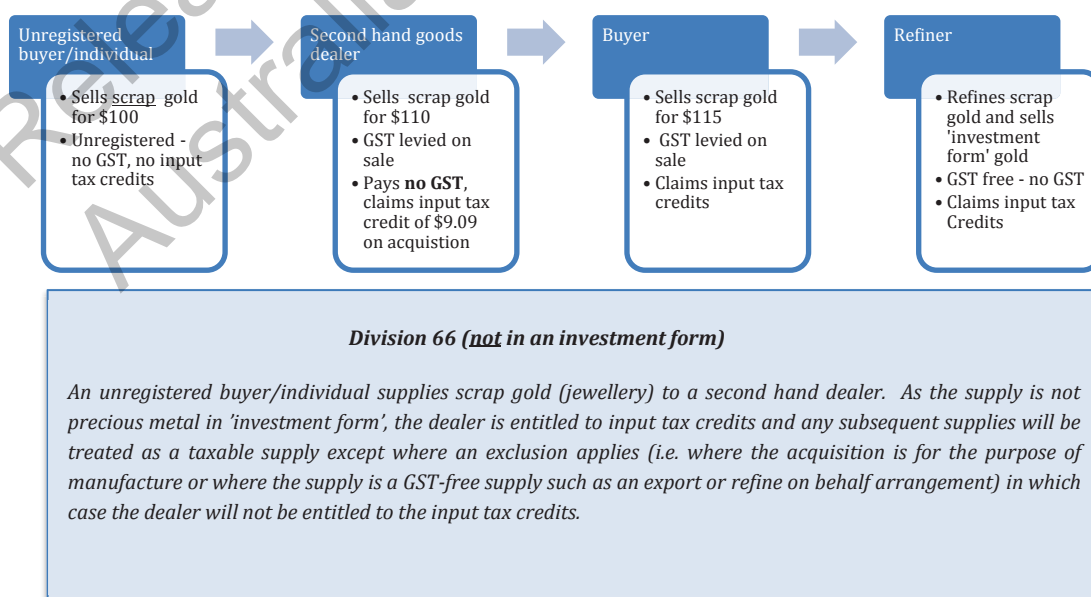
Second-hand goods

- 4.4 Division 66 of the GST Act allows input tax credits on the acquisition of second-hand goods from non-GST registered entities or individuals purchased for resale. The rationale for this is to avoid GST being charged on GST (double-taxing) by allowing a credit for any embedded GST on second-hand goods GST-registered entities acquire from unregistered entities.
- 4.5 For the purposes of Division 66, the 'second-hand goods' definition (which excludes precious metal or goods to the extent that they would be precious metal if it had been of the required fineness) leads to the conclusion that regardless of the fineness, precious metal is required to be in an 'investment form' to be excluded as second-hand goods. The rationale for this exclusion is that the first supply of precious metal after refining is GST-free, and subsequent supplies are input taxed, therefore there is no embedded GST in the precious metal price, and consequently these supplies do not attract the input tax credits available for second-hand goods acquired from unregistered businesses or individuals.

Example 2



Example 3



5 COMPLIANCE SCHEMES AND ISSUES

Compliance activities

- 5.1 The high value of precious metal as a commodity and the structure of the GST law creates significant exploitation opportunities where the law is applied contrary to its purpose. The principal scheme enabler is the ease in which the 'form' of precious metal can be altered. No sophisticated process is required to change, alter or deface investment form precious metal and can include melting (with or without the addition of alloys), granulating, removal of hallmarks, cutting or chopping in order for 'investment form' characteristics to be absent.
- 5.2 'Asset Flipping' activities involve ongoing repetitious circular arrangements between refiners, dealers and suppliers, where the nature of precious metal is 'flipped' from an input taxed supply (*precious metal 'in an investment form'*) to taxable (*scrap gold*) for subsequent refining. A substantial volume of product is sourced from and destined to the supplying original entity (or an associate) with input tax credits claimed during the 'flip' with benefits flowing to the controlling mind of the original entity.
- 5.3 Networks of clandestine suppliers are recruited to acquire 'investment form' precious metal, alter and on sell 'within supply chains, over short time periods, in a façade of bonafide commercial transactions. These suppliers do not have the access to legitimate scrap material, the ability to fund the transactions or requisite skills to commence trading, and are interposed to conceal the true origin or source of precious metal; these activities are attractive to individuals with criminal links. The substance and purpose behind the transactions allows each supplier to partake in the distribution of GST refunds, with minimal or no profit being generated from gold spot price fluctuations. It has been demonstrated that market price movements have no impact on the profit realised by participants in these schemes as price lock-ins are fixed for acquisition and sale within a short time frame (ordinarily less than one hour).
- 5.4 GST refunds provide additional cash flows which are distributed across clandestine supply chains (simple or sophisticated), to fund acquisitions of gold at substantial discounts with "carousel schemes" and "missing trader" fraud evident in some instances. An analysis of unaccredited refiners demonstrates that aggregate gross profit margins are equivalent to net GST refunds claimed disguised as inflated profits by virtue of discounted and/or inflated spot prices, given dealer margins may be as low as 0.7% above spot price, there are significant opportunities for non-compliance (see **Attachment B: Typical Gold Scheme**).
- 5.5 Second hand dealers, gold kiosks, gold buyers and refiners, who acquire 'scrap gold' from un-registered individuals, often falsely describe the true nature of the transaction. In some instances 'investment form' precious metal is subject to a destructive test (cutting, drilling etc.) for the purpose of internal composition analysis. To the extent that precious metal is purchased after testing, it has been contended by some industry participants, that at the time precious metal is acquired, 'title' (or ownership) has not passed and therefore not in an 'investment form'. Div 66 credits are consequently claimed for acquisitions purported to be second-hand, such as gold bars that have hallmarks removed, but which would otherwise be 'investment form' precious metal. There is further evidence that entities are interposed for material that is ultimately supplied to a refiner in order to retain Div 66 credit entitlement that otherwise would not be allowed.
- 5.6 Pricing distortion is evident within the industry with refiners offering up to 108% (GST inclusive) of the prevailing spot price for scrap gold and second hand/gold buyers offering up to 105%, further facilitating an un-level playing field and driving the prevalence of clandestine supplier networks and unintended artificial markets. The higher value paid and 'profit' is eventually derived through GST-refunds. Second hand dealers provide significant incentives to opportunistic individuals who operate in isolation and are prepared to disregard their tax obligations in order to significantly profit from the conversion of precious metal.

- 5.7 Export schemes have been identified where precious metal is acquired by an entity (other than a refiner) for purported export, in some instances, the export does not occur. Locally sourced or imported precious metal is diverted through local supply chains and ultimately sold as a taxable supply, with each supplier partaking in the distribution of GST refunds. In other instances, the form of precious metal is altered (addition of inferior alloys) by supply chain participants and acquired by an entity for supply to an offshore refinery. The exporting entity claims input tax credits with GST refunds being distributed (funding the profits of supply chain participants) providing the opportunity for transactions to be undertaken above the prevailing spot price where precious metal is acquired
- 5.8 Other broad reaching issues are evident which extend beyond tax compliance issues, facilitated by significant artificial volume turnovers concealed in complex arrangements. This activity provides the façade of large-scale commercial activity, which acts as an enabler to entering the market legitimately, for example, in satisfying security and cash flow requirements and the purported ability to meet LBMA and other accreditation requirements.

Compliance – an ineffective solution

- 5.9 Compliance activities have attempted to address the issue, but are rarely effective. It is evident that our difficulties often encourage continuance of the identified arrangements, with trading volume escalations and increased non-compliant behaviour for the following reasons:
- an extensive degree of fraud and evasion is evident within clandestine supplier networks with high levels of collusion in the concealment of altering of ‘investment form’ precious metal, audit activities require the use of formal information gathering powers to effectively identify the source of transactions in order to effectively address non-compliance;
 - isolated audits undertaken in silo approaches, fail to identify the issues due to the complexity and sophistication of established networks resulting in release of refunds;
 - industry participants who are registered are entitled to self-generate Recipient created tax invoices¹⁹ increasing the risk of deliberate misclassification;
 - compliance activities require a high degree of industry knowledge (*e.g. refining processes and pricing*) in order to determine transaction legitimacy, which includes intensive analysis (*e.g. identification of artificial assay results and transaction splitting*);
 - the lack of industry accreditation and other regulatory requirements for dealers and refiners, does not enable the ATO to verify ‘investment form’ requirements (*i.e. purity/fineness*) in assessing input tax credit entitlement;
 - No authority, rules or determinations exist to establish “market acceptance” of ‘investment form’ precious metal;
 - missing trader and phoenix activities are prevalent resulting in limited opportunity to verify the bona fides of transactions with limited success in debt recovery;
 - significant third party enquires are required to establish supplier networks to identify at which point in the supply chain precious metal has been altered;
 - compliance activities to date have encouraged the diversifying of the risk with more frequent trading (lower volumes per trade), structuring of payments and the implementation of more complex supplier networks;
 - responses by refiners include challenges regarding the meaning of refining and legal representations that the identified issues are evasion (fraud) perpetrated by clandestine suppliers, despite their apparent advance funding arrangements;
 - the application of the General Anti Avoidance provisions has not been tested by the Courts, and is being considered in current major compliance matters;
 - recovery opportunities are often limited or unsuccessful, as entities/individuals do not have financial resources, in some instances, undischarged bankrupts or individuals have permanently left the jurisdiction.

¹⁹ A New Tax System (Goods and Services Tax) Act 1999 Classes of Recipient Created Tax Invoice Determination (No 17) 2000 (RCTI 2000/17; recycling precious metals

6 PROBLEMS IDENTIFIED

6.1 Definition of precious metal (s195-1)

The definition of 'precious metal' was amended²⁰ in the GST Act by substituting 'in an investment form' for the term 'in any form' effective from 1 July 2000. In the Explanatory Memorandum (EM), prior to the amendment, the paragraphs that discuss the definition of precious metal did not specify any restrictions or requirements as to "form" but rather relied on "fineness" in isolation. The effect of the consequential amendment is that in order to be precious metal, both fineness and form needs to be satisfied.

On face value, the rationale for amending the definition was to provide a distinguishing feature for precious metal which is tradeable or used for an 'investment purpose' by virtue of the 'form'. This approach is consistent with international practice and other legislative frameworks, which recognises tradeable precious metal as a financial commodity or instrument in a required form. The interaction of the insertion of 'in an investment form' to the precious metal definition and the operation of the legislation, does not prevent the schemes in its current construction.

Section 38-385 - GST Free supplies of 'precious metal'

The supply of 'precious metal' – defined as gold, silver or platinum of a certain fineness in an '**investment form**' – is GST-free under section 38-385 if it is the first supply after refining and the recipient is a dealer of precious metals. The Explanatory Memorandum (EM), states that *"The current provisions limit a GST-free supply to where a dealer acquires the precious metal for investment purposes. The restriction to investment purposes is unnecessarily restrictive and will be deleted"*. One interpretation of this paragraph may be that the term 'in an investment form' was specifically applied to the definition in order to not limit the requirement to the first supply after refining. An alternative interpretation may be that the construction was 'restrictive' in that it does not allow dealers to sell precious metal to persons other than investors.

Section 40-100 - Input Taxed supplies of 'precious metal'

Any other supply of 'investment form' precious metal will be input taxed in accordance with s40-100 (ensures that precious metal can be sold at 'spot price' and there is no embedded GST which would inflate the cost above the spot price). The insertion of the term 'in an investment form' to the definition altered the initial construction significantly. Prior to the amendment, precious metal would be input taxed if of the required fineness. This construction would mean that any precious metal, once refined to the required fineness, is unable to re-enter the GST system as a taxable supply, even if it is altered and refined again, it would continue to be input taxed.

Division 66 – Second-hand goods

Clear reading of the exclusions in Div 66 indicates that parts (a) and (b) seeks to exclude precious metal. Paragraph (a) refers to precious metal "in whole" and paragraph (b) refers to goods that contain precious metal "in part". The use of the phrase "to the extent that" in paragraph (b) further emphasises the intent of ("the GST Act") to apply to goods "in part" or on an apportionment basis. Prior to the amendment, the operation of Div 66 prescribed that input tax credits are not allowed for precious metal in any form, excluded by virtue of paragraph (a) or (b) if of the required fineness. With this construction, it is apparent that the policy was to exclude from second-hand goods, not only precious metals, but also goods that comprised of precious metals, to the extent of the precious metals content. The subsequent amendment to the definition of precious metal means that Paragraph (b) ceases to operate as there is no circumstance where the exclusion can be applied, as precious metal "in an investment form" will never apply "in part".

²⁰ No 177 of 1999 s3 and Sch 1 items 145 and 146

6.2 ATO view – ‘in an investment form’

The ATO view of ‘in an investment form’ is defined in **GSTR 2003/10** - ‘precious metal’ must be capable of being traded on the international bullion market (that is, it must be a bar, wafer or coin), bear an accepted mark or characteristic that guarantees its fineness and quality and is usually traded at a price that is determined by reference to the spot price²¹. The ruling does not refer to hallmarks that have been approved by the London Bullion Market (“LBMA”) as detailed in the Explanatory Memorandum²² and does not provide a list of accepted hallmarks for non-accredited refiners.

The ruling further specifies that *some small refiners in Australia make bars that are only traded in Australia. As noted at paragraph 22²³, bars are an internationally traded form of metal. If the bars produced by the refiner have a hallmark that is accepted in their market as guaranteeing the fineness and quality of the metal they will be in a tradeable form bearing an accepted mark or characteristic. If such bars are traded at a price determined by reference to the spot price they will be in an investment form.*

In the Australian market, not all precious metal dealers or traders sell precious metals that bear LBMA approved hallmarks, and not all ‘refiners’ of traded precious metals are LBMA accredited, the ATO relies on the refiners claim that the precious metal hallmark satisfies the purity and ‘investment form’ requirements. Non-LBMA accredited hallmarked bullion bars, wafers and coins are traded and accepted in the Australian market as precious metal.

Unaccredited refiners and traders in the Australian market sell their products at a discount (lower price than products with an LBMA accredited hallmark). Prices are determined by reference to the prevailing spot price and the precious metal content, however, a lower premium is included. These products are not ‘capable of being traded’ on the international bullion markets and are not of interest to foreign investors. ^{s38}

A substantial volume of ‘investment form’ precious metal purported to be accepted by the market never reaches investors. The form is changed (defaced, granulated or melted with or without the addition of alloys), as ‘scrap gold’ and supplied to refiners in ongoing repetitious circular arrangements by established networks, resulting in an ‘artificial market’. No sophisticated process is required to alter precious metal and can include melting, removal of marks, cutting or chopping in order for ‘investment form’ characteristics to be absent.

s38

²¹ Goods and Services Tax Ruling GSTR 2003/10: *Goods and Services Tax: What is ‘precious metal’ for the purposes of GST?*

²² Explanatory Memorandum to the Bill for the *A New Tax System (Indirect Tax and Consequential Amendments) Act (No. 2) 1999*, which added the words ‘in an investment form’ to the definition of precious metal – *Paragraph 1.11*

²³ Bars, wafers and bullion coins are the physical forms in which the metals gold, silver and platinum are traded on the international bullion market for those metals. These are therefore forms of those metals that are capable of being traded on the international bullion market.

6.3 ATO view - 'meaning of refining'

The legislation does not define the meaning of 'refining'. To be GST-free, a supply of 'precious metal' must be 'the first supply' of that precious metal after its 'refining' providing the definition of precious metal is satisfied and the other requirements are met. s47C(1)

s47C(1)

FTR 2007/1 (at [204])

adopts the Macquarie Dictionary meaning for excise purposes as follows – '1. to bring to a fine or a pure state; free from impurities; to refine metal, sugar, petroleum, etc ... 3. to bring by purifying, as to a finer state or form'²⁴ The Australian Oxford Dictionary defines 'refine' to mean 'free from impurities or defects; purify, clarify'²⁵. The Oxford English Dictionary gives the first sense of 'refine', which it dates from 1582, as 'to purify or separate (metals) from dross, alloy, or other extraneous matter ...'²⁶ The Dictionary of Mining, Mineral, and Related Terms compiled by the American Geological Institute defines 'refine' as '(a) to free from impurities; to free from dross or alloy; to purify, as metals; to cleanse ...'²⁷ The word 'refining' in turn is defined as the 'purification of crude metallic products'²⁸

There is currently no mechanism in the legislative provisions to distinguish between refining of primary mine sourced product and any later purported refining of 'investment form' precious metal. As previously mentioned, 'investment form' precious metal can be changed (or defaced) with relative simplicity, including, but not limited to, melting and recasting into unmarked bars, granulation, surface melting to remove identifiable hallmarks or cutting, drilling or damaging bars, to lose 'investment grade' status. These processes have been identified as being implemented in the identified schemes, none of these processes alter the fineness or purity, and therefore cannot be refining.

Manufacturing processes within the industry include both analytical and refining processes. It is questionable to what extent 'necessary' refining processes need to be applied to produce 'investment form' precious metal, where the source of metal has been previously 'refined', changed or defaced, and then re-supplied to a refiner at 99.99%.

To the extent the original source is 'investment form' precious metal (regardless of altered form) when acquired, the precious metal content remains unchanged. It is arguable that the mere reinstatement of form (*bar, wafer etc.*), requires further refining processes. Compliance activities have determined, that in some instances, precious metal acquired (*in an altered form*), was recast into ingots without any refining processes being undertaken. Industry information indicates that metal of confirmed fineness (99.99%) would not require any further refining and would only need to be cast and stamped (these processes are not refining), nor would it be commercial to add this material to a pool of metal which is of a lesser fineness. Refiners contend that:

- Precious metal acquired at 99.5% (or greater fineness) is 'refined' as purification or improvement in the 'state' or 'form' of the material is achieved by converting product to an 'investment form', regardless of any increase or loss in metallic purity.
- Metal is not acquired prior to initial assay (melting to obtain a sample in a homogenous state), consequently the form, after sampling, does not meet the definition of precious metal, even if it is received in investment form (bar, wafer etc.);
- Initial melting for assay purposes is 'refining' as the crucible absorbs silicates and other non-metallic components, metallic components and elements (other than gold) remain in the crucible when the molten charge is released, any purification is arguably insignificant the subject metal is already above 99.5% (in most instances 99.99%) prior to melting.

²⁴ Macquarie Dictionary (at XXX).

²⁵ Australian Oxford Dictionary (at 1083).

²⁶ Compact Edition of the Oxford English Dictionary, Volume II (at 2463)

²⁷ Dictionary of Mining, Mineral, and Related Terms (at 450).

²⁸ Citing Fay A Glossary of the Mining and Mineral Industry (1920).

7 INTERNATIONAL COMPARISONS

7.1 This section will provide a summary of reviewed legislative frameworks in comparable jurisdictions following ATO liaison with Canada and New Zealand and other research, to understand other GST/VAT approaches in considering alternative options. Broadly speaking, countries whose legislative frameworks included a combination of accreditation, limitation of GST-free treatment, additional reporting requirements or other special mechanisms (e.g. reverse charging) do not experience similar non-compliance issues (refer to *Legislation Jurisdictional Analysis and Jurisdictional Summary Table* in Chapter 9).

The following points from this comparative review are to be noted:

- None of the international legislative frameworks limit refining to mined gold (first supply of doré out of the ground);
- Singapore (and Malaysia) do not offer GST-free (zero rating) on the first supply of precious metal after refining. The UK only allows GST-free (zero rating) treatment where the supply is between central banks, between a central bank and an LBMA accredited member, and between LBMA members;
- All countries specify that supplies of precious metal for 'investment' purposes are input taxed (GST-exempt) with varying requirements;
- All countries defined the 'form requirements' of precious metal (or fine metal, or gold/silver/platinum) differently, with some countries adopting a very detailed definition (including identifying hallmarks etc.) and others not;
- The UK and Singapore specify accreditation requirements, other countries do not.
- Countries that do not allow input tax credits for second hand goods do not have issues with precious metal entering supply chains. South Africa has recently amended their laws to deny input tax credits, while New Zealand (NZ) is seeking to now allow input tax credits on second hand goods, where previously they were denied.

New Zealand

Like Australia, the supply of "fine metal" in New Zealand may be zero-rated (GST-free) or GST exempt (input taxed). New Zealand allows for zero-rating where fine metal is supplied as an 'investment item' in order to allow dealers to obtain gold, silver and platinum at a GST exclusive price, the reason being that *"the value of fine metals is fixed by international trading"* and *"to impose GST on the supply in New Zealand would effectively reduce the value of the commodity, encourage offshore trading, and provide an advantage to non-resident suppliers"*²⁹.

The legislative framework, whilst almost identical has fundamental differences including:

- In New Zealand, GST exemption (input taxed) applies to a supply of fine metal "in any form". The absence of a defined form following the first zero-rated (GST-free) supply after refining of an 'investment item' removes the distinguishing characteristics between tradable and non-tradable fine metal once the first supply has occurred, i.e. input taxation is driven on fineness not form.
- Fine metal "in any form" that meets the fineness requirements, regardless of form, provided for 'refining' or 'subsequent re-purification' is GST exempt (input taxed), therefore GST is not charged and no input tax credits can be claimed.³⁰ Australia's approach amended the definition of precious metal to be in an 'investment form' applicable to both GST-free and input taxed supplies. In practical terms NZ may be vulnerable to compliance issues where the addition of alloys would circumvent the denial of input tax credits for subsequent refining of metal of the required purity.

²⁹ <http://taxpolicy.ird.govt.nz/publications/2015-ip-gst-current-issues/chapter-4>

³⁰ Contrast with Australia's approach which is that the definition of precious metal requires that it be in an "investment form", and this requirement is applicable to both GST-free and input taxed supplies.

- Second-hand goods is the subject of discussion in NZ, initially legislation denied input tax credits due to concerns regarding conversion of fine metal. The exclusion of gold from the definition of “second hand goods” reflected the fraud risk stemming from the difference in treatment of fine and non-fine gold, and the ability to convert these metals from a fine form to a non-fine form and back again. A proposal to allow input tax credits is currently in submission following industry representation that the approach of excluding second hand goods results in high compliance costs due to apportionment issues and to further address recoverability of the embedded GST.
- No LBMA accredited refiners are listed on the “Good Delivery List” in New Zealand, accreditation is not required to access zero-rating and GST-exempt treatment in accordance with the GST Act.

Singapore

Singapore adopts a different approach and does not extend zero-rating (GST-free) concessions to supplies of investment precious metal. In 2012, Singapore announced that “investment precious metal” or IPM will be GST exempt (input taxed) for the sale and importation of certain investment grade gold, silver and platinum. The change was introduced in recognition that IPM are essentially financial assets, just like other actively traded financial instruments (e.g. stocks, bonds) where supplies are GST-exempt, as well as to facilitate the development of IPM refining and trading in Singapore³¹. Singapore does not allow input tax credits incurred in producing exempt goods. Precious metals which do not meet the criteria do not qualify as IPM and are therefore taxable. Non-IPM includes jewellery, scrap precious metals, numismatic coins and precious metals which are refined by refiners who are not on the ‘Good Delivery’ list of the London Bullion Market Association or the London Platinum and Palladium Market who administers accreditation for platinum and palladium.

Singapore further established the Approved Refiner and Consolidator Scheme (ARCS) to allow approved refiners and consolidator’s access to GST exemption on their imported goods, waiver of GST payment on goods supplied between approved refiners and consolidators and the prescribing of special input tax delivery (the aim being to ease cash flow and compliance and relieve input tax incurred on refining activities). In order to meet the criteria a refiner can either be LBMA accredited or endorsed by Singapore under the Approved Refiner and Consolidator Scheme (ARCS) (i.e. intend to obtain LBMA accreditation within a time period for refiners). In addition, materials purchased (e.g. scrap gold and other non-IPM) delivered to a LBMA or LPPM accredited refiner for refining into IPM under the toll refining model, are not eligible for input tax credits. Singapore further prescribes what coins are in an investment form and provides certainty around classification issues and also is specific in terms of the record keeping, registration and tax invoicing requirements.

s47C(1)

Malaysia has a similar framework and is not discussed in this paper.

United Kingdom

The United Kingdom provides Value Added Tax (VAT) exemption and zero-rating in some instances for ‘investment gold’ (which includes prescribed gold coins). The HMRC published VAT guidance for gold in VGOLD (1100-1700)³² which includes the background to the exemption for investment gold, the special accounting scheme or ‘reverse charge procedure’ and invoice, record keeping and notification requirements for traders.

The legislation for exempting gold in the UK has unusual features including:

- an option to tax;
- limited right to deduct input tax attributable to exempt supplies of investment gold;
- special invoicing requirements for traders in investment gold;
- and its own penalty regime.

³¹ https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/e-Tax_Guides/etaxguide_GST_GST%20Exemption%20of%20Investment%20Precious%20Metals.pdf
 IRAS Guide on Exemption of Investment Precious Metal e-Guide and IRAS Guide GST: Approved Refiner and Consolidator Scheme

³² <http://www.hmrc.gov.uk/Manuals/vgoldmanual/VGOLD1100.htm>

Some instances of trading in the London Bullion Market or the London Platinum and Palladium Market are also zero-rated for transactions between Central Banks, or between a Central bank and LBMA member, or between LBMA members/agents.³³ Investment gold trading between members and non-members (who are taxable persons) are subject to reverse charging (*VGOLD1500*) and transactions between members and private individuals are exempt.

In order to prevent missing trader fraud, the UK introduced a special accounting and payment scheme in 1993 for gold transactions between taxable persons or persons liable to be registered. Because gold is a high value commodity it was regularly used by fraudsters who charged VAT on the supply of gold to their customers and disappeared without remittance to HM Revenue and Customs. Under the scheme, the responsibility for accounting for the output tax to HMRC is passed to the recipient, not the supplier, who may also recover the tax as input tax, subject to the normal rules.

The HMRC requires special notification, invoicing, accounting and record keeping requirements for persons who trade in exempt investment gold. HMRC requires a one-off notification within 28 days of the first exempt supply of investment gold > £5,000 (*or > £10,000 within a 12mth period*), for both VAT-registered and non-registered entities). The detailed invoicing and recording requirements in relation to supplies of exempt investment gold valued at more than £5,000 (*or smaller transactions totalling £10,000 in the last 12 month period*), has specific data recording requirements including:

- a description of the gold supplied;
- for bars and wafers: form, weight and purity, any other identifying feature (including any proprietary mark, hallmark and serial number where applicable); or
- for investment gold coins: the coin type, country of origin and whether or not the coin is included on the list of gold coins reproduced in *Notice 701/21A Investment gold coins*.

With the exception of missing trader issues which has been addressed through a reverse charging mechanism, no information is available regarding compliance issues in the UK, given the strict regulations imposed.

Canada

The supply of "precious metal"³⁴ in Canada may be zero-rated (GST-free)³⁵ or GST exempt (input taxed)³⁶, and is considered to be a financial instrument³⁷. Supplies for financial services³⁸ are exempt, unless specifically listed as zero-rated (newly refined). Any supply of precious metal (*i.e., gold, platinum or silver*) meeting the purity (99.5% for gold/platinum and 99.9% for silver) and "form" requirements (*bar, ingot, coin or wafer*), as set out in the definition of precious metal is a supply of a financial service and generally exempt³⁹.

Precious metal in the form of a bar, ingot or wafer at the required purity levels must generally be recognized and accepted for trading on Canadian financial markets.⁴⁰ Ordinarily, these will bear markings indicating their purity level. They will also have an identification mark of the issuing financial institution or refinery. With respect to coins, only those at the required purity levels that have been

³³ See VAT Notice 701/21: gold < <https://www.gov.uk/government/publications/vat-notice-70121-gold/vat-notice-70121-gold> > and VAT Notice 701/9: commodities and terminal markets < <https://www.gov.uk/government/publications/vat-notice-7019-commodities-and-terminal-markets> >

³⁴ "precious metal" means a bar, ingot, coin or wafer that is composed of gold, silver or platinum the purity level of which is at least 99.5% in the case of gold and platinum and at least 99.9% in the case of silver;

³⁵ A supply of a financial service that is the supply of precious metals in the case where the supply is made by the refiner or by the person on whose behalf the precious metals were refined is a zero-rated supply.

³⁶ A supply of a financial service is exempt, unless it is a zero-rated supply

³⁷ "financial instrument" includes "precious metal"

³⁸ "financial service" includes the borrowing or lending of a financial instrument; and the acceptance, allotment, issue, endorsement, variation, granting, repayment, renewal, processing or transfer of ownership of a financial instrument.

³⁹ http://www.cra-arc.gc.ca/E/pub/gm/17-1/17-1-e.html#P213_10371

⁴⁰ See *Bombay Jewellers Ltd v Canada; Bombay Jewellers v R* [1998] GSTC 94, which held that the terms "bar", "ingot" and "wafer" has a technical meaning for it to be recognised as a marketable financial instrument (e.g. marked for weight, purity, source of manufacture etc).

issued by a government authority and that may be used as currency will qualify. Where precious metal meets the required purity but not “form” or is of lesser purity it is classified as a “supply of property” and is taxable and would be considered scrap gold (jewellery is classified as non-precious metal).

Canada has experienced similar issues in the publicised *Kitco*⁴¹ matter (Project Carat) for a scheme where artificial transactions were generated for the sole purpose of creating tax credits on inputs. Pure gold was transformed by conversion to scrap between a gold supplier and gold transformer and on sold to a refiner for re-purification in continued circular arrangements involving several companies, participants in the scheme claimed tax refunds and tax was not remitted (missing trader). The same cycle of transactions was repeated and proliferated in volume, increasing refunds and loss of revenue. Several intermediaries were also interposed in order to obfuscate the structure, in efforts to conceal the scheme. The Kitco matter is currently ongoing and has not reached a conclusion. Another recent court case found judgment in favour of the CRA (*TricomCanada Inc. v. The Queen, 2016 TCC 82016*), which addressed similar issues with clandestine supplier networks. No prospective law changes have been identified as a result of these matters to date.

Other Jurisdictions

Whilst not covered in detail, it should be noted that in 2014, the German Federal Central Tax Office⁴² also introduced a “Reverse Charge Regime” for supplies of precious metals. Germany has experienced issues in respect of missing trader fraud type schemes both domestically and cross-border similar to the Kitco scheme.

South Africa has the world’s richest deposit of gold (Witwatersrand Basin) and platinum (Bushveld Complex) and is a primary exporter. Other than zero-rating applicable to the supply of precious metal to the South African Reserve Bank, there are no specific provisions providing zero-rating for precious metal with the exception of exports. Since most precious metals mined in South Africa are exported, mining companies pay no VAT on exports but are also entitled to a refund for all the input taxes paid. South Africa also allows for input tax credits on second-hand goods acquired from suppliers who do not charge VAT (i.e. notional or deemed input tax credit).⁴³ Prior to amendments in 2014, second-hand goods were defined as excluding animals and gold coins issued by the Reserve Bank.⁴⁴ Fraudulent activities included second-hand gold jewellery being smelted with gold coins and illegally acquired raw gold, in order to claim fraudulent input tax credits. The South African National Treasury announced in its 2014 Budget Review amendments to the VAT rules:

‘A notional input tax is allowed when a VAT vendor acquires second-hand goods from a non-VAT vendor, allowing for the unlocking of part of the VAT on goods previously paid by final consumers as those goods re-enter the formal supply chain. Sales of certain gold coins are zero-rated for VAT. While the resale of gold jewellery by non-VAT vendors to VAT vendors should allow for the deduction of notional input VAT, in practice such jewellery is smelted along with gold coins and illegally acquired raw gold. This has created an enabling environment for fraudulent input tax deductions. Government proposes that second-hand goods made from precious metals be excluded from obtaining the notional input tax.’⁴⁵

⁴¹ <http://www.cbc.ca/news/canada/montreal/accused-in-quebec-gold-tax-scam-face-jail-and-750m-in-fines-1.2457169> ; <http://www.wsj.com/articles/SB10001424052702304778304576377852269636870>

⁴²

ng.HASH=efed15dffeb1d7dcdc41&searchArchive=0&searchArchive.HASH=06b9aa4261406859d1b0&searchIssued=0&searchIssued.HASH=4f23bf4861407d5227b0

⁴³ For some discussion on this, see <http://www.taxrefunds.co.za/index.php/registerable-second-hand-goods> and <http://www.bdo.co.za/documents/Guide%20for%20Vendors.pdf>

⁴⁴ in terms of section 14 of the South African Reserve Bank Act

⁴⁵ South African National Treasury, *2014 Budget Review*, page 56.

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9 FURTHER CONSIDERATIONS

9.1 Options

Other factors to consider in identifying the most appropriate solution or option will include:

- Is a combination of options required to address the issue or is there an alternative solution?
- Are there other issues that need to be addressed for eg whether a coin requires a special definition (currency and government endorsement)?
- What is the impact on the treatment of numismatic coins (collector, commemorative, numismatic or modern numismatic coins)?

9.2 Retrospective or not?

If a legislative based solution is proposed, consideration of whether a retrospective approach is required, will need to be evaluated. Tax law is often passed with retrospective effect, but is usually backdated to the date of an announcement by the Government that the law will be created in the future. As a result, potential tax evaders are *put on notice* in time to change their behaviour.

*The law can thus be known and complied with and is therefore consistent with the rule of alian Parliaments can validly enact retrospective laws - "the wrongful nature of the conduct ought to have been apparent to those who engaged in it." – Deane J at 18 in Polyukhovich.*⁵³

Retrospective laws make the law less certain and reliable. The Law Council observed that retrospective laws can cause a 'number of practical difficulties for business, and the wider economy', including: actual and reputational damage to the market (sovereign risk); disruption to business planning processes resulting in high compliance costs; and unintended consequences from increased regulatory complexity⁵⁴

Special consideration may need to be applied to the precious metal industry in this regard. In the absence of government activities to date, the behaviours and more importantly "the act of defacing and manipulation of form" would have continued, resulting in risk proliferation, as industry participants where merely "doing what the law allows". It is evident that the industry was aware that manipulation of the GST legislation resulted in the artificial increase of purported scrap gold, through activities designed to disguise the true nature of transactions. Whilst the availability of scrap gold is difficult to quantify, estimates indicate that approximately one third of supply is generated from this market. Some industry players were generating in excess of 90% of trading volumes from supplies of scrap gold. Analysis of trading volumes indicates that the escalation occurred in 2012 and continued regardless of gold spot price movements.

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Any solution adopted would need to ensure that the Australian Tax System is not vulnerable to similar issues in the future, given the revenue leakage and cost of investment in compliance activities.

⁵³ <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1991/32.html?stem=0&synonyms=0&query=HCA%201915%2058%20or%201915%20HCA%2058>

⁵⁴ http://www.alrc.gov.au/publications/common-law-principle-4#_ftn15

SUPPLEMENTARY INFORMATION

10.1 Additional Supplementary Information

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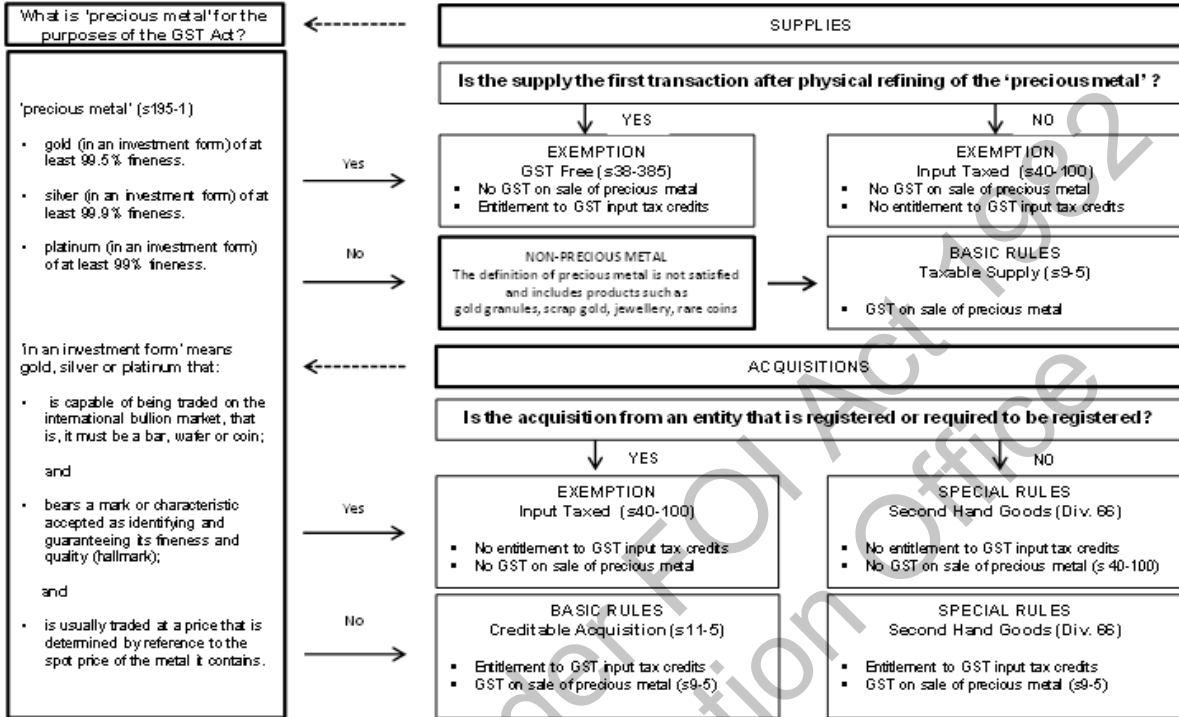
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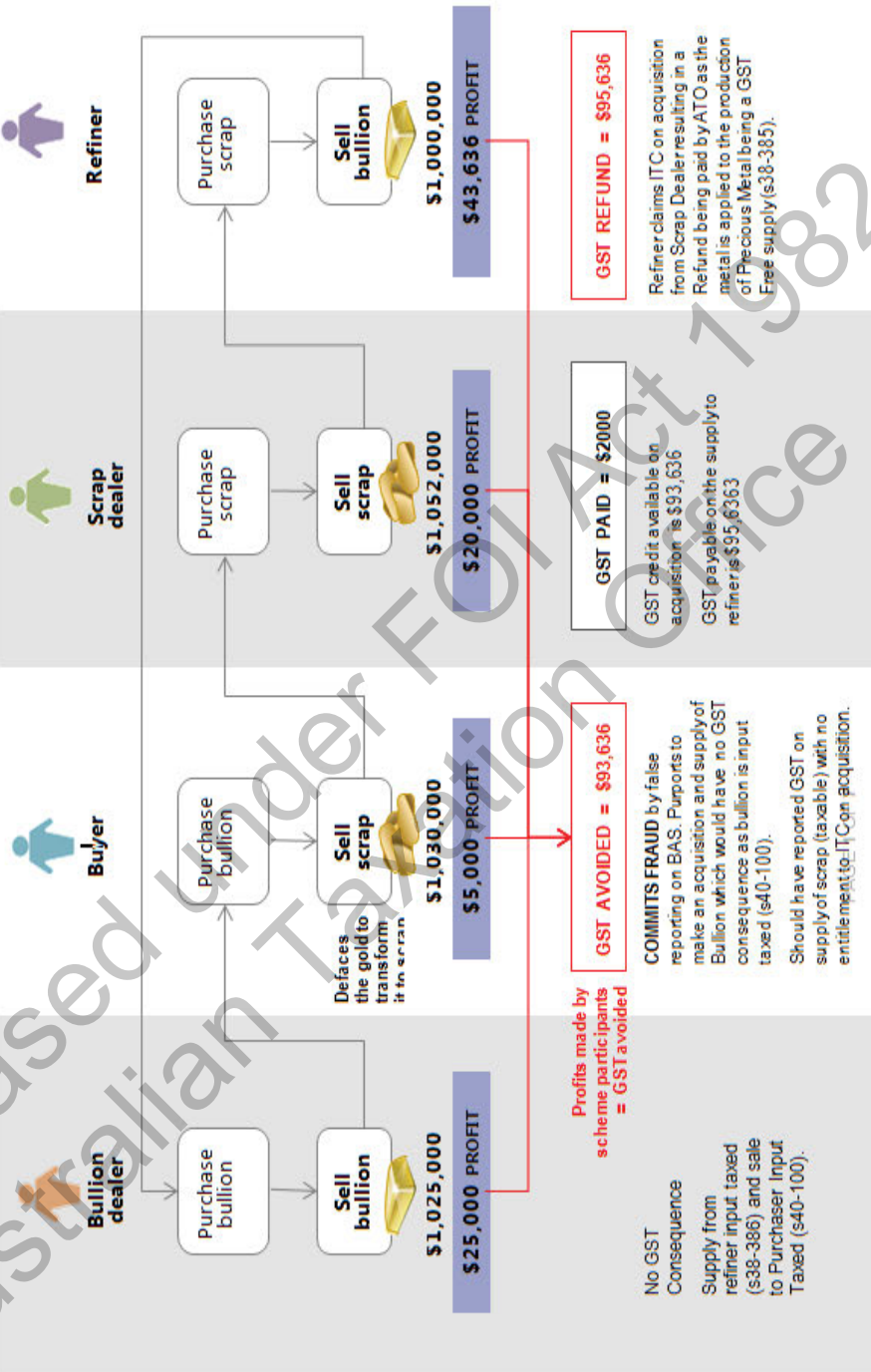
Attachment A: Legislative Framework

LEGISLATIVE FRAMEWORK



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Attachment B: Example of a typical gold bullion scheme



Gold bullion scheme participants exploit the legislative provisions that provide for:

- GST Free or input taxed status of precious metal in an investment form, and
- the taxable nature of non-precious metal.

While the structure and complexity of these arrangements varies, the principal apparent intent is to convert gold bullion to scrap, which creates a taxable supply. The GST attributed to this supply and paid by the refiner (claimed from the ATO) effectively funds the profit derived by all participants.

The operation of the scheme relies on these conditions:

- the GST refund ultimately claimed from the ATO the entering the supply chain at the refiner level
- the form of the metal being changed (in the depicted arrangement by the dealer)
- the buyer not correctly reporting GST and/or paying GST liability

Without these conditions, there would be no opportunity for profit.



INTERNAL	OFFICE	OCTOBER	SENSITIVE
SEGMENT	MINUTE	2013	
	FORMAT	ISSUE DATE	CLASSIFICATION



Australian Government
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OFFICE MINUTE

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ISSUE DATE:	17 September 2013	RESPONSE DATE:	
SUBJECT:	PRECIOUS METALS PROJECT – GOLD BULLION		

PURPOSE

The purpose of this minute is to provide advice to the ATO Senior Executive regarding industry accreditation and regulation issues within the Gold Bullion market and impacts in the application of the GST Law within a compliance environment as it applies to the meaning of 'precious metal'.

BACKGROUND

A current project is in progress to assess compliance risks within the Gold Bullion industry. The current stakeholders include ITX Serious Evasion R&S/Delivery and Serious Non Compliance (SNC) - other impacted areas include Refund Integrity and IA – Review and Litigation.
(Refer to Project Outline 1-4RECLT7 as attached)

LEGISLATION AND RULING/S

The pertinent legislation and rulings include:

Section 38-385 of the **A New Tax System (Goods and Services Tax) Act 1999** - deals with the GST Free status of the first sale of 'precious metal' to a dealer after refining.

Section 40-100 of the **A New Tax System (Goods and Services Tax) Act 1999** - deals with the Input Taxed status of other type of supplies of 'precious Metal'.

Section 195-1 of "the GST Act" - provides definitions of terms referred to in the legislation.

GST Ruling 2003/10 *Goods and Services Tax: What is 'precious metal' for the purposes of GST?*¹

Note that all references to legislation referred to in this document refer to the A New Tax System (Goods and Services Tax) Act 1999, unless otherwise stated.

INTERPRETATION

Critical to the identified issue is whether a refiner produces 'precious metal' from the refining process. If the product does not meet the definition of 'precious metal' then s38-385 and s40-100 do not apply. The supply would then be subject to the basic rules of the GST legislation and would be classified as taxable supplies under s9-5.

To be precious metal for GST purposes the dictionary definition (s195-1) provides that:

"precious metal means:

- (a) gold (in an investment form) of at least 99.5% fineness; or
- (b) silver (in an investment form) of at least 99.9% fineness; or
- (c) platinum (in an investment form) of at least 99% fineness; or
- (d) any other substance (in an investment form) specified in the regulations of a particular fineness specified in the regulations."

The **"in an investment form"** requirement is the focus of the current issue. The original Bill and Explanatory Memorandum (EM) did not address this issue in terms of a clear definition, however an amended EM contained in the *A New Tax System (Indirect Tax and Consequential Amendments) Act (No.2) 1999* that was presented to the House of Representatives/Senate in considering the proposed Bill addresses the issue and is where the term "in an investment form" was added to the legislation - extract of the amended EM as below-:

¹ <http://law.ato.gov.au/atolaw/view.htm?docid=GST/GSTR200310/NAT/ATO/00001>

"Precious metals

1.11 Following extensive consultation with industry it has been determined that the precious metal provisions do not reflect the way precious metals are mined and supplied in Australia. This Bill amends the precious metal provisions to reflect the following:

- Where a precious metal producer retains title of the precious metal (the refiner is effectively an agent), the refiner does not make the first supply of the precious metal, and the transaction is not GST-free under the current provisions. **Item 16** amends section 38-385 of the GST Act to allow the first supply of precious metal to be provided by an entity on whose behalf the refining has been done;
- The current provisions limit a GST-free supply to where a dealer acquires the precious metal for investment purposes. The restriction to investment purposes is unnecessarily restrictive and will be deleted [**item 54**];
- In order to ensure that the correct supply of precious metal is GST-free or input taxed, the definition of precious metal has been amended to refer to sales of precious metals in an investment form. Investment form means precious metal sold in a coin, wafer, bar or other tradeable form which has an internationally accepted hallmark. In the case of gold, this means a hallmark that has been approved by the London Bullion Market and means that the gold can be traded on the international bullion market. [**Items 65 and 66**]

1.12 The amendments will ensure that the precious metal provisions contained in the GST Act better reflect the way the precious metals industry currently operates. "

The third dot point is clear that precious metal must bear a hallmark approved by the London Bullion Market Association (LBMA) **and** can be traded on the international bullion market (Refer to references for LBMA accreditation information)

GSTR 2003/10 dilutes the EM significantly and may include many of the gold bars produced by smaller Australian refiners who may only sell their product in the Australian Market. The ruling specifically mentions one such refiner Australian Bullion Company (NSW) Pty Ltd (ABC) whose hallmark is not accredited with the LBM and does not further appear on the Goldbars Worldwide or any other organisations website.

"Bars and wafers

34. Bars and wafers that are hallmarked with hallmarks listed in the ICGB bear an accepted mark as to their fineness and quality. The list of hallmarks in the ICGB is not exhaustive. There are other hallmarks, such as the ABC hallmark,^{F9} that are accepted as guaranteeing fineness and quality.

35. Such bars and wafers are produced at varying weights. If they are in a form traded at prices determined by reference to the spot price, such bars and wafers are in an investment form. If so, and they are of gold, silver or platinum of the requisite fineness, they are precious metal for the purposes of the GST Act.

36. As an example, some small refiners in Australia make bars that are only traded in Australia. As noted at paragraph 22, bars are an internationally traded form of metal. If the bars produced by the refiner have a hallmark that is accepted in their market as guaranteeing

the fineness and quality of the metal they will be in a tradeable form bearing an accepted mark or characteristic. If such bars are traded at a price determined by reference to the spot price they will be in an investment form. "

This position is significantly different to what appears to have been proposed in the EM.

Paragraph 34 of GSTR 2003/10 clearly includes bullion produced by recognised Australian suppliers (such as [REDACTED]) who are **not** internationally accredited.

[REDACTED]

s38

[REDACTED]

Smaller unaccredited players in the industry claim to be refiners who use laboratories, which do not meet the necessary specification standards. Other smaller industry players may produce gold bars sold at a discount as there is no guarantee as to assay quality which does not meet the LBMA standards.

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[REDACTED]

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Nick Athans (co-author of GSTR 2003/10) provided advice that:

- s38-385 of the GST Act was designed for miners supplying dore (gold or silver produced at their operations) to refiners for refining, and as such this provision would not apply to scrap or jewellery being refined for a second time, as this would not be the first supply of that precious metal.
- Suggested we don't get too hung up on hallmarks. When considering whether a hallmark is recognised, consider whether the hallmark on the item would be accepted by the refiner/dealer purchasing the product as recognition of its purity and quality.
- Suggested we contact Danny Sorbello (co-author) of GSTR 2003/10 who dealt with the smaller refiners including [REDACTED] directly during the consultation phase.

Danny Sorbello (co-author of GSTR 2003/10) provided advice that

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- Owen Clancey drafted the EM for these provisions and advised them that they were under a lot of pressure and didn't have time to consider secondary impacts of the provisions past their basic understandings of the industry. Therefore it is unlikely that they considered second-hand goods dealers when they drafted the explanatory material supporting s38-385.

TECHNICAL ADVICE

s47C(1)

² See References for detailed information on [REDACTED]

s47C(1)

SUMMARY OF ISSUES

The industry is unregulated in Australia with no regulatory body and only one entity holding the required accreditation to meet the accepted international standards as prescribed by the EM.

The industry has further increased in size due to increases in gold prices with increasing participants and consequential refunds being released by the ATO.

GST Ruling 2003/10 and the statement that the ABC hallmark is 'accepted as guaranteeing fineness' is problematic. Other industry players are in a position to argue that their product fineness meets the legislative requirements with no guarantee or ability for the ATO to confirm that the product qualifies for concessional treatments.

RECOMMENDATIONS

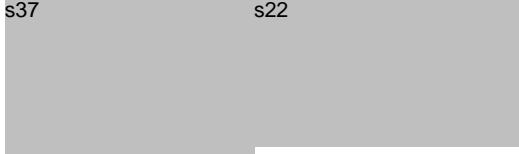
s47C(1)

REFERENCES

1. Project Outline/Ruling

s37

s22



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3. London Bullion Market Association/Goldbars Worldwide

London Bullion Market Association (LBMA). This document describes what the LBMA is, what it does and how it ensures that LBMA accredited refiners (also known as good delivery refiners) uphold agreed and trusted standards in international markets. It also describes the LBMA's involvement with the Responsible Gold initiatives, ensuring that gold produced by LBMA accredited refiners is acquired from ethical sources. Non LBMA refiners are not held to this standard.

"In the refining industry, the LBMA Good Delivery List is now widely recognized as representing the de facto global standard for the quality of gold and silver bars, in large part thanks to the stringent criteria that an applicant must satisfy before being accredited.

In 2004, the LBMA introduced a system of regular proactive monitoring of refiners on the List, an important initiative which further enhanced the reputation of the List and the refiners on it. The List is used by many precious metals exchanges around the world to define in whole or in part the refiners whose gold and silver bars are accepted in their own markets."

http://www.lbma.org.uk/assets/LBMA_Brochure_201304.pdf

LBMA Good Delivery Rules - describes the process that a refiner has to undertake to become an accredited LBMA refiner. You will note from the document that the accreditation process is both rigorous and exhaustive, ensuring that bars produced bearing an LBMA accredited hallmark (also known as good delivery bars) are indeed what they purport to be. It is this hallmark that gives the international (and domestic) markets confidence in the product, and demonstrates why organisations in Australia that produce their own non accredited bars also need to sell accredited bars.

http://www.lbma.org.uk/assets/GD_Rules_11.pdf

The list of accredited refiners is as follows:

http://www.lbma.org.uk/pages/index.cfm?page_id=147&title=good_delivery_lists

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The LBMA actively monitors all its accredited refiners to ensure standards are maintained. Non LBMA accredited refiners are not subject to this scrutiny, meaning that there are no checks and balances on bars they produce. For this reason their non-accredited bars will always be less desirable (they may not meet assay or weight requirements) and sell at a discount to accredited bars.

http://www.lbma.org.uk/pages/index.cfm?page_id=31&title=proactive_monitoring

http://www.goldbarsworldwide.com/PDF/BI_2_GoldBarManufacturers.pdf

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INTELLIGENCE
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FILE REF:

Intelligence Assessment

Carouselling and Missing Trader Fraud - Overview

Abstract

This paper was commissioned by Jim Collins, SME Exec.

It provides an overview of “Carouselling” fraud and “Missing Trader Fraud” as they occur in Europe and looks at whether they are risks in Australia.

The findings of this paper are “Carouselling” and “Missing Trader Fraud” are not risks in Australia due to adequate cross-border and importation controls as provided by the Australian Custom Service.



IN CONFIDENCE

Access to, and dissemination of ATO information and intelligence is governed by security considerations and the need to know principle. Staff seeking further information about the products presented in this report should refer to the product authors for details.



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DOCUMENT CONTROL

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Path\file name	G:\SIRA Melbourne\ATO\Publishing\Product Migration\Alert - Carouselling and missing trader fraud.doc
Created	3 August 2004
Last Edited	
Number of Pages	7
Time	Research & report 8 hours Editing

VERSION CONTROL

Version	Date	Details
1.0	3 August 2004	Initial draft – sent to D Mazarolo 3 August 2004
2.0	12 Oct 2004	Final editing

ENDORSEMENT

..... Date

Dennis Mazarolo, Director, SRM

INTRODUCTION

This paper was commissioned by Jim Collins, SME Exec.

It provides an overview of "Carousselling" fraud and "Missing Trader Fraud" as they occur in Europe and looks at whether they are risks in Australia.

The findings of this paper are "Carousselling" and "Missing Trader Fraud" are not risks in Australia due to adequate cross-border and importation controls as provided by the Australian Custom Service.

It is recommended that no further action be taken with respect to these risks.

BACKGROUND

VAT arrangements within Commission of the European Communities are designed so that intra-Community supplies of goods between taxable persons are exempt in the goods' Member State of origin, with taxation taking place in the Member State of destination. This arrangement has been facilitated in the European Communities by the removal of border controls for tax purposes from 1 January 1993.

These arrangements provide that intra-Community operations between taxable persons continue to be taxed at the rate and conditions of the Member State of destination. However, abolishing border controls resulted in the control of taxation of intra-Community trade being integrated into domestic VAT control, which required cooperation between Member States on a new scale. In particular, Member States needed information from other Member States in order to be able to control the tax since they were no longer able to obtain information about the flow of goods into their territory by the use of traditional customs controls at their frontiers.

In order to make absolutely sure that the correct amount of tax is declared by the client in the country of destination, it is necessary for there to be a flow of information between Member States.

In the European Communities, the VAT Information Exchange System (VIES) is a common computer network giving detailed control information about all exempt intra-community transactions

WHAT IS "CAROUSELLING"?

The paper headed "**REPORT FROM THE COMMISSION (OF THE EUROPEAN COMMUNITIES) TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on the use of administrative cooperation arrangements in the fight against VAT fraud**", dated 16 April 2004, describes "Carousselling" as:

"A so-called "conduit company" (A), makes an exempt intra-community supply of goods to a "missing trader" (B) in another Member State.

This company (B) acquires goods without paying VAT and subsequently makes a domestic supply to a third company (C), called the "broker".

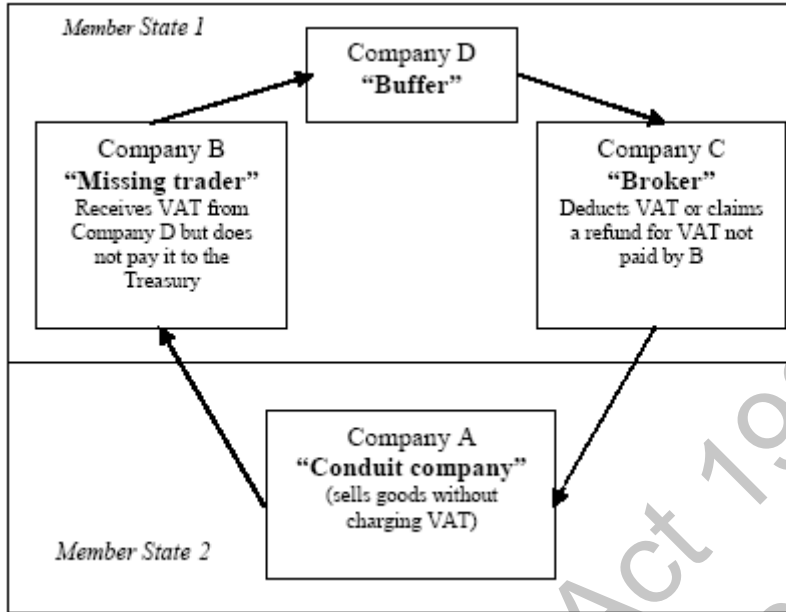
The "missing trader" collects VAT on its sales to the "broker", but does not pay the VAT to the Treasury and disappears. The "broker" (C) claims a refund of the VAT on its purchases from B.

Consequently, the financial loss to the Treasury equals the VAT paid by C to B.

Subsequently, Company C may declare an exempt intracommunity supply to Company (A) and, in its turn; (A) may make an exempt intracommunity supply to (B) and the fraud pattern resumes, thus explaining the term "Carousel fraud".

In order to distort VAT investigations, the goods will often be supplied from (B) to (C) via intermediary companies, called "buffers". It may happen that the buffer is unaware of the fraud but in most cases he is conscious that he is involved in an irregular type of transaction (because of the unusual nature of the commercial transaction).

In practice, these kinds of fraud are constructed in a complex manner involving transactions between several Member States and several companies in each Member State. The underlying mechanism of missing trader fraud in intra-community trade can however be illustrated as follows":



The revenue effects of these transactions are shown in the table on the next page.

TRANSACTIONS				REVENUE EFFECT		
Step	CONDUIT COMPANY (A)	MISSING TRADER (B)	BROKER (C)	VAT	Refund	Difference in Revenue
1	makes an exempt intra-community supply of goods to a B in another Member State	acquires goods without paying VAT		NIL	NIL	NIL
2		makes a domestic supply to C and collects VAT	makes a domestic acquisition of goods from B	Collects VAT	Pays VAT	NIL
3		Fails to remit VAT to taxing authority	claims a refund of VAT	Not remitted	Refund claimed from and paid by taxing authority	Amount of refund claimed by C (i.e. amount of VAT paid by C to B)
4	acquires goods from C without paying VAT		C may declare an exempt intra-community supply to A	NIL	NIL	NIL
1	makes an exempt intra-community supply of goods to a B in another Member State	acquires goods without paying VAT		NIL	NIL	NIL
<p>Note 1: -Steps 1-3 constitute “Missing Trader” fraud.</p> <p>Note 2: The addition of Step 4 and the repetition of Steps 1-3 constitute “Carouselling”.</p>						

WEAKNESSES IN THE EUROPEAN COMMUNITY TRADE SYSTEM

Goods can be moved without being taxed. In fact, the responsibility for imposing and reporting consumption taxes lies with the entity acquiring the goods in the recipient Member State.

Therefore, it is important that the Community administrative co-operation arrangements are used as effectively as possible and that national control systems should be adapted to record and control these movements.

However, it has become clear to the Commission and to Member States that administrative cooperation as well as national control systems are still not fully adapted to the new situation created in 1993.

The following needs have been identified

1. clear and binding rules to facilitate information exchanges.
2. more direct contacts between tax inspectors of different Member States.
3. more information exchanges.

These are currently being addressed in an effort to control "carousel" fraud.

THE AUSTRALIAN PERSPECTIVE

"Carouselling" and "Missing Trader Fraud" capitalise on the fact that goods can be moved, received and on sold before any taxation obligations are required.

However, in Australia, GST is payable on imports, regardless of whether the importer is registered or not. GST is payable by the importer at the same time and in the same manner as customs duty. GST on the goods must be paid prior to the Australian Customs Service releasing the goods for consumption. In the normal situation, the Australian Customs Service collects the GST and remits this to the ATO.

This is different from the European VAT procedures in that:

- Australian Customs have a record of the goods being received in Australia.
- An amount of GST which is payable on the imported goods is assessed and recorded by Customs and this information is given to the Australian Taxation Office.
- There is no requirement for an exchange of information with the exporting country.
- The importer has no influence on the amount of GST payable for the goods.

Notwithstanding that there are two options under which goods can be released to the importer without GST liability having been paid (Deferred GST and Tradex - Tradex is an industry assistance programme which will allow for the importation of goods without payment of customs duty or other taxes, provided the goods are subsequently exported or incorporated in other goods which are exported), the importer cannot avoid having a GST liability imposed on them at the border.

This situation negates the possibility of "Carouselling" and "Missing Trader Fraud" occurring.

OTHER POSSIBLE "ON-SHORE" FRAUD

Prevention of "Carouselling" and "Missing Trader Fraud" does not mean that fraud cannot occur once the goods have been released by Customs.

Other types of fraud which may occur include:

1. failure to pay deferred GST;
2. failure to comply with the Tradex scheme rules.

However, these risks are different to "Carouselling" and "Missing Trader Fraud" in that they are "on-shore" and are not within the ambit of this overview.

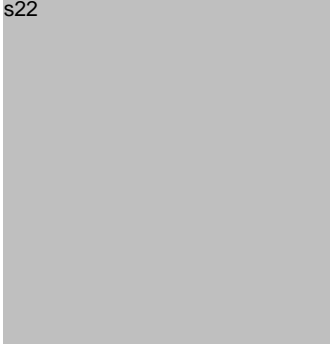
SUMMARY

"Carouselling" and "Missing Trader Fraud" are not risks in Australia due to adequate cross-border and importation controls as provided by the Australian Custom Service.

It is recommended that no further action be taken with respect to these risks.

REFERENCES

s22



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Application of s 38-385 to 'precious metal' refined from scrap

Background

We need to resolve the ATO view on whether an entity which refines scrap into 'precious metal' - in this case 'gold (in an investment form) of at least 99.5% fineness'¹ - is entitled to treat its supply of that precious metal as GST-free under s 38-385². s38

but a draft discussion paper takes the following view -

Gold that is refined from its natural state is refined into precious metal a first time and it is that supply as precious metal to a dealer from the original supplier which is its first supply and GST free. Subsequent re-purifications of second hand or scrap metal even if into a precious metal state will not be the first supply of that metal in a precious metal state as it will have been already produced as refined gold in a prior supply.

Despite what the discussion paper says, the preliminary view I expressed at the PHU was that the taxpayer is correct in saying that the first supply of 'precious metal' refined from scrap or other sources is GST-free provided in every case all of the other requirements of s 38-385 are satisfied.

Advice

Section 38-385(a) extends to subsequent refining of 'precious metal' from scrap and is not confined to any original refining for ore or doré. There is little if any prospect in my view that a court would reach a different conclusion, either on the words of the provision itself or by reference to extrinsic materials. It follows that I agree with the view s38 (consistent with the earlier PBR) and that I disagree with the position put in the draft discussion paper.

Discussion

Policy speculation

s38 there are two views about how s 38-385 works in practice. The first is that the provision only applies to the first supply of 'precious metal' refined from ore, while the second is that it applies to the first supply refined from whatever source. It has been suggested that it was only ever the policy of the provision to render GST-free supplies of 'precious metal' refined from ore (as opposed to scrap) as a concession to the mining industry.

However, nothing I can discern in the legislation itself anticipates this, and the extrinsic materials are all but silent on the issue. So far as we are collectively aware, no documents which otherwise might satisfy s 15AB⁵ demonstrate any policy in these terms, and refining from scrap was not considered when s 38-385 was drafted⁶. Neither public ruling GSTR 2003/10 nor *AGR Joint Venture v FCT*⁷ sheds light on the issue. Matt Bambrick, who worked on the public ruling, has indicated his understanding that s 38-385 was not directed at securing a mining industry concession and that it applies in scrap metal situations as well. The *Australian GST Guide* refers to the fact that some supplies of 'precious metal' are GST-free and some are input taxed then states as follows⁸ -

¹ Paragraph (a) of the s 195-1 definition of 'precious metal'.

² The alternative treatment is that the 'precious metal' will be input taxed under s 40-100.

⁵ s 15AB of the *Acts Interpretation Act 1901*.

⁶ The OPC drafter, Owen Clancy, apparently has indicated that no thought was ever given to refining from scrap.

⁷ *AGR Joint Venture v FCT* (2007) 70 ATR 466 (at [50-53]).

⁸ *Australian GST Guide* (at 66201 [465-300]).

The reason for this differential treatment is that precious metal prices may be internationally fixed, and dealers cannot pass on the GST on sales that they make. Making the initial supply after refining GST-free is intended to ensure that there is no GST embedded in the price of that sale.

What the provision says

A supply of precious metal (as defined) is GST-free under s 38-385 if (a) 'it is the first supply of that precious metal after its refining by, or on behalf of, the supplier'; and (b) 'the entity that refined the precious metal is a *refiner of precious metal'; and (c) 'the *recipient of the supply is a *dealer in precious metal'. The expression 'refiner of precious metal' means an entity that satisfies the Commissioner that it regularly converts or refines precious metal in carrying on its enterprise⁹. The expression 'dealer in precious metal' means an entity that satisfies the Commissioner that a principal part of carrying on its enterprise is the regular supply and acquisition of precious metal¹⁰.

The note to s 38-385 provides – 'Any other supply of precious metal is input taxed under s 40-100'. That provision in turn says – 'A supply of *precious metal' is input taxed'. The note to s 40-100 provides – 'If the supply is the first supply of precious metal after refinement, the supply is GST-free under s 38-385'.

It is assumed in the present circumstances that that the taxpayer is a 'refiner of precious metal' supplying to a 'dealer in precious metal'. This being so, the issue is whether s 38-385(a) is satisfied by the taxpayer – that is, whether taxpayer supplies to a 'dealer in precious metal' are GST-free as 'the first supply of that precious metal after its refining by, or on behalf of, the supplier'.

Approach to interpretation

We apply a generally purposive approach to interpretation. This is mandated both by s 15AA of the *Acts Interpretation Act 1901* and by what the HCA directs generally. Primary attention must be given to the text of the law, though context and purpose are also important¹¹. The task is to discern the legal meaning by reference to the language of the instrument viewed as a whole¹²; where context, purpose and policy together with consistency and fairness are surer guides to that meaning than the logic with which the provisions are constructed¹³. As the HCA emphasised in 2006¹⁴ – 'The words of the statute, not non-statutory words seeking to explain them, have paramount significance'.

Several other comments should be made about how we are to approach interpretation questions.

The first is that extrinsic materials are rarely if ever decisive in determining the meaning of a provision because they invariably fail to meet a gateway test of s 15AB in being capable of assisting this process¹⁵. Second, the task is essentially to determine what parliament meant by the words it used, and any search for legislative intention is an objective exercise by reference to the text as a whole¹⁶. Third, extrinsic materials rarely have anything permissible to say about legislative intention¹⁷. Fourth, extrinsic materials cannot be relied on to displace the clear meaning of the text, even if those materials suggest that by inadvertence the legislative intention has not been translated into the text¹⁸. Fifth, it is not for a court (much less us) to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as the statutory purpose¹⁹. Sixth, it is parliament rather than the courts which is responsible for remedying any unintended consequences which the text produces²⁰. Seventh, words will only be read into statutes very rarely and on the meeting of strict conditions²¹. Eighth, tax exemptions are generally construed in favour

⁹ s 195-1 definition.

¹⁰ s 195-1 definition.

¹¹ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 (at [47]), *FCT v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98 (at [39]), *Certain Lloyd's Underwriters Subscribing to Contract No IHOOAAQS v Cross* (2012) 87 ALJR 131 (at [24]).

¹² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (at [69]).

¹³ *Commissioner of Railways (NSW) v Agalianos* (1955) 92 CLR 390 (at 397).

¹⁴ *Nominal Defendant v GLG Australia Pty Ltd* (2006) 80 ALJR 688 (at 693).

¹⁵ *Harrison v Melhem* [2008] NSWCA 67 (at [12]), *FCT v Anstis* (2010) 241 CLR 443 (at 459).

¹⁶ *Meridien AB Pty Ltd v Jackson* [2013] QCA 121 (at [18-19]), for example.

¹⁷ *Parliamentary Trustee of the Parliamentary Contribution Superannuation Fund v FCT* [2013] FCAFC 127 (at [55]).

¹⁸ *Griffiths v Trustees of the Parliamentary Contributory Superannuation Fund* [2012] NSWCA 231 (at [10]), for example.

¹⁹ *Australian Education Union v Department of Education & Children's Services* [2012] HCA 3 (at [28]).

²⁰ *Consolidated Media Holdings Ltd v FCT* [2012] FCAFC 36 (at [31]), *FCT v Multiflex Pty Ltd* (2011) 197 FCR 580 (at [1]).

²¹ *Taylor v Owners of Strata Plan No 11564* [2013] NSWCA 55 (at [37-39]), for example.

of the taxpayer when they are ambiguous²². And, last, what lies behind a tax law provision in terms of economic theory is not the same thing as the criteria parliament has laid down²³.

What s 38-385(a) means

Creation of 'precious metal'

To be GST-free, a supply of 'precious metal' must be 'the first supply of that precious metal after its refining by, or on behalf of, the supplier' [emphasis added]²⁴. There is nothing I can discern in the wider text of s 38-385 read with applicable s 195-1 definitions, interaction with default provision s 40-100, Div 38 as a whole or indeed the GST law generally which indicates (even in a remote or indirect way) that the purpose or policy of the provision was to confine GST-free treatment to precious metal refined from doré. When a buyer of scrap metal refines that metal into something which satisfies the s 195-1 definition, it creates 'precious metal' which did not before exist. This is the case whether or not at some earlier time (A) the scrap metal was in a form which otherwise satisfied the s 195-1 definition, or (B) it was part of 'precious metal' supplied under the exemption.

First supply

Refining in this regard operates to create something new²⁵. When s 38-385(a) refers to 'the first supply of that precious metal', it is a reference to the 'precious metal' created by the immediately antecedent act of refining. Because 'that precious metal' did not exist prior to that act of refining, the statutory reference cannot be to some earlier act of refining. In this respect, care should be taken not to allow the statutory term chosen to influence the content of the definition itself, as to do so involves impermissible circularity²⁶. There remains the task to give operation to the word 'first'²⁷. Arguably, the first supply of that 'precious metal' to a 'dealer in precious metal' is to be GST-free, but any further supplies of that 'precious metal' as 'precious metal' to another 'dealer in precious metal' will be input taxed under s 40-100. This seems uncontroversial.

Meaning of 'refining'

The draft discussion paper says there is a distinction between 'refining' and a 'subsequent re-purification'. It is said that 'gold is only ever refined once'. This necessarily raises what is meant by the term 'refining' when used in s 38-385(a). As a starting point, the term will take its ordinary meaning subject to context and applicable rules of interpretation. FTR 2007/1 (at [204]) adopts the *Macquarie Dictionary* meaning for excise purposes as follows – **1. to bring to a fine or a pure state; free from impurities; to refine metal, sugar, petroleum, etc ... 3. to bring by purifying, as to a finer state or form**²⁸. Nothing in this definition suggests the distinction made in the draft discussion paper, nor can I find support for the position that 'gold is only ever refined once'.

The *Australian Oxford Dictionary* defines 'refine' to mean 'free from impurities or defects; purify, clarify'²⁹. The *Oxford English Dictionary* gives the first sense of 'refine', which it dates from 1582, as 'to purify or separate (metals) from dross, alloy, or other extraneous matter ...'³⁰ The *Dictionary of Mining, Mineral, and Related Terms* compiled by the American Geological Institute defines 'refine' as '(a) to free from impurities; to free from dross or alloy; to purify, as metals; to cleanse ...'³¹ The word 'refining' in turn is defined as the 'purification of crude metallic products'³². I do not see anything in these further definitions (or the wider context of s 38-385) as would support a valid distinction being made between an initial 'refining' and some 'subsequent re-purification'.

²² *BSH Holdings Pty Ltd v CSR* (2000) 2 VR 454 (at 458 [19]), *Rsays Pty Ltd v CST* [2007] SASR 398 (at [25-30]).

²³ *WR Carpenter Holdings Pty Ltd v FCT* [2007] FCAFC 103 (at [29]), cf *FCT v Reliance Carpet Co Pty Ltd* (2008) 68 ATR 158 (161 [3]), *Esso Australia Resources Pty Ltd v FCT* [2011] FCA 360 (at [125]).

²⁴ It is assumed that all other qualifying requirements of s 38-385 are met in the circumstances.

²⁵ s38

²⁶ cf *Ship 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 (at 419), *AA Pty Ltd v Australian Crime Commission* (2005) 60 ATR 440 (at [21]), *Channel Seven Adelaide Pty Ltd v ACMA* [2013] FCA 812 (at [57]).

²⁷ *Plaintiff M70/2011 v Minister* [2011] HCA 32 (at [97]).

²⁸ *Macquarie Dictionary* (at XXX).

²⁹ *Australian Oxford Dictionary* (at 1083).

³⁰ *Compact Edition of the Oxford English Dictionary*, Volume II (at 2463).

³¹ *Dictionary of Mining, Mineral, and Related Terms* (at 450).

³² Citing *Fay A Glossary of the Mining and Mineral Industry* (1920).

Note to s 40-100

My reading of s 38-385 is also consistent with the note to s 40-100, to the extent that a note can properly be taken into account for interpretational purposes. This note forms part of the GST Act³³, but is not an explanatory section as would formally invoke the interpretational rules in s 182-10(2). Despite this, the note will be taken into account by a court, but it cannot operate to alter the meaning of a provision that a court without reference to it would otherwise reach³⁴.

Words of s 38-395

Accordingly, the first conclusion I draw is that, on a primary examination of the text consistent with what is required by *Unit Trend Services* and a range of other recent cases, the words of s 38-385 are ample enough to cover the first supply to a dealer of 'precious metal' refined from scrap metal.

Extrinsic materials

Leaving aside the observation that extrinsic materials are rarely ever useful in interpretational situations for the reasons given in *Harrison v Melhem*³⁵, my view is that the *explanatory memorandum* in the present case provides no sure guide whatsoever as to the policy or purpose of s 38-385. In particular, I do not see how the statements in paragraphs [1.11-1.12] are construed to distil certain policy, much less to exert any legitimate influence over the provision itself. I cannot accept the draft discussion paper position that, because paragraph [1.11] talks about the way that 'precious metals are mined and supplied in Australia', that this means s 38-385 only applies to mining. At most, paragraphs [1.11-1.12] may half suggest some vague policy direction, but that is all. There is no clear implication that later refinement was positively intended to be beyond the exemption. What is of concern is the suggestion or question about whether the Commissioner is 'required to follow' the *explanatory memorandum*. To do so would invert the process of interpretation.

What a court would do

In the face of what I regard as the plain open words of s 38-385(a), the *explanatory memorandum* moves the legal analysis nowhere. ^{s38} position may be an example of self-construction of desirable policy, imputing it to the legislature, and then (contrary to *Australian Education Union*) characterising the result as the statutory purpose to be served. Further, I do not see any scope for reading words into s 38-385(a) to secure the policy outcome argued for. And even if my analysis leads to an unintended consequence, the FCA would likely say that this is something for parliament to remediate. It follows that I agree generally with the view ^{s38}, which is consistent with both the earlier PBR and what industry representatives have argued for. I do not agree, however, that either 'practical business tax' considerations or what the AAT said in *AGR Joint Venture* advance the industry view in any real way.

s38

Other materials

Earlier ATO views

s38

The Issues Register for the *Mining & Energy Industry Partnership* confirms that precious metal refined from doré³⁷ then supplied to an agent refiner 'by way of sale or loco swap' attracts s 38-385. On the same Issues Register are the so-called *Eight Precious Metal*

³³ s 182-1(i) of the GST law, cf s 13 of the *Acts Interpretation Act 1901*.

³⁴ *One.Tel Ltd v Rich* (2005) 190 FLR 443 (at [50-53]), *TWU v Schools Bus Contractors Pty Ltd* [2011] FMCA 28 (at [22-25]).

³⁵ See also *Commissioner for ACT Revenue v Dataflex Pty Ltd* [2011] ACTCA 14 (at [35]).

³⁶ s38

³⁷ The word 'doré' means a semi-pure alloy of gold and silver (the proportions of which can vary considerably) usually created at the minesite for transportation to a refinery, and invariably in the form bars weighing as much as 25kg.

Principles agreed by the ATO with industry which (A) are based on standard refining agreements, (B) underpin the doré conclusion above, and (C) constitute a public ruling.

s38

s38

the view adopted is that only to the first sale after the first refinement of 'precious metal' can be GST-free under s 38-385. The 'key element' is seen to be word 'that' in s 38-385(a) as an indication that subsequent refinements are beyond the scope of the provision. The example given is that 'the first supply following refining is a GST-free supply of that precious metal, as the metal was obtained from a mine site and has not previously been refined or supplied'. The following then appears –

This implies that when gold, silver or platinum is procured from other sources (i.e. other than from a mine in raw form) such as scrap metal, jewellery, coins etc that have previously been refined, subsequent supplies of that metal, will not be the first supply of that precious metal after refining, as that metal has previously been refined and supplied as jewellery, coins or other items etc.

s38 says this is 'further supported' by the *explanatory memorandum* (at [1.11-1.12])³⁸. In particular, paragraph [1.12] says that the 1999 amendments 'will ensure that the precious metal provisions ... better reflect the way the precious metals industry currently operates'. The report (at 10) then says that the 'legislative intention ... is to reflect the way precious metals are mined and supplied in Australia and does not apply to subsequent refining or melting of precious metals'.

s38 submits in response that the words 'first supply' are broad enough to cover later refinements of 'precious metal' from scrap. This, they say, is supported by GST being a 'practical business tax'³⁹, and by the industry convention to treat subsequent refinement as GST-free.

s38

reaches the same conclusion, but emphasises that all conditions of s 38-385 must be met. said there was 'no ambiguity in the wording of paragraph (a)' and that the wording 'is clear and broad enough to include the first sale after each subsequent refinement. He thought that there was no scope to limit s 38-385 to the first sale after the first refinement, and said that 'this is a straight application of the law [and] therefore not an interpretative issue'⁴¹. I substantially agree with this.

s38

³⁸ Explanatory Memorandum to the *A New Tax System (Indirect Tax and Consequential Amendments) Bill (No 2) 1999*.

³⁹ *Sava Holidays Ltd v FCT* [2006] FCAFC 101 (at [20-20]) cited.

s38

20. If, as asserted by the ATO this morning, there is only one first supply with any gold material this means that it is necessary to trace gold at, an atomic level, to work out whether the material has been previously supplied as “precious metal”. With a fungible commodity like gold or silver this is impossible.

21. Even if the recycled material represents as little as 1% of the completed product it would mean that the “precious metal” is not GST-free even though 99% of it has not gone into consumption as precious metal before (i.e. it had come from a mine). With respect, it cannot work that way.

At the end of the representations (at [23-24]), further views are put regarding how s 38-385 applies –

23. There is nothing here that suggests that the exemption applies one time only to the raw material when it comes out of the ground or that contamination of the gold or silver with a minute amount of recycled material will deny the exemption. The amendment to insert the words “, or on behalf of,” in s.38-385 was to ensure that the exemption would apply to miners who retained title to that raw material and who had their material processed for them by a tolling operation so that they can make the first supply to a dealer. There is no suggestion that this amendment was directed at denying GST-free treatment to “precious metal” as defined that has been produced by refining recycled material.

24. In the case of *AGR Joint Venture and Commissioner of Taxation 2007 ATC 2692* President Downes and Senior Member Sweidan said that they were obliged to apply the GST law in a practical and commonsense way avoiding interpretations that are unduly technical and overly meticulous (at [32]). To suggest that the exemption provided by s.38-385 is denied if “precious metal” contains any recycled material is counter intuitive, not supported the legislation and contrary to the principles identified by the AAT. Furthermore, this interpretation would be contrary to industry practice where, perhaps more than any other industry, material is recycled.

Further angles

At the PHU, the treatment of ‘precious metal’ under the *Fightback Proposal* in the Cole Report⁴³ and under the old sales tax law were raised. While neither of these factors, whatever they may show can influence what the words of s 38-385 mean, I will deal with each for completeness.

Chapter 41 of the Cole Report proposed that fine metal be zero-rated if supplied by a refiner to a dealer, it is the first supply after refinement and it is to be used as an investment. The term ‘refiner’ was to be defined to include fine metal producers where metal ores are refined for them by the physical refiners without the passing of title⁴⁴. The proposal generally ‘borrows from the New Zealand experience’, it was said⁴⁵. No mention is made specifically of refining from scrap metal and the whole of the Cole Report discussion is in terms of ore and doré being refined. In the time available, I have not been able to consider how newly refined ‘precious metal’ is dealt with in NZ⁴⁶.

So far as the old sales tax law is concerned, indications are that sales following subsequent refining of gold ‘from ores, jewellers’ floor sweepings, scrap gold and direct from the Mint’ were exempt⁴⁷.

Gordon Brysland
27 November 2013

⁴³ Cole Report of 14 December 1992 by the GST Planning & Co-ordination Office to the Leader of the Opposition.

⁴⁴ cf Principle 7 in the *Eight Precious Metal Principles* agreed by the ATO with industry.

⁴⁵ Cole Report (at [41.4, 41.4.2]).

⁴⁶ s 11(1)(n) of the *Goods and Services Tax Act 1985*, McKenzie *GST- A Practical Guide* (at 34 [9202], 55 [9307]).

⁴⁷ *Australian Sales Tax 1984* (at 116 [595-598]).



Precious Metals – Law Advocacy Action Items

Title:	Precious Metals – Law Advocacy Working Group		
Issue date:	25th May 2016		
Venue:	Audio Conference s47E(d)		
Event date:	Tuesday 24th May 2016	Start: 1.00pm	Finish: 1.40pm

Chair:	Jasmine Edwards	Secretariat:	Jasmine Edwards
Contact	X33780 or s47E(d)	Contact phone:	X33780

ATTENDEES

Key stakeholders		
Business area	Business section	Representatives
Indirect Tax	Risk and Strategy GST Evasion	James Webeck Jasmine Edwards
Indirect Tax	Government Relations and New Measures	Margot Tredoux
Indirect Tax	Policy Analysis and Legislation	Trent Jakubowski
Indirect Tax	Tax Counsel Network	John Gleeson
Indirect Tax	PGH	Jacinta Lawson
Indirect Tax	Technical Leadership & Advice	Vanessa Keane Barry Chen

APOLOGIES

Business area	Business section	Representatives
Indirect Tax	Government Relations and New Measures Policy Analysis and Legislation ***Note Trent has taken over from Kathleen De Kleuver (optional invitee)	Jasmine Boncales Kathleen De Kleuver Deborah Becker

NEXT MEETINGTuesday 7th June 2016 (*Regular PHU to be scheduled from this date*)**AGENDA SUMMARY**

AGENDA ITEM NO.	AGENDA TOPICS	DISCUSSION LEADS
1	Welcome	Jasmine Edwards
2	Treasury discussions	Margot Tredoux/Trent Jakubowski
3	Private Binding Rulings and Alerts (Internal and Taxpayer)	Barry Chen/Vanessa Keane/Jacinta Lawson/John Gleeson
4	The Way Forward	All
5	Exchange of Information	James Webeck/Jasmine Edwards
6	[REDACTED]	James Webeck/Jasmine Edwards
7	Meeting close and next meeting	Jasmine Edwards

Previous Action Items

All previous action items related to the development of the Options Paper and Treasury Alert and have been actioned.

Discussion Overview

The topics included a discussion of the way forward (next steps) following the Options Paper Workshop on the 10th May, 2016 with key stakeholders. Precious Metals was incorporated into high level Treasury discussion – work is continuing to progress this issue with additional work being commenced in respect of PBRs, potential ATO ID and Taxpayer Alerts in the interim.

Summary of new action items

Action item 1

Reference	OPTIONS WORKSHOP – 10TH MAY 2016
Action item	Minutes from the workshop are expected to be provided in the next few weeks from the Design Team Facilitator. Documents drafted during the workshop and key documents are contained in the previous minutes of 17th May, 2016.
Responsibility	Kathleen De Kleuver/John Alley
Action required by	ASAP (pending Options Workshop Minutes)

Action item 2

Reference	TREASURY DISCUSSIONS
Action item	The precious metals reform issue was discussed at a meeting on Friday 20 May, 2016; this meeting was high level and not exclusive to this issue. As with all measures and particularly GST the attention to the precious metals reform issue is dependent on government priorities and the program as a whole and where the issue can placed in a Bill. The priorities are determined by the government in power and the budget s22 [REDACTED]
Responsibility	Margot Tredoux/Trent Jakubowski
Action required by	7 June, 2016.

Action item 3

Reference	PRIVATE BINDING RULINGS AND ALERTS (INTERNAL AND TAXPAYER)
Action item	Barry advised that TLA has continued progressing activities in obtaining Private Binding Rulings from the database to assess the accuracy and conflicting advice that may have been issued to industry participants. Rulings that have been incorrectly issued may be considered for withdrawal. Flow on issues will include previous audits which will require further consideration where incorrect decisions have resulted from ATO interpretation issues.

Division 66 - On the issue of how to interpret paragraph (b) of the second hand goods definition, based on the search result so far, there are about a dozen PBRs issued in 2011 and 2012 that were inconsistent with the current TCN view. The latest inconsistent advice was issued in May 2013. So far, we have not identified any inconsistent PBRs issued on this issue since May 2013 but will explore further to confirm. Most of these affected taxpayers approached the ATO in year 2015 and requested to have PBRs revised and we did reissue the PBRs to those affected taxpayers (about 10 of them). There is a historical reason as to why this occurred. In year 2011, an officer that was involved in the drafting of the GST legislation raised the issue that it was not Parliament's intent to allow gold jewellery to fall within the definition of second-hand goods for the purpose of Div 66. The advice from then CoE confirmed his view. The business line followed that view in providing advice and conducting audits. The issue was escalated to TCN in 2014 and TCN provided an advice that based on the current law as it stands, the business line's position cannot be sustained. The project team sought TCN's advice on the issue in 2015 and TCN reconfirm their view of 2014.

s38-385 - On the issue of the first GST supply of precious metal after its refinement so far, we have not identified any inconsistent issued PBRs. TLA will continue searches to obtain a more complete picture and will provide a summary of the findings.

Barry to provide a summary of these activities on completion.

New PBR's Alert

A new alert has been issued with respect to new applications of PBR's <http://sharepoint/GASites/ITXCommunicationsExchange/Lists/Tech%20alert/DispForm.aspx?ID=434&ContentTypeId=0x0104006A288FC9EA963041B50F9A0263C92A51>

ATO ID

Trent flagged the idea that an **ATO ID** should be issued confirming our view. Vanessa/John will explore whether these can be issued with Fiona Dillon and TLA can then work with TCN (John) on drafting and issue). This will assist in providing certainty on the ATO view to achieve consistency. An internal Tech Alert was discussed at the last meeting with respect to providing clarity around the ATO view in respect of s38-385 and Div 66 – this was not discussed at today's meeting but may be replaced by the **ATO ID**.

Taxpayer Alert

Jacinta advised that process for issuing a Taxpayer Alert should be accessible on intranet/sharepoint. Jacinta's key contact is Sue Brunner - it was agreed that the content of any Taxpayer Alert would need to incorporate clear key messages. Trent advised that these messages may take the form of the ATO view. Work as a group to develop this alert.

Jasmine to follow up process for taxpayer alert.

The issuing of alerts and ID's will also provide information for the law advocacy component.

Responsibility	Barry Chen/Vanessa Keane/Jacinta Lawson
Action required by	Ongoing

Action item 4

Reference	THE WAY FORWARD
Action item	<p>Further discussion and clarification of work required prior to progressing issue include:</p> <ul style="list-style-type: none"> ▪ Determination of whether a single fix or multiple treatments is required (solution mapping) and whether issues will be resolved. ▪ Map life cycle (supply chains) against potential solutions to determine best approaches is to be commenced with a draft or semi-draft to be presented at next meeting (ITX) – these need to be prepared in terms of 2 key areas (1) GST core provisions and (2) Behaviour (ie accreditation and other reporting) ▪ Consideration of markets for second refinement (commercial reality), volumes and spot price sensitivity (ITX) – not discussed James to follow up ▪ Consider ITX New Measures and phoenixing (PALS) – Trent to follow up ▪ Les DeWind/Paul Southwell to engage with Scott Parkinson
Responsibility	All
Action required by	Ongoing

Action item 5

Reference	EXCHANGE OF INFORMATION
Action item	<p>ITX tabled what further actions may be required with respect to EOI. Trent advised that further discussions may be of value pending progression and potential solutions. Jasmine to send Trent historical summary of activities to date (still pending).</p>
Responsibility	Jasmine Edwards/James Webeck
Action required by	ASAP

Action item 6

Reference	████████████████████
Action item	<p>ITX to follow up with CRM on any new developments in current conversations given ongoing dialogue with respect to the meaning of coins. Les De Wind is the SES manager for ██████████ Ashleigh may join forum at a later date where discussions with ██████████ may include potential reform – updates to be provided to CRM by James and Jasmine in the interim.</p>
Responsibility	Jasmine Edwards/James Webeck
Action required by	Ongoing

Indirect Tax SES Brief – Big 4 Meetings

AGENDA ITEM:
CONTACT:
MEETING DATE:

 30 Nov & 1 Dec
2015

SES ENDORSEMENT:
Purpose/outcome

To brief you on ATO activities with respect to the Precious Metals Industry.

Key messages

- Industry participants are exploiting exemptions and special rules in the A New Tax System (Goods and Services Tax) Act 1999 (GST Act in relation to 'precious metals' including gold bullion and scrap. The identified schemes exploit the legislative provisions due to the relative ease in which the form of precious metal can be altered.
- The high value of gold provides significant opportunity for exploitation, particularly in organised networks, both registered and unregistered. The behaviour ranges from simple and opportunistic (individuals and entities operating independently) to elaborate schemes, principally carousel style arrangements, whereby established syndicates acquire bullion and alter the form (melting or defacing) and re-supply the altered precious metal for refining.
- A whole of government approach has been adopted to address the risk which includes an ATO compliance programme which commenced in 2015/2016 and is expected to continue in 2016/2017. Results from current compliance activities include a significant reduction of fraudulent input tax credits particularly in relation to refunds, reductions in volumes of traded metal and the cessation of some operations.
- The current compliance programme incorporates a broad reaching treatment strategy across all industry tiers including refiners, bullion dealers, scrap dealers/amalgamators, gold kiosks and identified opportunistic individuals. The current focus and priority is to implement strategies which have an immediate impact on the industry.
- The ATO is actively promoting compliance and continues to monitor behaviours of participants and new entrants. Criminal prosecutions will be pursued in relation to identified participants as required.
- Matters are currently before the Administrative Appeals Tribunal and the Federal Court as a result of disallowed objections on assessments.

Key points

- The ATO is reviewing the potential issues identified from compliance activities and is considering what options are available to address the altering or conversion of precious metal and exploitation of the current legislative provisions.
- Engagement and consultation will continue and forms an integral component of ATO activities

Background/further detail

- The risk was identified following a series of intelligence referrals to the ATO. The Australian Federal Police (AFP), in conjunction with the ATO executed search warrants on gold industry participants in October 2013. As a result of the investigations the ATO issued garnishee notices and GST amended assessments with liabilities of more than \$130m and issued ATO Media Release 2013/33.
- The Precious Metal industry is unique from a tax perspective with the interaction between the basic GST rules, exemptions (s38-385, s40-100), special rules (Division 66) and additional requirements relating to the form and fineness of precious metals. The relative ease with which the form of precious metal can be altered or said to have been altered has resulted in significant issues in terms of industry behaviour and the derivation of tax benefits usually in the form of fraudulent input tax credits.



IGT-PM-REQ 6-7 (Additional Information)

Please provide information on:

- the monitoring and analytical activity undertaken prior to Operation Nosean commencing, providing context to how the ATO viewed activity in the precious metals industry, and
- a contextual summary of the activity undertaken from Operation Nosean up to the eventual law reform measure coming into operation.

ATO response

Prior to Operation Nosean commencing no specific refund integrity processes targeting the precious metals industry were employed by the ATO, as refund claims by industry participants would have been risk assessed by the general GST refund risk models in operation at the time. These models included the Risk Rating Engine (RRE), which incorporates a number of business rules that detect high risk refunds such as large value claims, unusual refunds, and claims from new businesses.

In addition to the RRE, Suspect refund models (post 2009) specifically targeted fraudulent refunds, as such, high risk refund claims for the precious metals industry would have been subject to business as usual (BAU) verification checks by these processes at the time.

As previously advised, the ATO does not rely solely on data analytics to identify fraudulent activity, as other sources of information (i.e. external agencies and community information) is required to support this process. Where action has been taken to obfuscate arrangements and transactions, the additional information (referral) is critical to identify the fraudulent activity, such was the case in respect to the fraudulent activity in the precious metals industry.

As evidenced in our prior responses, the analysis of industry turnover and refund claims undertaken by the ATO suggests there was no significant risk to revenue prior to late 2011. (Refer to the Refund Analysis (July 2011 – Jan 2016) – provided in IGT_PM_REQ 6-7 preliminary information and Document 2, IGT-PM_REQ1).

The following supplementary documents have also been supplied to provide a more comprehensive understanding of the various activities undertaken within the ATO leading up to the eventual law reform. Some of these documents were mentioned previously as part of IGT-PM-REQ2 but were not supplied due to case sensitive material. These documents have since been redacted, where necessary.

- 17 September 2013 – Concerns identified within GSTR 2003/10 on the application of accreditation and Div 66 of the GST Act (refer to Document 1).
- 27 November 2013 – TCN Advice on application of s38-385 to 'precious metal' refined from scrap provided the view that the legislation does not distinguish between first and second supply. This view was applied to subsequent refiner refunds (refer to Document 2).
- 24 February 2014 – Clarification sought from TCN on the impact of the definition of precious metals on the application of Division 66 Second Hand Goods, with advice provided in July 2014 that second-hand jewellery is not excluded from being second-hand goods under paragraph (b) of the definition of second-hand goods (refer to Document 3).

- February 2015 – TCN issues paper (GST and Gold) which contemplates the GST Act in the context of the schemes identified from compliance activity (refer to Document 4).
- March 2015 – Re-submission to TCN in respect to section 38-385 (accreditation) and Paragraph b of Division 66 of the GST Act (refer to Document 5a). Advice received in May 2015 (refer to Document 5b) provided no further opportunity to address the compliance issues and articulated the ATO view on these issues.
- In September 2016 the Draft Precious Metals Project Assurance Strategy was developed for the 2016-17 financial year (refer to Document 6). This document detailed the proposed strategy based on the current ATO view of the taxation of gold, prior to the legislative reform.

The ATO explored other avenues through compliance activity on the application of 40-100, however evidence was unable to be obtained to support this argument. The relevance of this aspect of ATO activity, is that it relates to addressing the first and second supply issue identified. The ITX Executive then proceeded to pursue the application of the anti-avoidance provisions (Div 165 of *A New Tax System (Goods and Services Tax) Act 1999*) against the refiners as a means of addressing the risk in the precious metals industry.

As noted and documented in previous responses, opportunities to progress law reform were considered throughout the management of Operation Nosean, and the Gold Bullion Project.

Additional documents relating to the Precious Metals Law Advocacy working group are being provided as additional evidence of the action undertaken by the ATO in respect to obtaining the eventual law reform in relation to the reverse charge measure (refer to Documents 7a-k). Integrated Tax Design was first engaged GST Risk and Strategy in April 2015, with subsequent meetings taking place after obtaining TCN advice in order to support discussions with Treasury with respect to legislative intent. Documents 7c, 7f and 7g are relevant papers provided at those meetings. Due to the sensitive nature of these documents, the majority have been redacted.

As documentation being provided in respect to this response contains sensitive information, as well references to advice obtained from external firms, these documents, or any material contained within these documents, cannot be on disclosed or released into the public arena without the prior consent of the ATO.

Supporting documents

1. Gold Bullion Project Minute_AC Chris Barlow
2. Precious metals advice 27 November 2013

s22

- 7a. Precious Metals - Law Advocacy Action Items 20 Oct 2015
- 7b. Precious Metals - Law Advocacy Action Items 10 Nov 2015

7f. Precious metals workshop 10 May 2016

7h. Precious Metals - Law Advocacy Action Items 24 May 2016

ASSESSMENT

INTERNAL

MARCH

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FORMAT

AUDIENCE

2015

DATE

CLASSIFICATION



Australian Government

Australian Taxation Office

Operational Intelligence Assessment

Gold Bullion Fraud: Operation Nosean Business Model

An assessment of vulnerabilities in the GST system specifically in the gold market that enables GST refund fraud. Operation Nosean which resulted in \$130 million in GST, penalties and interest is used as a case study to demonstrate these vulnerabilities.

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V.2

DATE

17/03/15

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02/04/15

SCAN DISSEMINATION

Dissemination options	Access to document	Storage
All ATO staff	Yes	Store in Shared intelligence products or Shared information documents library.
Designated staff only (such as decision makers, intelligence analysts and risk officers)	No	Store in Limited access intelligence products and information documents library. (Create and store a separate abstract in the appropriate Shared library for every document stored in the Limited access library.)
Upon request only	No	Do not store in IPR workspace.

VERSION CONTROL

Version	Revision date	Name of author/modifier	Distributed to
V1	22/02/2015	Jozef Imrich	Marie Gannon, Renato Derango, Steve Hoult
V2	19/03/15	Jozef Imrich, Marie Gannon	Gary Read

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EXECUTIVE SUMMARY

Operation Nosean arose from a Criminal Assets Confiscation Taskforce (CACT) referral to the ATO on potential abusive behaviour in Gold Bullion trading. This highlighted a serious and ongoing risk to GST fraud.

The risk centres on abusive behaviour by altering or misclassifying pure gold bullion bars and coins — which are legally not taxed — as lesser-quality or scrap gold, which is taxed at 10%, in order to fraudulently claim Good and Service Tax (GST) credits.

The business model used is similar to Canadian experience. In Canada “The Waste Gold Asset Flip Scheme” involved several steps.¹ Companies were incorporated for the sole purpose of purchasing pure, hallmarked gold, which is GST free when purchased from a refinery.

The gold was melted down to produce alloy gold, which was then sold to other companies, who claimed Input Tax Credits (ITC) on their purchases. In turn, these companies then sold the alloy to a refinery. This process brought the gold back to its original hallmarked purity, to be sold again by the refinery as GST free gold.

The Australian gold bullion scam identified in Operation Nosean involved the processing and reprocessing of pure gold and scrap gold in sham economic activity designed to claim GST refunds, while failing to remit GST to ATO.

The fraud essentially is possible by exploiting the differing GST status of gold as sales of pure gold are GST free while sales of gold objects such as jewellery may be input taxed or taxable. This creates a tax loophole when gold bullion is ostensibly converted back and forth between the two forms.

There were small differences between each transaction, perhaps to evade detection, or to account for individual issues encountered however all employed the basic steps in the business model.

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From an operational perspective Operation Nosean demonstrated the effectiveness of multi-agency cooperation however the inherent vulnerability within the GST system on the treatment of gold means that the risk for exploitation remains and the abusive behaviour is likely to evolve to evade detection.

Compliance activity, including cross agency investigations and proceeds of crime action can only treat the symptoms and not the cause. Consequently priority focus needs to be applied to addressing the underlying legislative vulnerabilities.

In the interim potential for detection may exist with monitoring of BAS lodgements of refiners given the dramatic change in GST refunds noted of two refiners following the warrant and assessment action undertaken in Operation Nosean.

¹ Revenu Quebec. The total value of the alleged illegal transactions amounted to a total of C\$1.8 billion and allegedly defrauded the government of more than C\$150 million in taxes (Kitco Metals Inc case) <http://business.financialpost.com/2011/06/10/revenue-quebec-investigates-massive-gold-fraud/>

INTRODUCTION

Information received from law enforcement agencies² and other intelligence sources³ suggested that gold bullion is being cycled through gold refining entities. The bullion is broken down into a taxable form prior to being 'reconstituted' and sold GST Free to a precious metal dealer after GST credits have been fraudulently claimed on the purchase by misrepresenting the nature and status of the transactions.

In 2014 Operation Nosean; a joint Australian Taxation Office (ATO) and Australian Federal Police (AFP) investigation highlighted a serious and ongoing risk to revenue arising from the abuse of the GST system by participants operating in the Gold Bullion industry. At the simplest level, refunds of GST arise where the credit claimed for purchases of taxable supplies exceeds the GST payable on sales of taxable supplies.

The GST fraud came to light when compliance activities, as a result of a AFP (CACT) referral, identified complex supply chains (syndicates)⁴ in which participants:⁵

- changed the nature (form, purity etc.) of bullion to generate GST refunds (eg melting of .9999 bullion for sale as scrap gold)
- failed to remit taxes within the supply chain
- claimed GST credits where no lawful entitlement exists
- obtained financial benefits resulting from fraudulent trading activities, in particular the use of third parties to establish bank and trading accounts.

Broadly, the tax mischief identified can be described as:

- purporting to change the nature (form, purity, etc) of bullion to generate GST refunds;
- failure to report and pay GST by some participants;
- receiving financial benefit resulting from the fraudulent trading activities and subsequent GST reporting.

A number of fraudulent gold bullion schemes have been identified each with similar business models, but with slightly different characteristics. For example, the use of identity fraud, the creation of documents purporting to evidence acquisitions from third parties and the use of

² Financial Action Task Force, Report on Money Laundering Typologies 2002-2003, FATF, Paris, 2003, viewed 20 September 2013, www.fatf-gafi.org

³ Australian Transaction Reports and Analysis Centre, Money Laundering in Australia 2011 (MLA 2011), AUSTRAC, West Chatswood, NSW, 2011, p. 25, viewed 20 September 2013, www.austrac.gov.au/money_laundering_in_australia_2011.html

⁴ GST risks associated with gold bullion and precious metal traders
<http://workspaces/Knowledge/IPR/Limited Access Documents/GoldDealersJun2013FOUO.pdf>

⁵ Gold Bullion Industry Project
<http://workspaces/Knowledge/IPR/IntelProducts/20140318CashEconomyALERTGoldBullion.docx>; Rivers of gold: Raids take shine off alleged scam that has cost taxpayers an estimated \$200m SMH 13 July 2014 <http://www.smh.com.au/national/rivers-of-gold-raids-take-shine-off-alleged-scam-that-has-cost-taxpayers-an-estimated-200m-20140712-3btv8.html> ; Tax Crime Focus Group held on 28 November 2013 at Hurstville <http://workspaces/Knowledge/IPR/Shared Documents/TaxCrimeFocusGroup20131128.pdf> ; Tackling VAT fraud: International VAT Monitor, 2014 (Volume 25), No. 5 http://online.ibfd.org/collections/ivm/html/ivm_2014_05_int_1.html?WT.z_nav=Navigation&colid=4947; An organized crime: Tax fraudsters steal from the German Treasury <http://www.zeit.de/2010/48/Umsatzsteuerbetrug-Steuerhinterziehung/komplettansicht>

fraudulently obtained identification to create the façade of legitimate suppliers into the syndicates.

This assessment therefore seeks to increase understanding of the abusive behaviours that can readily be engaged in by entities intent on obtaining fraudulent GST refund activities by highlighting:

- the role of precious metal traders; and
- observations of key players.

Operation Nosean – Background

In late 2012 the investigation into Nosean syndicate was part of the work undertaken by the joint-agency Criminal Asset Confiscation Taskforce (CACT).^{s37}

A referral to the ATO was made.

As a result of this referral a compliance audit was commenced which undertook enquiries of selected bullion traders involved in the Nosean syndicate in relation to possible GST fraud. The controlling mind became aware of these enquiries and trading ceased.

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he activities of the syndicate resumed as previously.

In October 2013, the joint AFP/ ATO investigation, amended GST assessments and garnishee notices were issued to corporate entities linked to a syndicate involved in gold bullion trading activities. The outcomes of these activities can be summarised as;

- Total liabilities including GST, penalties and interest \$130,785,780
- Cash collections (by way of garnishee notices) totalling \$17,774,299

Numerous 3E search warrants were executed by the AFP on various premises in New South Wales and Victoria on the same day that amended assessments were issued. Large amounts of documentation, as well as equipment purportedly used by the syndicates to transform the gold bullion, were seized.

The immediate effectiveness of these activities across industry participants was evident in the BAS lodgements after the assessments issued and warrants were executed.^{s38}

ANALYSIS AND FINDINGS

Operation Nosean Business Model

At the heart of this fraud is the process of converting pure gold into a gold object and then refining it back into a pure state. Contrived transactions were used to obtain refunds of GST that were never actually paid.

Analysis of transactions

There are four key identities used in the commission of this fraud:

- Bullion Dealer (also the controlling mind of the scheme)
- Buyer
- Scrap Dealer
- Refiner.

The following explanation and the diagram overleaf explain the process of transactions typically used in committing this fraud.

1. **Bullion Dealer** sells pure gold (marked bars – 99.9% purity) to the **Buyer**. At this point pure gold is not subject to GST.
2. The **Buyer** purports to acquire gold in a taxable form (i.e. scrap) from fictitious suppliers. Analysis of information holdings failed to identify any acquisitions of this nature - all available evidence is that only (input taxed) bullion was acquired by the **Buyer** from the **Bullion Dealer**.

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3. The **Buyer** melts down the gold at their business premises and recasts it as unmarked (or in some cases 'unmarks' it by defacing the bullion). At this point the purity of the gold is unknown and it is subject to 10% GST.

Notionally, the three **Third Party Gold Account Holders** transfer ownership of the gold to the **Scrap Dealer**, as scrap gold, which is now subject to GST. Tax mischief occurs at this stage as no GST was remitted by the **Third Party Bank Account Holders** to ATO.

As the third parties are not registered for GST they have not issued tax invoices for the gold.

At this point the **Scrap Dealer** claims a GST input tax credit they are not entitled to claim as no GST was remitted.

4. **Scrap Dealer** then on-sells the gold to the **Refiner** as scrap gold, who then re-refines the gold into pure bullion and circulates it back to the wider gold bullion dealer market.

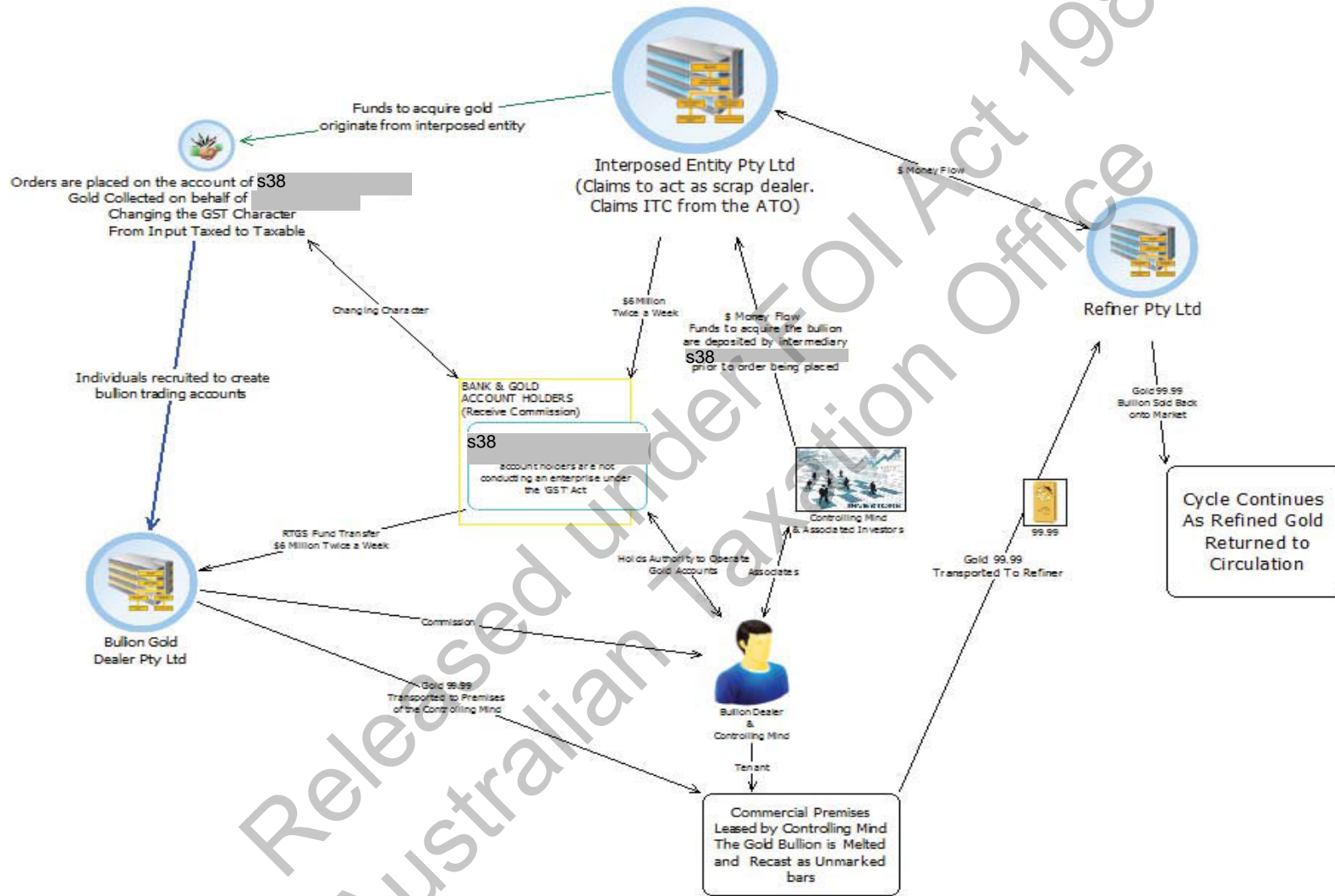
The scrap dealer is intended to provide a layer of separation between the buyer and the refiner. The interposing of third parties to pay for and transfer the purchased gold was not typical to all bullion schemes reviewed. This was a variation seen in a more sophisticated arrangement and represented an attempt to further isolate key players in the fraud from each other, in order to make detection of the fraud more difficult.

The funds used in the scheme highlighted above came from a number of investors linked to the **Scrap Dealer** ^{s38} [REDACTED]

It is notable that it usually takes about one week to process a gold refinement transaction in the precious metal industry; however in Operation Nosean the transactions took place within a day or two.

Entities identified in this Operation had undergone significant recent growth in turnover in the same period of time.

Relationship Chart



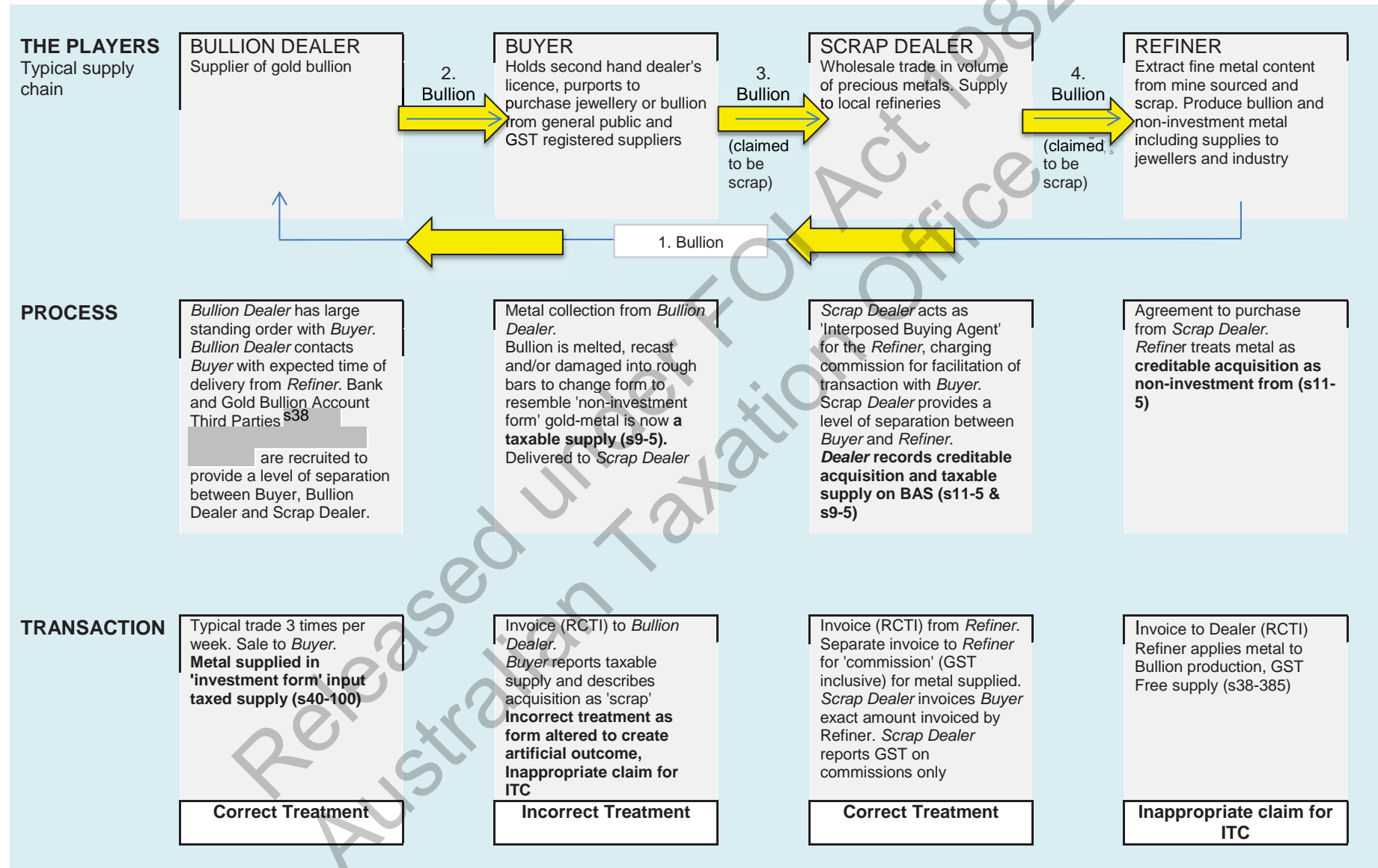
Patterns of behaviour

Two main types of behaviour have been observed which fit the available information:

- 1) Opportunistic gold trading – individuals and entities operating
- 2) Contrived supply chains – elaborate schemes, principally carousel style arrangements whereby established syndicates acquire bullion and alter the form (melting or defacing) and re-supply the altered precious metal for refining.

Tax benefits are derived through either registered and/or unregistered supply chains where s38-385 and Division 66 apply. The issues relating to the current legislative framework are discussed in more detail in the diagram on the next page.

Typical Gold Bullion Transactions and Arrangements



Lessons Learned from Operation Nosean

Legislative Enablers and Drivers

Precious metals create unique opportunities for exploitation:

- A supply of Bullion (investment form metal) made by a refiner of precious metal to a precious metal dealer is a GST free supply (s38-385).
- The acquisition of the material applied to the production of Bullion is a creditable acquisition (s11-5) by the refiner.
- The price paid to the supplier is GST inclusive and a corresponding entitlement to ITC claimed in the relevant BAS.
- The supply of Bullion by a precious metal dealer and any later supply is input taxed (s40-100).

The interaction of s38-385, s11-5 and s40-100 effectively allow Bullion to be acquired, fed through a supply chain of entities (often with fictitious entities and/or directors) and ultimately acquired by a refiner who claims an ITC on purchase of the material.

The high value of gold and relative ease of availability and transport provides significant opportunity for exploitation of the existing GST provisions, particularly in organised networks.

The limiting factors to the scale of particular syndicates has been the availability of capital to fund the acquisition of bullion feeding the syndicate and/or the GST paid on the acquisition by the refiner between the time of acquisition and payment of the related BAS refund.

There is also exploitation of the special rules in Division 66 which allow the acquisition of second hand goods to be treated as a creditable acquisition where acquired from a non GST registered individual.

We have seen instances where entities purportedly engaged in the acquisition of scrap gold (usually claimed to be the fine gold content in unwanted jewellery or coins) from individuals where it has been revealed that the actual source metal was Bullion.

This arrangement ultimately facilitates a convenient entry point for bullion into a supply chain, the perpetrators seeking to disguise the source of the metal while claiming an ITC without entitlement which effectively funds the profit of syndicate participants.

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IMPLICATIONS AND ADVICE

GST refund fraud associated with precious metal trading remains an ongoing problem as the inherent vulnerability within the GST system in this gold market means that compliance activity cannot effectively treat the risk.

Bullion is a stable, anti-inflationary investment⁶. As such it holds an appeal as a mechanism for money laundering, particularly where criminals operate across borders and in volatile economies. There is considerable literature, including the AUSTRAC Typologies and Case Study Report 2013⁷ which link money laundering by organised criminal groups to gold bullion. The relative ease at which this fraud can be undertaken may make it an increasingly attractive proposition for organised crime and other fraudsters.

GST fraud, while serious, is considered victimless and white collar. The penalties while often significant and may include custodial sentences, are generally less than those for other organised crime activities such as narcotics. Additionally, activities undertaken to commit bullion fraud do not pose the same level of physical threat, which potentially reduces the risk factor for participants.

Mitigation and Detection

Further involvement continues with ATO Investigations into the investigation of criminal offences. The ATO continues to explore legislative and process reform in respect to the Gold Bullion industry where preliminary discussions have occurred with Treasury.

Recent open source reporting indicates an increasing trend in the volumes and value of gold bullion trading from 2012.⁸ The operation of a number of syndicates carrying out serious evasion in this sector could, if untreated, result in a rapid growth in serious evasion behaviour and subsequent increased risk to GST revenue.⁹

Potential for detection may exist however in closer monitoring of BAS lodgements of refiners given the dramatic change in GST refunds of ^{s38} refiners following the warrant and assessment action undertaken in Operation Nosean.

⁶ A Beginners Guide To Precious Metals

<http://www.google.com.au/url?url=http://www.investopedia.com/articles/basics/09/precious-metals-gold-silver-platinum.asp&rct=j&frm=1&q=&esrc=s&sa=U&ei=xIPRVJHQEYSomgXXnoA4&ved=0CBsQFjAA&usq=AFQjCNEtllkwGBh9G1CTI17SXygKnczEUw>

⁷ http://www.austrac.gov.au/sites/default/files/documents/typ13_full.pdf

⁸ Australia's gold industry: trade, production and outlook, DFAT, <https://www.dfat.gov.au/publications/stats-pubs/australias-gold-industry-trade-production-and-outlook.pdf>; https://www.dfat.gov.au/publications/stats-pubs/trade_statistical_articles.html; Forum Discussions relating to Precious Metals <http://forums.whirlpool.net.au/archive/1368090>

⁹ MTIC (VAT FRAUD) IN VOIP – MARKET SIZE: \$3.3B; Boston University School of Law Working Paper No. 10-03; (February 8, 2010) <http://www.bu.edu/law/faculty/scholarship/workingpapers/2010.html>; Value-Added Taxes: Lessons Learned from Other Countries on Compliance Risks, Administrative Costs, Compliance Burden, and Transition; GAO-08-566: Published: Apr 4, 2008. Publicly Released: May 5, 2008. <http://www.gao.gov/products/GAO-08-566>

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Australian Government
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SE R&S
FILE REF: BNE 03/13

Operational Intelligence Alert

GST risks associated with gold bullion and precious metal traders

The purpose of this intelligence alert is to outline the current serious evasion risk to revenue associated with the identified and potential abuse of the GST system by entities operating in the gold bullion and precious metal trading industry. The alert will also outline activities already undertaken to treat this risk and highlight that ITX Serious Evasion, Risk and Strategy team is seeking to share information with other ATO teams that have recently or are currently dealing with risks associated with gold bullion and precious metal trading.



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ENDORSEMENT/VERSION CONTROL

CURRENT VERSION NUMBER

3

DATE

20/6/13

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12 Jun 13

35148

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ENDORISING OFFICER/S APPROVAL

Glenn Smith

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Approved

20/6/13

ALERT PUBLICATION (select applicable option)

	Decision makers + Tier 1 Intelligence Analysts only	All ATO
Full Product Access		YES
Abstract only		
No Access		

VERSION CONTROL

Version	Revision date	Name of author/modifier	Distributed to
1	12 Jun 13	Todd Kliendienst	ITX SE R&S
2	13 Jun 13	Todd Kliendienst	ITX SE R&S
3	20 Jun 13	Glenn Smith	ATO

OBSERVATIONS

A combination of intelligence from ITX Serious Evasion Risk and Strategy (SE R&S), ITX Serious Evasion Delivery profiling, input from other BSLs and TERC referrals have highlighted a potential serious evasion risk to revenue associated with the abuse of the GST system by entities operating in the gold bullion and precious metal industry(s). This includes trading in bullion, granules and scrap gold/silver.

A case referred to SE R&S by the Criminal Asset Confiscation Taskforce (CACT) in 2012 resulted in the identification of ^{s38} [REDACTED]

[REDACTED] As outlined in GSTR 2003/10, gold granules are not precious metal for the purposes of the GST Act and are therefore a taxable supply for GST purposes, thus in this case there has been a failure to remit in excess of \$20 million in GST to the ATO. Other entities have been identified by SE R&S carrying out this typology of risk to GST revenue.

s38 [REDACTED]

The audit concluded that the taxpayer engaged in the avoidance of tax through the following actions:

- Misclassifying taxable supplies as GST-free supplies of precious metals.
- Claiming input-tax credits that relate to making input-taxed supplies.
- Claiming input-tax credits under Division 66 of GST Act on second-hand goods that do not meet the definition of a second-hand good.

Additional SE R&S intelligence assessments, ITX SE Delivery profiling and input from other BSL has identified the following behaviour by entities in the gold bullion and precious metal trading industry(s) that poses a risk to GST and other revenue:

- Using a 'missing trader' typology to either claim input tax credits against input taxed supplies or making taxable supplies on which GST is not remitted. This often involves the movement of funds through a range of elaborate syndicates with some gold products passing through 4 to 5 layers of entities.
- Carrying out 'asset flipping'. This involves a round robin of transactions between entities that purportedly change the nature of the gold product from an input taxed to a taxable supply and back to an input taxed supply again. The product can end up back at the original entity or an associate of the original entity with input tax credits claimed during the 'flip' and benefitting the controlling mind of the original entity.
- Continually trading with significant losses or low profit margins for prolonged periods.
- Reverse flow of funds through a number of entities in the supply chain
- The use of 'dummy' or 'straw' Company Directors, often visa holders.
- Family members operating in the business, often in key company roles, in addition to other family members operating related jewellery and scrap metal businesses.
- Extensive use of RCTIs.
- Significant discrepancies between gold/silver products reported as exported on BAS and Customs export data.
- Significantly understating profit margins for gold bullion sales.
- The formation of syndicates that carry out a combination of the evasion behaviour outlined above.

- Numerous entities in this industry have undergone significant recent growth in turnover in the same period of time. ^{s38}

Of note, it is possible that bullion dealers, jewellers and refiners are complicit by conspiring with or choosing to ignore the fraudulent actions of others. ^{s38}

SIGNIFICANCE

The observations outlined above indicate that significant revenue is potentially at risk with tax evasion in the gold bullion and precious metal sectors. Recent open source reporting indicates an increasing trend in the volumes and value of gold bullion trading from 2012. The operation of a number of syndicates carrying out serious evasion in this sector could, if untreated, result in a rapid growth in serious evasion behaviour and subsequent increased risk to GST revenue.

ACTIVITY

SE R&S and ITX SE Delivery are currently conducting intelligence assessments and profiles on a number of entities engaged in the gold bullion and precious metal sectors.

ITX SE Delivery has audited entities engaged in this sector.

SE R&S and ITX SE Delivery have been liaising closely with SNC on intelligence sharing and treatment strategy development.

ITX SE Delivery has escalated two issues to Central Technical Support in relation to precious metals to obtain an ATO view. The first issue is on the tax treatment of subsequent refinements of gold ie is gold purchased by second hand dealers and then put through a refinement process and sold for the first time after that subsequent refinement a GST free supply. The second issue is whether entities that acquire second-hand jewellery, coins and other collectable metal consisting of gold, silver and/or platinum, from individuals who are not registered for GST entitled to an input tax credit on the purchase of second hand goods pursuant to division 66 of the GST Act.

ACTION REQUIRED

SE R&S requests that other ATO teams dealing with entities engaged in the gold bullion and precious metal trading industry(s) notify SE R&S to assist in intelligence collection, the detection of entities engaged in possible evasion and to assist in the co-ordination of treatment strategies. This includes notification of cases irrespective of the GST classification of the product being traded ie irrespective whether the product is being traded is GST free, input taxed or taxable.

Please contact SE R&S via e-mail at 'ITX Serious Evasion Referrals' or direct enquiries to Glenn R. Smith, National Director ITX SE R&S on e-mail at GlennR.Smith@ato.gov.au or on (07) 5605 8335.

Appendix A - FURTHER Publishing DETAILS

Key Intelligence Need	Insert Text:	s37
Revenue Product or Focus Area	Choose 1 or more:	ATP, SNC, TPALS, GST, Income Tax, Debt
Outcomes Impacted	Choose 1 or more:	Community confidence, Revenue,
Market	Choose 1 or more:	Large, S&ME, Micro, Individuals
Contact Officer	Insert Text:	Todd Kliendienst
Date Created	Insert Text:	12 Jun 13
Business Line	Insert Text:	ITX
Revision Frequency	Choose From:	3 months
Enterprise Risk Category	Choose one from:	<ul style="list-style-type: none"> - Law interpretation - Major tax integrity threats - Policy advice and design - Tax revenue

Keywords List

goods and services tax (GST)	tax integrity threats (major)
emerging risks (ATO)	correct reporting
aggressive tax planning	debt collection (ATO)
international cross border transactions	money laundering

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Australian Government
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FILE REF: BNE 02/13

Operational Intelligence Alert

Gold trading risks

The purpose of this intelligence alert is to inform the intelligence community of current enquiries into the relatively new area of investigation, gold trading. The ITX Serious Evasion, Risk and Strategy team is seeking input from those who have knowledge of this activity and any awareness of issues or risks, whether treated or hypothesised, associated with gold trading and gold traders.



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ENDORSEMENT/VERSION CONTROL

CURRENT VERSION NUMBER

1

DATE

19/3/13

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Evasion

35128

ENDORISING OFFICER/S APPROVAL

Craig Powell

Director ITX Serious
Evasion

Approved

19/3/13

ALERT PUBLICATION (select applicable option)

	Decision makers + Tier 1 Intelligence Analysts only	All ATO
Full Product Access	YES	NO
Abstract only		YES
No Access		

VERSION CONTROL

Version	Revision date	Name of author/modifier	Distributed to

OBSERVATIONS

A matter was referred to Serious Evasion Risk and Strategy (SE R&S), by the Criminal Asset Confiscation Taskforce (CACT).

s38

As outlined in GSTR 2003/10, gold granules are not precious metal for the purposes of the GST Act and are therefore a taxable supply for GST purposes,^{s38}

s37

Other overseas jurisdictions such as Canada have reported significant mischief involving gold bullion including missing trader fraud and 'asset flipping' between GST free and taxable versions of gold

Matters for consideration for the ATO include missing trader fraud, misclassification of supplies, unreported sales and income, and 'asset flipping'.

SIGNIFICANCE

The case outlined above indicates the significant revenue that can be placed at risk with tax evasion in the gold trading sector. Open source reporting indicates an increasing trend in the volumes and value of gold trading. There is a potential significant risk to revenue through several avenues including missing trader fraud, misclassification of supplies, unreported sales and income, and 'asset flipping' in the gold trading sector.

ACTIVITY

SE R&S have commenced an intelligence scan to investigate the broader serious evasion risks associated with gold dealers.

This alert is issued to the greater ATO intelligence community seeking any available information or input from those who have knowledge of the before mentioned activities and any awareness of issues or risks, whether treated or hypothesised, associated with gold trading

and/or gold traders. Any information or inquiries can be forwarded to [Todd Kliendienst](#) of SE R&S - phone 07 3213 5148.

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Appendix A - FURTHER Publishing DETAILS

Key Intelligence Need	Insert Text:	s37
Revenue Product or Focus Area	Choose 1 or more:	ATP, SNC, TPALS, GST, Income Tax, Debt
Outcomes Impacted	Choose 1 or more:	Community confidence, Revenue,
Market	Choose 1 or more:	Large, S&ME, Micro, Individuals
Contact Officer	Insert Text:	Todd Kliendienst
Date Created	Insert Text:	19 Mar 13
Business Line	Insert Text:	ITX
Revision Frequency	Choose From:	3 months
Enterprise Risk Category	Choose one from:	<ul style="list-style-type: none"> - Law interpretation - Major tax integrity threats - Policy advice and design - Tax revenue

Keywords List

goods and services tax (GST)	tax integrity threats (major)
emerging risks (ATO)	correct reporting
aggressive tax planning	debt collection (ATO)
international cross border transactions	money laundering

IGT REVIEW

INFORMATION REQUEST - PRECIOUS METALS

TIMELINE	2012-2013 1/7 - 30/6	2013-2014 1/7 - 30/6	2014-2015 1/7 - 30/6	2015-2016 1/7 - 30/6	2016-2017 1/7 - Current	Comments/ References
	PRIVATE GROUPS AND HIGH WEALTH INDIVIDUALS (PGH)					
	Greg Williams Deputy Commissioner	Greg Williams Deputy Commissioner	Michael Cranston Deputy Commissioner	Michael Cranston Deputy Commissioner	Michael Cranston William Day Deputy Commissioner	
	Serious Non Compliance - Audit Peter Zjeleer/ Phil Jones (AC) Jacinta Lawson (EL2)	Tax Implications of Organised Crime TIOC-Audit William Day (ADC) Phil Jones (AC) Jacinta Lawson (EL2)	Tax Implications of Organised Crime TIOC - Audit William Day (ADC) Phil Jones (AC) Jacinta Lawson (EL2)	Tax Implications of Organised Crime TIOC-Audit Phil Jones (AC) - #1/11 Jeff McAlister (AC) Jacinta Lawson (EL2)	Tax Implications of Organised Crime TIOC-Audit Jeff McAlister (AC) Jacinta Lawson (EL2)	
	Serious Non Compliance - Investigations Troy Whelan (AC)	Serious Non Compliance - Investigations Troy Whelan (AC)	Criminal Law Investigations Troy Whelan (AC) Peter Vujanic (AC)	Criminal Law Investigations John Ford (AC) Troy Whelan (AC) - #2/16 Peter Vujanic (AC) Elizabeth Simpkin (EL2) #3/16	Criminal Law Investigations John Ford (AC) Peter Vujanic (AC) Elizabeth Simpkin (EL2) - #8/16 Jacqui Smith #8/16	
	INDIRECT TAX (ITX)					
	James O'Halloran Deputy Commissioner	James O'Halloran Deputy Commissioner	James O'Halloran Deputy Commissioner	James O'Halloran Deputy Commissioner - #1/11 Tim Dyce	Tim Dyce Deputy Commissioner	Jeremy Geale Deputy Commissioner - #9/10/17
	Serious Evasion	Serious Evasion Ian Read (ADC) Marina Dolevski (AC) - #24/6 George Montanez (AC) James Webeck (EL2)	Complex Assurance & Evasion (CA&E) Ian Read (ADC) George Montanez (AC) #1/7 James Webeck (EL2) - #31/8 Michelle Wenzel (EL2) #1/3 - 7/16	Complex Assurance & Evasion (CA&E) Ian Read (ADC) #2/11 George Montanez (AC) #1/7 - 2/11 Ian Read (AC) #2/11 Michelle Wenzel (EL2) #7/16	Complex Assurance & Evasion (CA&E) Ian Read (AC) Elizabeth Simpkin (EL2) #8/16	
	Risk & Strategy Chris Barlow (AC) Glenn Smith (EL2)	Risk & Strategy Chris Barlow (AC) # Retired Brett Martin (AC) Glenn Smith (EL2) - #15/7 Paul Bowmer (EL2) #15/7 ESM	Risk & Strategy Les De Wind (AC) # 1/10 Nick Roussos (EL2) James Webeck (EL2) #1/9-30/6 ESM	Risk & Strategy Les De Wind (AC) - # 1/8 James Webeck (EL2) ESM	Risk & Strategy Steve Howlin (AC) #1/8 - Retired 14/7/17 Katie Welsh (AC) James Webeck (EL2) ESM Kelly Canavan (EL2) SP	GST Evasion Strategy Manager (ESM) Special Projects (SP)
			ITX Government Relations Kathleen de Kleuver (AC) Kathleen de Kleuver (EL2) Debra Rowe (EL2)	ITX Government Relations Paul Southwell (AC) Debra Rowe (EL2) Margot Tredoux (EL2) #3/16	ITX Government Relations Paul Southwell (AC) #04/17 Margot Tredoux (EL2)	
	TAX COUNSEL NETWORK (TCN)					
		Jonathon Woodger Deputy Chief Tax Counsel Gordon Brysland (AC) Steven Koufomanolis (EL2)	Jonathon Woodger Deputy Chief Tax Counsel Gordon Brysland (AC) Steven Koufomanolis (EL2)	Jonathon Woodger Deputy Chief Tax Counsel Gordon Brysland (AC) Steven Koufomanolis (EL2)	Jonathon Woodger Jeremy Geale Deputy Chief Tax Counsel Gordon Brysland (AC) Steven Koufomanolis (EL2)	
	INTEGRATED TAX DESIGN (ITD)/POLICY ANALYSIS & LEGISLATION (PALS)					
		Special Tech Projects Frank Wilson (AC) #8/5 Retired		Andrew England First Assistant Commissioner Tracey Nicholson Ben Kelly Kathleen de Kleuver (EL2) Trent Jakubowski (EL2)	Andrew England First Assistant Commissioner	
Area of Responsibility National Program Managers (NPM)	Serious Non Compliance - Audit #2/5 CACT/SNC Meeting regarding specific activities undertaken by ITX and further instructions (Minutes) - additional notes/email 19/6 - (NFRPA)	s37				

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TIMELINE	2012-2013 1/7 - 30/6	2013-2014 1/7 - 30/6	2014-2015 1/7 - 30/6	2015-2016 1/7 - 30/6	2016-2017 1/7 - Current	Comments/ References
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Executive Briefings PGH	Serious Non Compliance - Audit s37
	#28/5 Exec AC Briefing - Gold Bullion Treatment Strategy -(NFRPA)



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AGENDA

MEETING

15 MAY 2013

SENSITIVE

FORMAT

EVENT TYPE

DATE

CLASSIFICATION

**Australian Government****Australian Taxation Office****Purpose**

To develop a cross BSL strategy addressing risks associated to the Gold Bullion industry.

AGENDA

FILE REF:

TITLE:	SNC / ITX cross BSL Risk strategy		
VENUE:	Terrica Place, Brisbane	Dial in 1800 857 853	#618291
EVENT DATE:	Wednesday 15 May 2013	START: 9am	FINISH: 2pm (EST)
CHAIR:	Jacinta Lawson	MINUTE TAKER:	
CONTACT:	Luke Manassa	CONTACT PHONE: X 53274	
ATTENDEES: NAMES/SECTION	Jacinta Lawson (SNC), Luke Manassa (SNC), Kathy Knappick (SNC), Glen Smith (ITX), Des McMaster (ITX), Craig Powell (ITX), Gary Lieschke (SNC Austrac Liason)		
	By Phone: Raymond Jamieson (SNC), Michael Bowd (SNC), Bronwen Gatehouse (SNC), s47E(d)		

AGENDA ITEM NO.	TOPIC	PRESENTED BY
1	Introduction	Jacinta Lawson / Luke Manassa
2	Overview of initial CACT Referral to ITX	Kathy Knappick / Julie Pearson
3	Syndicate One explanation – key entities and scheme	ITX teams
4	Other identified ITX syndicates	Glenn Smith / Des McMaster
5	Overview of second CACT Referral to SNC	Kathy Knappick / Julie Pearson

UNCLASSIFIED

PAGE 1 OF 2

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AGENDA ITEM NO.	TOPIC	PRESENTED BY
6	Syndicate Two explanation – key entities and scheme	Luke Manassa
7	Syndicate Three explanation – key entities and scheme	Luke Manassa
8	s37 [REDACTED]	Gary Lieschke
9	Discussion and agreement on BSL's tasking	All
10	Recap action items	All

Precious Metals Industry

Options for Reform



HMRC (UK) VAT MODEL

Workshop: 21st September, 2016

Jasmine Edwards
Risk & Strategy (GST Evasion)

x33780 or ^{s47E(d)} [redacted]

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BACKGROUND HMRC (UK) MODEL Value Added Tax 1995 (UK) Act

- ▶ Prior to 1 Jan 2000 investment gold was taxed with the exception of certain LBMA transactions which were zero rated (GST Free) between:-
 - LBMA members
 - LBMA members and non-members for gold not physically delivered.
- ▶ Changes were introduced to remove competition distortion between member states in accordance with the European Union and to place investment gold on the same platform as other investment products (*ie stocks and shares*). **Note: The UK is a member of the European Union (EU) – rules are aligned with the VAT Directive.**
- ▶ Post 1 Jan 2000 changes were made to **exempt (input tax)** for supplies of investment gold (including qualifying coins) – subject to an “**option to tax**”.
- ▶ Zero rating was retained for transactions between LBMA members (*VAT Terminal Markets Order TMO Notice 701/9*) and the requirement for physical delivery of gold was removed.
- ▶ Introduction of notification and record keeping requirements and a penalty regime for failure to notify or keep records.
- ▶ The scope of coins classified as investment gold (exempt) includes coins purchased not for rarity or numismatic interest but for bullion or investment. (*Coins acquired for more than 180% of precious metal content are excluded as investment gold.*)

THE HMRC (UK) MODEL (Post Jan 2000)

The legislation provides that investment gold is **exempt** (input taxed) – *investment purposes includes gold that is minted or transformed into coins, ingots, bars and wafers as a “store of value”*. The normal rules (**taxable**) apply to investment silver and platinum or gold that is not investment gold.

Additional features of the UK model include:

- Certain trading activities with London Bullion Market accredited members may be **zero-rated** (GST Free).
- “Option to Tax” to make exempt supplies of investment gold **taxable**;
- Limited right to deduct input tax (input tax credits) attributable to exempt (input taxed) supplies of investment gold;
- Special Accounting Scheme (**Reverse Charge**);
- Additional invoicing, record keeping and notification requirements;
- Penalty regimes;
- Specific measures to deal with missing trader issues and non-recoverability.

DEFINITION OF INVESTMENT GOLD

Supplies of investment gold are **exempt** (input taxed) for supplies, right of supply and agency arrangements (*Notes in Section 31 and Schedule 9 Part II Group 15 – Investment Gold*) for

- (a) Gold of a purity not less than 995 thousandths that is in the form of a bar, or a wafer, of a weight accepted by the bullion markets
- (b) Gold coin minted after 1800 that:
 - is of a purity of not less than 900 thousandths
 - is, or has been, **legal tender** in its country of origin, and
 - is of a description of coin that is normally sold at a price that does not exceed **180 per cent of the open market value** of the gold contained in the coin, or
- (c) An investment gold coin as specified in **Notice 701/21A – Investment Gold Coins**

***** The Australian definition of precious metal (s195-1) includes gold, silver and platinum and does not have the extensive requirements for “coins” as detailed in Paragraph (b) and (c).*

LONDON BULLION MARKET ASSOCIATION (LBMA)

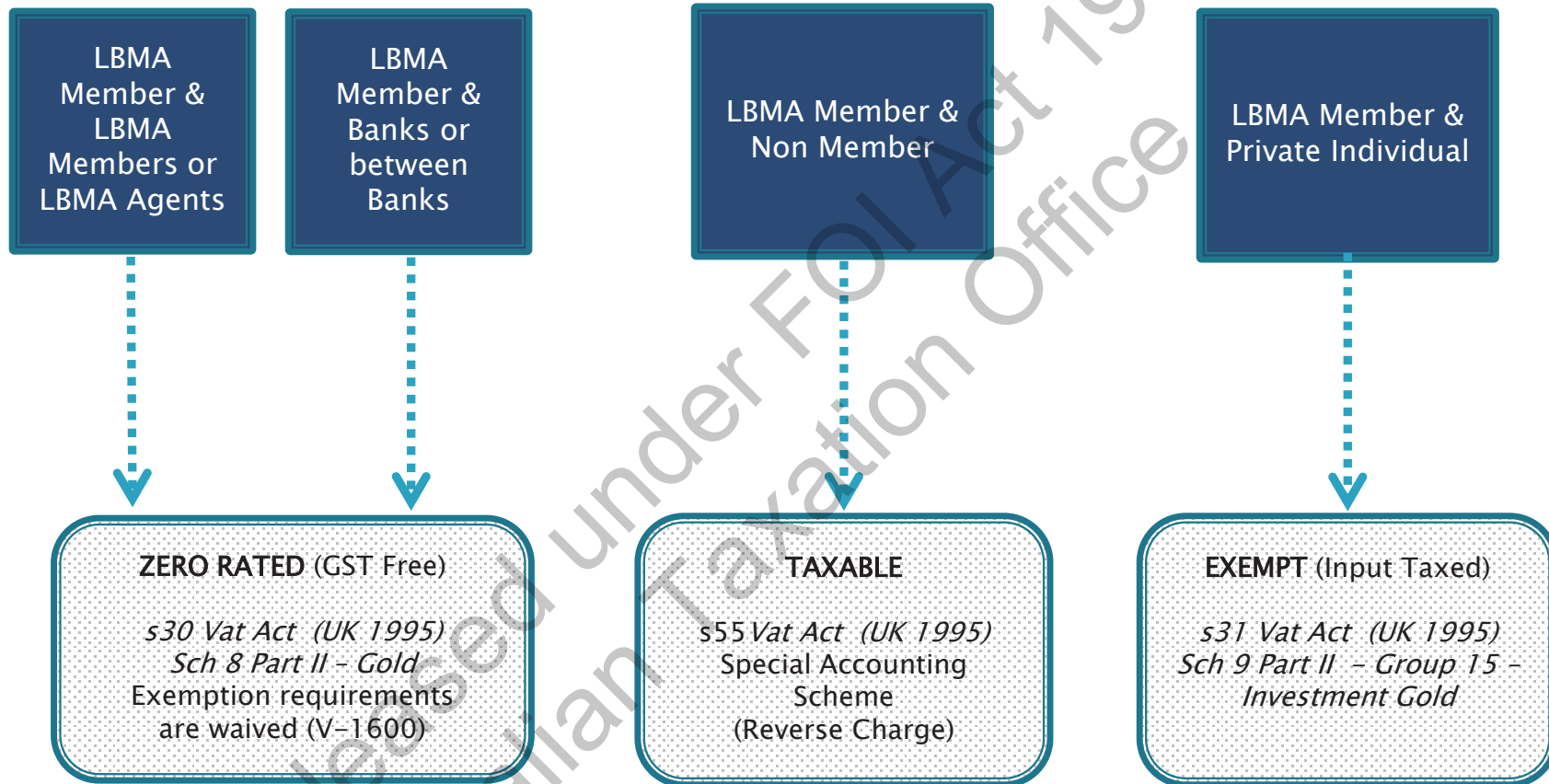
Zero Rating (GST Free)

- ▶ Members of the London Bullion Market Association (LBMA) typically trade with each other and clients on a principal to principal basis. Trading is effected in:-
 - ❑ Allocated accounts- specified bars which are owned (supply of a good)
 - ❑ Unallocated accounts - unspecified entitlement to value in stock (supply of a service)
- ▶ LBMA members (including agents) can benefit from zero rating (GST Free) relief for certain supplies of investment gold (including coins) including transactions between:-
 - ❑ LBMA members and LBMA members and Agents
 - ❑ LBMA members and central banks
 - ❑ Central banks and Central banks

Notice 701/9 - Commodities and terminal markets - trading which qualifies as zero rated (GST Free)

- ▶ Supplies between LBMA members and a non-LBMA member are taxable and subject to the Special Accounting Scheme (Reverse Charge).
- ▶ LBMA members that supply investment gold to non taxable persons is always **exempt** (input taxed).
- ▶ Where the transaction is between taxable members, the Member State is able to waive the requirement to collect the tax, i.e. is able to zero rate the supply.
- ▶ LBMA members can account for tax on behalf of non members who would only meet the registration requirements for LBMA type transactions.

LONDON BULLION MARKET ASSOCIATION (LBMA) Zero Rating (GST Free)



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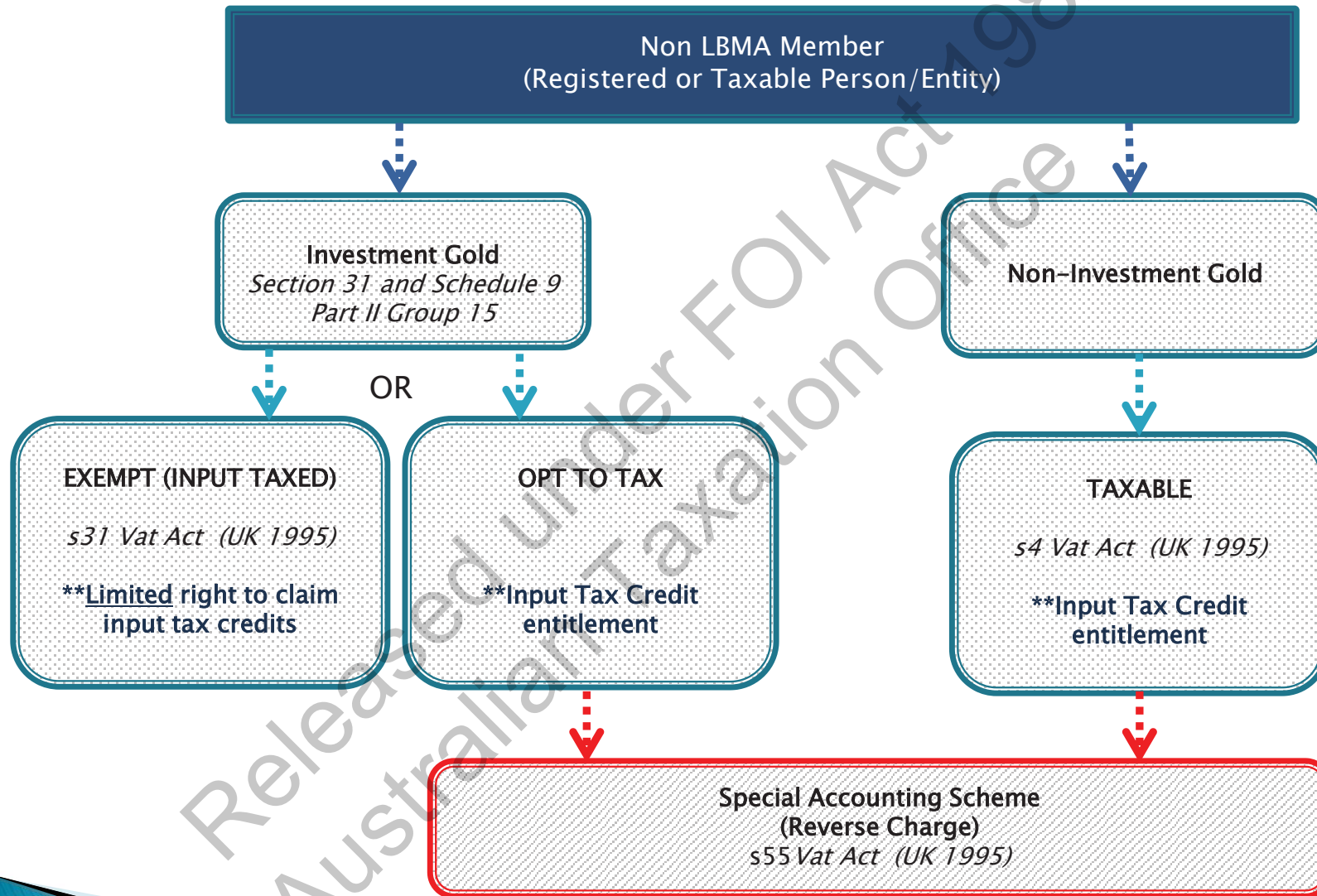
EXEMPT or OPTION TO TAX

- ▶ Supplies of investment gold are **exempt** (input taxed) except where an “option to tax” is elected.
- ▶ This election was Introduced to combat the issue of “sticky tax” to allow input tax credits to be claimed for an “opted” taxable supply of **investment gold** , it further allows “sticking tax to wash through to the final consumer where investment gold moves to industrial markets;
- ▶ Businesses can “opt” to tax:
 - ▢ **any** supply of investment gold to **taxable persons**
 - ▢ “producers” of coins (only) can access the “option to tax”, traders cannot access this option;

*Note: Supplies of investment gold to **non-taxable persons** will always be **exempt**;*

- ▶ Investment gold supplied for “industrial purposes” for individual transactions requires HMRC agreement which can be withdrawn where revenue protection is at risk.
- ▶ Agents acting on behalf of principals can further opt to tax services if it relates to a principals “opted supply of investment gold”;
- ▶ Input tax credits can only be claimed to the extent of being directly attributable to the making of taxable supplies where an option to tax has been elected.
- ▶ Input tax credits can also be claimed on acquisitions where the supplier has opted to tax, even if the consequential supply is **exempt**.

EXEMPT or OPTION TO TAX



LIMITED RIGHT TO DEDUCT INPUT TAX CREDITS FOR EXEMPT SUPPLIES OF INVESTMENT GOLD

- ▶ Supplies of exempt (input taxed) investment gold would generally not trigger an entitlement to input tax credits for acquisitions relating to that supply.
- ▶ The limited right to deduct input tax credits was introduced to combat the issue of “sticky tax” to allow input tax credits to be claimed for expenses directly linked to production costs by refiners and producers;
- ▶ Input tax credits are **limited** to the purchase of investment gold (*where a supplier has opted to tax*) or any other gold refined to investment gold. Without these credits it would result in losses in trading for refiners.
- ▶ Deals with pricing issues (spot price) for investment and non investment gold;
- ▶ Refiners are entitled to claim on operating costs such as machinery, plant, crucibles, laboratory instruments, tools, buildings and maintenance etc. No credits are allowed for administration type expenses such as computers, apportionment is required for building type expenses set aside for administration.
- ▶ Additional apportionment is required for expenses which include precious metal other than gold which is not exempt.

SPECIAL ACCOUNTING SCHEME “Reverse Charge”

- ▶ The Special Accounting Scheme (Reverse Charge) was enacted in the UK model (*s55 of the Value Added Tax 1995 (UK) Act*) to address missing trader fraud issues.
- ▶ The principal aim of the scheme is for responsibility for accounting for tax payable (on sales) to be passed from the seller to the recipient or acquirer (buyer) who can recover the tax as an input tax credit (subject to normal rules) – the rules also apply to agent’s and auctioneers;
- ▶ The Special Accounting Scheme is **compulsory** and applies where:
 - ❑ the seller and the buyer are both registered persons, or are persons liable to be registered as a consequence of the transaction, or other transactions
 - ❑ the supply by the seller is by way of business and the buyer is making the purchase in connection with any business carried on by them
 - ❑ you carry out treatment or processing work on your customers’ goods, and the goods produced are fine gold (Section 16), gold grain of any purity, or gold coins
- ▶ The Special Accounting Scheme applies to the following:
 - ❑ any supply of goods consisting of fine gold and coins
 - ❑ goods that do not exceed the spot price by no more than a negligible amount (includes scrap, jewellery watch cases and sweepings)
 - ❑ services in treating or processing goods to make fine gold, granules (grain) or coins

SPECIAL ACCOUNTING SCHEME “Reverse Charge”

▶ **Exceptions** include:

- ❑ Non-investment gold coins (sold as collector items as items of numismatic interest which are eligible under the **Second Hand Margin Scheme**)
- ❑ Part manufactured or finished jewellery, gold compounds and semi manufactured products (excluding granules or grain)

Practical Operation

- ❑ Recipient of the supply does not pay the tax to the supplier and the supplier does not account for the tax. The accounting scheme essentially provides for a zero net accounting effect. For example a refiner acquires \$1100 of precious metal and accounts for this amount as both an output (sale) and output (acquisition) – the net effect being zero.
- ❑ The major advantage in this scheme is the removal of incentive for funding arrangements facilitated by tax refunds, as no supplier would be in a refund position for general trading.

SECOND HAND GOODS

- ▶ Second hand goods are accounted for under a margin scheme (ie tax is levied on the difference between price paid and price sold or the profit margin).
- ▶ Precious metals and investment gold are excluded from the second-hand margin scheme (Notice 718 Margin Schemes – for second hand goods) as detailed in the **definitions of ineligible goods**

Precious metals – Goods (including coins) consisting in precious metals or any supply of goods containing precious metals where the consideration for the supply (excluding any VAT) is, or is equivalent to an amount which **does not exceed the open market value** of the metal contained in the goods. For gold coins sold at or below the open market value (that is the daily 'fix' price) the **special accounting and payment system** for gold transactions applies. Further details can be found in Notice 701/21 Gold.

Investment gold –Gold coins which meet the definition of investment gold are not considered of numismatic interest and are **not** eligible for the margin schemes. Further details about investment gold can be found in Notice 701/21A Investment Gold Coins.

- ▶ **Exception to the rule** includes non-investment gold coins (sold as collector items may be eligible as items of numismatic interest).
- ▶ **Note:** The UK is a member of the European Union (EU) – rules are aligned with the VAT Directive.

INVOICING, RECORD KEEPING AND NOTIFICATION

- ▶ Obligations were introduced to combat existing fraud problems (acquiring of tax free gold from Member States and conversion to taxable products which was then sold outside the system).
- ▶ Traders are subject to strict rules for investment gold transactions as there is no audit trail for the making of “exempt supplies” including:-
 - ❑ Special invoicing requirements (de minimis limits);
 - ❑ Documentation includes customer identification (6 years)
 - ❑ Notification to HMRC for supplies of exempt investment gold (*legal force for the first transaction of investment gold exceeding threshold*).
- ▶ Requirements only apply to sale of exempt investment gold and where **gold is delivered** or made available to the customer;
- ▶ Use of **Recipient** invoicing where investment gold is acquired from a person that does not trade in investment gold;
- ▶ **Specific recording requirements** for:
 - ❑ bars and wafers (form, weight, purity, hallmarks, serial numbers)
 - ❑ coins (type, country of origin, and listings in Notices)
 - ❑ gold which is delivered (transaction, customer and proof of identity)
 - ❑ internet and mail order sales (proof of despatch)
 - ❑ banks, auctioneers, other agents
 - ❑ Imports and exports (proof of despatch)

PENALTIES AND OTHER MEASURES

- ▶ Underpinning the UK model specific penalties and other measures support the core legislation in assisting HMRC to regulate and treat tax evasion in the precious metals industry.
- ▶ Existing penalties were insufficient so deterrent introduced to prevent conversion of gold (based on VAT rate and value of transactions for records not kept);
- ▶ Special penalty regime introduced for failure to keep audit trails introduced in 2000 (registered or liable to be registered) – 17.5% of transaction value;
- ▶ Specific Special Accounting Scheme penalties for failure to account for tax (reverse charge) or where the exclusions are misrepresented.
- ▶ Specific measures to deal with Missing Trader Fraud and unpaid tax (Vat Notice 726) which incorporates:
 - ❑ Joint and several liability rules
 - ❑ Tests for “knowledge” and “reasonable grounds”
 - ❑ Supply chain integrity principles
- ▶ <https://www.gov.uk/government/publications/vat-notice-726-joint-and-several-liability-for-unpaid-vat/vat-notice-726-joint-and-several-liability-for-unpaid-vat>

HMRC (UK) MODEL AND AUSTRALIA WORKSHOP

Additional Considerations

- ▶ Major reform to the existing Australian framework required to implement the necessary support mechanisms that enable the model to work, if adopted in 'replica' form;
- ▶ The UK Model incorporates many additional features which support the legislative framework to ensure the integrity of a Special Accounting Scheme (reverse charge mechanism). The operation of the reverse charge is supported by penalties and additional special measures to deal with recoverability for missing trader issues (joint and several liability rules, tests for knowledge and reasonable grounds and supply chain principles);
- ▶ UK limits zero rating to accredited refiners for certain transactions, accreditation is a critical issue which requires clarification on the future Australian position (consideration of the original Explanatory Memorandum (EM) and the current ATO view expressed in GSTR 2003/10);
- ▶ Non accredited refiners can opt to not enter the reverse charge system and retain a limited right to input tax credits or opt to tax and enter the Special Accounting Scheme (reverse charge);
- ▶ The definition of precious metal in the UK is limited in scope (applies to gold only) but more specified in respect of coins (legal tender etc), the definition underpins the framework similar to Australia;
- ▶ Significant changes may arise in the classification of precious metals generally and coins with added complexity in specific rules (depending on participants manufacture and jewellers etc);

HMRC (UK) MODEL AND AUSTRALIA WORKSHOP

Additional Considerations

- ▶ The impact of the significant changes needs to be assessed in terms of each market in precious metals (producers, traders, second hand dealers, jewellers, manufacturers, coin collectors, auctioneers, agents etc);
- ▶ Complexity and administrative burden for both the taxpayer and government is significant (increase in apportionment issues adding to compliance cost, notification and reporting for both government and taxpayers and specific penalty regimes);
- ▶ The current Australian framework is modelled on the NZ framework, principle is based on limiting concessional treatment to the “first” time gold, silver or platinum is refined to the purity in accordance with the definition (consideration of Tax Counsel Network advice on the meaning of refining).
- ▶ An assessment is further required of draft GSTD for second hand goods to ensure that legitimate players are unaffected, options include limiting exclusion to non-retail acquisitions (not for manufacture).
- ▶ ^{s38} [REDACTED] view with respect to accreditation and coin classification leans towards the UK model principles.
- ▶ Further assessment required on potential schemes that could arise (operating outside of the system) on a significantly revised model and whether modifications will mitigate the risk without unnecessary administrative and compliance burdens (including complexity).

WORKSHOP FOCUS QUESTIONS

- ❑ Reverse Charge – Administration & Stakeholder impacts
- ❑ What constitutes Precious Metals?
- ❑ Accreditation and Reporting (translating the UK model to Australia). Is it critical?
- ❑ Industry implications of applying the UK model

Supporting Materials

Options Paper – April 2016 (Compliance Issues and Australian framework)

GST Ruling on Precious Metals

GSTD Draft Second Hand Goods/Tax Counsel Advice – Meaning of Refining

REFERENCES

HMRC – VAT Notices

Notice 70121 – describes the various liabilities relating to gold, including investment gold, and the relevant accounting requirements and has the force of law in some parts

<https://www.gov.uk/government/publications/vat-notice-70121-gold/vat-notice-70121-gold>

Notice 701/21A – lists the additional gold coins considered to be investment gold coins for the purposes of the VAT exemption detailed in Group 15 to Schedule 9 of the VAT Act 1994

<https://www.gov.uk/government/publications/vat-notice-70121a-investment-gold-coins>

Notice 718 – margin scheme or global accounting to account for tax (second hand goods)

<https://www.gov.uk/government/publications/vat-notice-718-the-vat-margin-scheme-and-global-accounting>

Notice 701/9 – Commodities and terminal markets – trading which qualifies as zero rated (GST Free)

<https://www.gov.uk/government/publications/vat-notice-7019-commodities-and-terminal-markets/vat-notice-7019-commodities-and-terminal-markets>

Notice 726 – Joint and Several Liability for unpaid VAT and guidance on supply chain principles (reasonable steps) – see also Kittel case as detailed below

<https://www.gov.uk/government/publications/vat-notice-726-joint-and-several-liability-for-unpaid-vat/vat-notice-726-joint-and-several-liability-for-unpaid-vat>

REFERENCES

HMRC GUIDANCE – VGOLD (1100–1700)

V 1100 – Scope of Guidance	https://www.gov.uk/hmrc-internal-manuals/vat-gold-manual/vgold1000
V1200 – HQ Responsibility	https://www.gov.uk/hmrc-internal-manuals/vat-gold-manual/vgold1200
V1300 – Background to the exemption for investment gold	https://www.gov.uk/hmrc-internal-manuals/vat-gold-manual/vgold1300
V1400– Special features of investment gold	https://www.gov.uk/hmrc-internal-manuals/vat-gold-manual/vgold1400
V1500 – The special accounting scheme	https://www.gov.uk/hmrc-internal-manuals/vat-gold-manual/vgold1500
V1600 – The London Bullion Market and Central Banks	https://www.gov.uk/hmrc-internal-manuals/vat-gold-manual/vgold1600
V1700 – Investment gold including coins	https://www.gov.uk/hmrc-internal-manuals/vat-gold-manual/vgold1700

REFERENCES

Other	
Legislation: Value Added Tax 1995 (UK)	http://www.legislation.gov.uk/ukpga/1994/23/body
European Union (EU) – Council Directive 2006/112/EC/ of 28 November 2006 on the common system of value added tax	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:347:0001:0118;en:PDF
European Union (EU) – Explanatory Notes 2014/C 396/06 – Gold Coins (Listed)	http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC1111(01)
Axel Kittel v Belgian State (C-439/04) and Belgian State v Recolta Recycling SPRL (C-440/04)	http://curia.europa.eu/juris/liste.jsf?num=C-439/04

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DESIGN WORKSHOP GST on Precious Metals

Day/ Date: Wednesday 21 September 2016

Time: 9.30am – 4:30pm

**Venue: National Office, Canberra
Amungula Level 10 McKay
Boardroom**

Participants:


Tracey Nicholson
Kelly Canavan
Kathleen De Kleuver
Leah Trebilcock
Jasmin Boncales
Jacinta Lawson
Steven Koufomanolis
Jasmine Edwards (via phone)
James Webeck
Barry Chen
Steve Howlin
Tony Poulakis
Robert Dinola

Designers

Therese Wicks - DCM
Daniel Bishop - DCM



21 August 2016

Objectives	<p>For the workshop At the end of this workshop we will have a way forward for the ATO's view on GST on Precious Metal. The intent is to:</p> <ul style="list-style-type: none"> ▪ Ensure all internal stakeholders are all on the same page in relation to the UK model and how it translates to Australia ▪ Refining with stakeholders the design of the reverse charge approach, potential application of accreditation and reporting matters and to ensure we have no unexpected consequences for industry or the ATO. ▪ An agreed to a way forward and ▪ identify any major roadblocks to take to the Executive for further consideration or decision. 											
Agenda	Welcome, Introductions 09.30am	Context	The UK model	 Break	Key Focus Areas	Lunch 1pm	Risk Implications	Way Forward	timeline	Next Steps 4.30pm		
Process notes	<table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top; padding-right: 20px;"> <p>AM</p> <p>Welcome, Introductions & Housekeeping</p> <ul style="list-style-type: none"> • What you can expect from the day and approach <p>Context</p> <ul style="list-style-type: none"> • The work completed thus far Steve Howlin • Context and stories of mischief – James Webeck • Putting our request to Government – Tracey Nicholson <p>The UK Model</p> <ul style="list-style-type: none"> • Model walk through – Leah Trebilcock <p>Key Focus Areas*</p> <ul style="list-style-type: none"> • Reverse Charge – Administration & Stakeholder impacts • What constitutes Precious Metals • Accreditation and Reporting (translating the UK model to Australia). Is it critical? • Industry implications of applying the UK model </td> <td style="width: 50%; vertical-align: top;"> <p>PM</p> <p>Risk implications</p> <ul style="list-style-type: none"> • Likelihood and Consequences of issues identified from key focus discussions <p>Way forward</p> <ul style="list-style-type: none"> • Agreement on the approach • Identifying outstanding matters or road blocks • Agreement on how to progress these. <p>Timeline</p> <ul style="list-style-type: none"> • Key events, action items, stakeholder responsibilities and timing. <p>Next steps</p> </td> </tr> </table>										<p>AM</p> <p>Welcome, Introductions & Housekeeping</p> <ul style="list-style-type: none"> • What you can expect from the day and approach <p>Context</p> <ul style="list-style-type: none"> • The work completed thus far Steve Howlin • Context and stories of mischief – James Webeck • Putting our request to Government – Tracey Nicholson <p>The UK Model</p> <ul style="list-style-type: none"> • Model walk through – Leah Trebilcock <p>Key Focus Areas*</p> <ul style="list-style-type: none"> • Reverse Charge – Administration & Stakeholder impacts • What constitutes Precious Metals • Accreditation and Reporting (translating the UK model to Australia). Is it critical? • Industry implications of applying the UK model 	<p>PM</p> <p>Risk implications</p> <ul style="list-style-type: none"> • Likelihood and Consequences of issues identified from key focus discussions <p>Way forward</p> <ul style="list-style-type: none"> • Agreement on the approach • Identifying outstanding matters or road blocks • Agreement on how to progress these. <p>Timeline</p> <ul style="list-style-type: none"> • Key events, action items, stakeholder responsibilities and timing. <p>Next steps</p>
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AGENDA
FORMAT

CROSS AGENCY
MEETING
EVENT TYPE

11 SEPTEMBER 2013
ISSUE DATE

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CLASSIFICATION



Australian Government
Australian Taxation Office

AGENDA

FILE REF:

TITLE:	Cross Agency Meeting – Gold Bullion Project		
VENUE:	ATO Sydney – 52 Goulburn St Sydney NSW 2000		
EVENT DATE:	17 September 2013	START:	10:00 FINISH: 15:30
CHAIR:	Jacinta Lawson	FACILITATOR:	Jacinta Lawson
CONTACT:	Kathy Knappick	CONTACT PHONE:	
ATTENDEES: NAMES/SECTION	Phil Jones (Assistant Commissioner, Serious Non Compliance - ATO) Tony Carrol (ATO), Jacinta Lawson (Regional Director Serious Non Compliance TIOC - ATO), Kathy Knappick (National CACT Manager - ATO) Luke Manassa (Project Leader - ATO), Glenn Lucy (ATO), Aris Zafirou (Debt - ATO), §47E(d) [REDACTED]		
APOLOGIES: NAME/SECTION	Barry Holland (ATO)		

AGENDA ITEM NO.	TIME	TOPIC	PRESENTED BY
1.	10:00 to 10:05	Introductions	Jacinta Lawson
2.	10:05 to 10:15	Meeting outline	Luke Manassa
3.	10:15 to 10:30	Background	Glenn Lucy
4.	10:30 to 10.45	Overview of Gold Bullion industry	Luke Manassa
5.	10.45 to 11:15	Explanation of Syndicates and structures	Luke Manassa

Sensitive

PAGE 1 OF 2

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AGENDA ITEM NO.	TIME	TOPIC	PRESENTED BY
6.	11:15 to 11:30	Break	All
7.	11.30 to 12:00	Objectives and desired outcomes	Jacinta
8.	12:00 to 13:00	Discussing possible treatment strategies	All
9.	13:00 to 13:30	Break	All
10.	13:30 to 15:00	Agreement on treatments strategies	All
11.	15:00	Summary of action items	All

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FORMAT

CROSS AGENCY
MEETING
EVENT TYPE

12 FEBRUARY 2014
ISSUE DATE

Sensitive
CLASSIFICATION



Australian Government
Australian Taxation Office

AGENDA

FILE REF:

TITLE:	Cross Agency Meeting – Gold Bullion Project		
VENUE:	ATO Sydney – 52 Goulburn St Sydney NSW 2000 - Room L13.713		
EVENT DATE:	12 February 2014	START:	13:00 FINISH: 15:00
CHAIR:	Jacinta Lawson	FACILITATOR:	Jacinta Lawson
CONTACT:	Jacinta Lawson	CONTACT PHONE:	03 9215 3329
ATTENDEES: NAMES/SECTIO	ATO Jacinta Lawson, Luke Manassa, Glenn Lucy, Malcolm Robar, Emmanuel Loutas, Dede Tadebois, Jacqueline Steward, Michael Karipis, Bernard Cudmore AFP s47E(d)		
APOLOGIES: NAME/SECTION			

AGENDA ITEM NO.	TIME	TOPIC	PRESENTED BY
1.		SNC Audit Update / Strategy <ul style="list-style-type: none">• Status of current Audits• Future Audits• Other Nosean commitments• SNC Executive briefing document	Jacinta Lawson / Luke Manassa

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AGENDA ITEM NO.	TIME	TOPIC	PRESENTED BY
2.		ITX Audits Update / Strategy <ul style="list-style-type: none"> Status of current Audits Legislative review 	Luke Manassa
3.		ACC Examinations process update	Jacinta Lawson
4.		AFP POCA Update	s47E(d) [REDACTED]
5.		SNC Investigations update <ul style="list-style-type: none"> General update Other Issues 	Malcolm Robar
6.		Confirmation of action items / ongoing roles and responsibilities	All
7.		SNC Audit / Invest - (AFP Not required) Auditors statements discussions	

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Precious Metals Governance Chronology

Summary

- PGH managed the initial audits following the execution of search warrants, in addition to the investigation activities, some of which are subject to current action by other government agencies.
- ITX Risk & Strategy and Serious Evasion/Complex Assurance & Evasion assisted PGH and assumed joint responsibility for the identification and management of the involvement to an industry wide project, as well as undertaking related audit activities.
- Tax Counsel Network business line was engaged to provide guidance on the ATO position following the execution of search warrants. In addition TCN retained responsibility for litigation/objection matters and the application of the GST anti-avoidance rule to schemes involving contrived gold trading arrangements, and clarification on the tax treatment of precious metals. This guidance obtained determined the timing in seeking the necessary law reforms through Treasury, with the Policy, Analysis and Legislation (PAL) business line contributing to the law reform advocacy process.

1. PGH Governance

This matter first came to ATO notice by way of a referral from the AFP Criminal Assets Confiscation Taskforce (“CACT”) in 2012

Following the referral PGH, with limited assistance from ITX Risk and Strategy, continued to work with the CACT in developing a Risk Assessment and Treatment plan.

2012-2013	Intelligence Alerts Risk Assessments Operational Plans	Risk Assessment- Gold Bullion Trading (DRAFT) <i>refer workshop 17/9/2013</i> <i>Timing and detail of relevant actions are recorded in various briefing notes and minutes of meetings on earlier provided timeline not provided to IGT as previously agreed with Duy.</i>
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PGH had responsibility of initial compliance activities including assisting in the execution of s3E search warrants on two principal refiners and other industry participants (suppliers). This work formed part of the business as usual activities for PGH in the assessment and treatment of a single taxpayer or defined group, i.e. not industry/endemic risk.^{s38}

During the course of ATO activities, PGH retained governance of criminal investigations, media and other releases, ATO Executive briefings and OH&S risk assessments to support other BSL engaged in this work. Governance and reporting was that ordinarily applied by PGH in similar matters.

2. ITX (Risk and Complex Audit & Evasion) Governance

ITX R&S re-commenced reviewing the issue in July of 2013 and were further engaged by PGH in September 2013 requesting assistance /resource commitment in preparation for the proposed Search Warrant Execution. ITX R&S engaged Serious Evasion/Complex Assurance & Evasion to provide further resources to support the activities.

In October 2013, ITX R&S raised concerns from initial research activities through direct engagement with ITX Senior Assistant Commissioner prior to the execution of the search warrants. Initial advice received from the SAC was that the risk was a missing trader issue being addressed by PGH and further instructed ITX R&S to work with Special Tech Projects

Precious Metals Governance Chronology

(AC Frank Wilson) to explore any potential perceived issues with GSTR 2003/10 with respect to accreditation in the context of the definition of precious metal and Div 66 – Second Hand Goods).

2013-2014	Executive Briefings ITX	<p>#17/10 Exec AC Briefing GSTR 2003/10 and issues within the precious metals industry</p> <p><i>Timing and detail of relevant actions are recorded in various briefing notes and minutes of meetings on earlier provided timeline not provided to IGT as previously agreed with Duy.</i></p>
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Initial audit casework was commenced by ITX CA&E in October 2013 (supply chain participants as determined by PGH to support the warrant execution) in accordance with BAU processes. Governance and reporting was that ordinarily applied by ITX in similar matters and included joint PGH briefings in some instances (as detailed on timeline).

Following advice from Tax Counsel Network in November 2013 with respect to refiner refunds, ITX R&S and CA&E continued to work jointly in real-time on a small scale industry project with a focus on:-

- targeted compliance cases (suppliers to refiners and key refiner to support PGH);
- intelligence and monitoring actions to develop an understanding of the industry, various risks, topologies (supply chains and nature of transactions) implemented by participants;
- research the application of the legislative framework in the context of the ATO view and GSTR 2003/10, identifying disparities and assessing vulnerability of the Commissioner given the identified behaviours and observed revenue leakage.
- comparison of NZ jurisdictional framework (most comparable framework to Australia) and the impact of the insertion of “in an investment form” to the definition: diluting the differentiation between first and second supply and consequential treatment under s38-385 and 40-100 and impact on Div 66;
- BAU Briefing Notes and progress advice emails were escalated to relevant AC and DC as appropriate.

In February 2014 the issues in the various audits required ATO view clarification further to Tax Counsel Network advice received in November 2013 (refiner refunds). In February 2014, ITX R&S further escalated to Tax Counsel Network for clarification of the ATO view, advice was received in September 2014.

2013-2014	Technical Advice Requested/Received	<p>#24/2 R&S escalation to TCN to clarify application of Div 66 and effect of EM change given ambiguity in ATO view and what constitutes manufacturing Seibel Activity 1-54ABUGPN.</p> <p><i>Timing and detail of relevant actions are recorded in various briefing notes and minutes of meetings on earlier provided timeline not provided to IGT due to case sensitive content.</i></p>
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Precious Metals Governance Chronology

In May 2014, ITX R&S issued a preliminary discussion paper and established contact with Integrated Tax Design. All potential law change advocacy was held over pending outcome of TCN agreement to review GSTR 2003/10.

At this stage, the ATO view remained unclear with preliminary audits and further compliance activities deemed to be on hold until an ATO view could be established, particularly for cases impacted by Div 66 Second Hand Goods provisions. Additionally, it was evident that the risk was systemic across the industry (sample of R&S initiated test cases e.g. exporters, buyers and second hand goods were progressed through audit). ITX CA&E had progressed the PGH targeted compliance which demonstrated that the core provisions limited the Commissioners ability to treat the behaviour.

s38

2013-2014	Executive Briefings ITX	#16/6 Exec AC Office Minute – <i>not released as previously agreed with Duy.</i>
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ITX CA&E Assistant Commissioner proposed that a Code of Compliance option should be considered, a draft minute to that effect was prepared and submitted in July 2014. The minute was not issued or considered by the ITX Executive.

2014-2015	Executive Briefings ITX	#31/7 Exec AC Briefing Code of Compliance as requested by George Montanez as an alternative to reform following joint agency meeting on 24/6 – final draft not issued due to case sensitive information.
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ITX CA&E Assistant Commissioner directed that Treasury did not have an appetite for reform and proposed a Compliance program (streamlined audit strategy) with the application of additional resources. An amended discussion paper was produced in December 2014.

Further resourcing was endorsed in March 2015 to commence an expanded Gold Project to implement the streamlined audit strategy. The additional resources commenced in May 2015 with a formal commencement of June 2015. ITX CA&E Assistant Commissioner further directed that the program of casework would be informed by the data acquisition (final instalment received in March 2015).

All compliance cases within CA&E were subject to case call-over (often in the presence of ITX SES) at least quarterly. More frequent case discussions were held in some instances, particularly where refunds were retained or supply chain topologies might benefit from a workshop engaging auditors for the entities party to the arrangements and technical experts (TCN, Case and Technical Leadership, Debt etc.).

Following initial Tax Counsel Network receipt in September 2014, ITX R&S escalated a further submission in March 2015 for clarification of the ATO view, a response was received in May 2015.

2014-2015	Technical Advice Requested/Received	#26/3 Re-submission to Tech Advice escalated to TCN on (a) definition of precious metals and (b) second hand goods part b – provided in response to REQ-6&7 in December 2017 (Document 5a).
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In April 2015 the Law Advocacy working group was established by ITX R&S.

Precious Metals Governance Chronology

3. Special Tech Projects, Tax Counsel Network and Technical Advice

ITX R&S worked with Special Tech Projects providing relevant material on ambiguity with the current ATO view. STP issued Discussion Papers in November 2013. The issue of significant refund lodgements by 2 major refiners following the execution of the warrants in October 2013 resulted in Tax Counsel Network providing an ATO view on the meaning of refining in the context of first supply in s38-385 (i.e. no second supply applies each time precious metal 99.5% is re-refined) consequently ITX released refunds as instructed. The Special Tech Projects view was overturned by Tax Counsel Network.

2013-2014	Technical Advice Requested/Received	#25/11 Technical Leadership Discussion Paper received from Frank Wilson on s38-385 – issue of first refinement – response to AC Briefing GSTR 2003/10 17/10 (REQ 2) October 2017(Document 8) #26/11 Technical Leadership Discussion Paper received from Frank Wilson on Div 66 – second hand jewellery, coins and other collectable metals response to AC Briefing GSTR 2003/10 17/10 REQ 2 in October 2017(document 9)
2013-2014	Technical Advice Requested/Received	#27/11 TCN Advice on application of s38-385 to 'precious metal' refined from scrap – response to refund held post resolution-provided in response to REQ-6&7 in December 2017 (document 2).

At this time, it was understood that Tax Counsel Network would review GSTR 2003/10 – no amendments to the ruling to date have been actioned.

Tax Counsel Network provided clarification of the ATO view in September 2014 in response to an escalation from ITX R&S in February 2014.

2013-2014	Technical Advice Requested/Received	#22/9 TCN response TCN Siebel Activity 1-54ABUGPN -(NPCSI) <i>Timing and detail of relevant actions are recorded in various briefing notes and minutes of meetings on earlier provided timeline not provided to IGT. Not released- case sensitive information.</i>
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Tax Counsel Network issued a further paper in February 2015 following a request from ITX CA&E Assistant Commissioner.

2014-2015	Technical Advice Requested/Received	#13/2 TCN Paper on GST and Gold <i>Timing and detail of relevant actions are recorded in various briefing notes and minutes of meetings. Provided REQ-6-7 (document 4)</i>
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Following initial Tax Counsel Network advice in September 2014, further advice was provided to ITX R&S in response to a further submission in March 2015. The response was provided in May 2015.

Precious Metals Governance Chronology

2014-2015	Technical Advice Requested/Received	<p>#26/5 TCN Advice received on (a) definition of precious metals and (b) second hand goods part b -(NPCSI) – escalated to Gold Project.</p> <p><i>Timing and detail of relevant actions are recorded in various briefing notes and minutes of meetings. REQ-6-7 (Document 5b).</i></p>
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A range of other advices were provided during the course of this initial period to PGH and CA&E to matters pertaining to objection and litigation and the application of Div 165 on industry participants. These advices were critical to establishing the way forward to law reform and impacted the timing and recommended solutions to resolve the issues.

4. Law Reform Governance

In May 2014, ITX R&S established contact with Integrated Tax Design, activities were held over pending advice and activities from Tax Counsel Network pending outcome of review of GSTR 2003/10 (no amendments were made to the ruling).

The forum was re-initiated in April 2015 following contact from ITX R&S to obtain advice from Treasury on policy intent and was held over until the advice was received. Integrated Tax Design advised that due to the passage of time, the ATO would not be seeking information from Treasury.

Law advocacy activities were progressed under the guidance of Integrated Tax Design/Policy, Analysis and Legislation with interested stakeholders and activities focussed on RAB costings and other jurisdictional discussions to the development of the Options Paper which was presented in a workshop in May 2016. The final decision on preferred option for reform was initiated by Policy, Analysis and Legislation.

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GPO Box 9990
IN YOUR CAPITAL CITY

Address 1
Address 2
Address 3
Address 4

Ref no: 1-5P6XGMX

21 December 2016

Dear Sir/Madam

Option to Reverse Charge for sellers and buyers in the precious metal industry

Introduction

This letter is to advise you that the ATO will allow sellers and buyers in the precious metals supply chain the option to enter into voluntary reverse charge agreements. These voluntary arrangements are intended to improve GST compliance and avoid delays in the payment of refunds where the Commissioner makes enquiries to verify the integrity of a supply or refund. The voluntary reverse charge agreements may be used on business to business sales of precious metals from 1 January 2017.

Background

The ATO has been conducting a number of audits and investigations that have detected exploitation of the GST law governing precious metals. This has led to a substantial loss of GST revenue and necessitated audit activity to identify and act upon inappropriate sales or input tax claims. This has led to delays in refunds in the precious metals industry whilst the ATO verifies claims.

Voluntary Reverse Charge Agreements

Effective from 1 January 2017 business to business sales of precious metal including scrap gold can be, with agreement, reverse charged.

Under the voluntary reverse charge mechanism the buyer will remit on behalf of the seller the GST payable on the sale which is normally remitted by the seller. This GST should be remitted by the buyer to the Commissioner at the same time as the buyer lodges their BAS.

Where the buyer will be entitled to a GST refund on lodgement of its BAS, the buyer may direct the ATO to apply that refund in discharge of the GST liabilities payable on behalf of the suppliers, effectively netting off the refund for GST credits against its suppliers' GST liabilities.

To ensure the GST is allocated to the appropriate seller, buyers will need to provide to the Commissioner details of any reverse charge GST liabilities it remits on behalf of the seller.

This mechanism removes the opportunity for incorrect input tax credit claims by the buyer or for the seller to avoid their obligation to remit the GST.

The reverse charge arrangement is voluntary and buyers and sellers are not required to enter into these arrangements. Where sellers and buyers take up this option the processing of BAS lodgements will be faster and there will be a reduced need for the ATO to audit the transaction.

Example

GoldX Refining purchases scrap gold from three suppliers, each of whom are registered for GST. GoldX agrees with each of its suppliers that the sale of scrap gold will be subject to the voluntary reverse charge mechanism. GoldX pays each of the suppliers the GST-exclusive price of the sale.

On the 21st of the following month, GoldX lodges its BAS for the month. At the same time it provides the Commissioner with details of reverse charge liabilities it has remitted on behalf of the suppliers. GoldX is entitled to an input tax credit for the GST payable on the acquisition of gold from its supplier and is entitled to a net GST refund for the month. GoldX also has a liability to remit the GST on behalf of the supplier. These amounts are offset by the ATO against each other at the direction of GoldX. The effective result is that the supplier has no further liability to the ATO in respect of the sale of the gold to GoldX.

Why Voluntary Reverse Charge?

The following benefits arise from adopting the voluntary reverse charge mechanism:

- Meets industry concerns about delays in refunds. Processing of refunds due to buyers will be faster, as effectively there will not be any net refunds due.
- Choosing the option comes at no cost/no benefit to the seller or buyer. Effectively the seller does not physically collect GST on the sale and the buyer has no refund to claim.
- Lower risk rating for the seller and buyer resulting in little or no enquiries from the ATO in relation to reverse charge transactions, resulting in less time and cost spent by registered businesses and the ATO
- Enables the industry to assist the ATO to reduce the opportunity of sellers that do not pay GST that is properly payable
- If broadly adopted, it removes distortion from the industry caused by inappropriate behaviour thus restoring a level playing field

What sales are included in the voluntary reverse charge mechanism?

The types of sales covered by the reverse charge are taxable supplies of goods that are comprised of gold, silver or platinum which are not "precious metal" as defined in the GST Act.

Some examples of metal to which the voluntary reverse-charge may be applied to include gold dore, gold granules and gold bars which are not investment form.

The reverse charge will only apply to taxable supplies.

Next Steps

The ATO will run two information sessions in January 2017 to further explain to the industry how the reverse will apply. You are invited to attend and details are below.

The ATO welcomes any suggestions on how we can work with industry to address the issues together. You can speak to a person on the voluntary reverse charge team on (07) 3213 5073.

Yours faithfully,

Tim Dyce
Deputy Commissioner of Taxation

Meetings will be as follows:

Melbourne. 17 January, 2017. 10am-12 noon

747 Collins Street
Docklands

Sydney. 20 January 2017. 10am-12 noon

52 Goulburn Street
Sydney

Upon arrival at the office, please go to security to sign in and someone will collect you and take you to the meeting room.

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INDIRECT TAX EXECUTIVE SUBMISSION PAPER

Meeting Date: 27th March 2015

Action Item (if applicable):

TITLE:	Precious Metals (Gold) Project		
SPONSOR:	Ian Read	BUSINESS LINE/ BRANCH:	Indirect Tax
AUTHOR:	George Montanez	BUSINESS LINE/ BRANCH:	Indirect Tax Serious Evasion
PURPOSE	Serious Evasion Resourcing	PRESENTERS	James Webeck
DATE:	19th March 2015		

Purpose

To obtain ITX executive endorsement for the allocation of additional resources to the Gold Project.

Recommendation(s):

It is recommended that the project be resourced in line with the following table:

BSL	ACTIVITIES	CURRENT	PROPOSED 14/15	PROPOSED 15/16	PROPOSED 16/17
ITX	Project Management	1	2	2	1
	Data Acquisition and Risk Assessments	2	3	3	
	Reviews and Audits	20	35	45	6
	Letter and Lodgement program		3	3	2
	Retention of Refund	1	1	1	1
	Law Change/Reform	3	2	1	
	Technical Advice (C&TL)	4	2	2	
	Litigation	2			
	TOTAL	33	48	57	10

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Background information:

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[REDACTED]

[REDACTED] The rationale behind the proposal would be to increase coverage, provide a more holistic approach to the risk treatment, and reduce timeframes.

We are in the process of obtaining data from the [REDACTED] and have received two of four tranches. The additional two tranches are due to be received mid-April 2015.

Key issues:

The drivers for the proposal are:

- The risk pool is larger than first expected
- The need to ensure an industry response
- The need to prevent proliferation in real time

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IGT-PM-REQ3

We note that in 2012, the ATO and the Australian Federal Police (AFP) collaborated on a joint operation – Operation Nosean – concerning the precious metals industry. Please provide details on:

- what was the genesis for Operation Nosean;
- which area within the ATO was responsible for overseeing the interaction with the AFP;
- what briefings were provided to the ATO Executive or other relevant oversight committees to engage relevant areas and resources on Operation Nosean;
- what briefings or reports were provided to the ATO Executive or other relevant oversight committees after Operation Nosean to provide details on any ongoing work or resource commitments; and
- any ongoing briefings or updates that provided to the ATO Executive or other relevant oversight committees regarding any outcomes, ongoing work, progress or resource commitments.

Please provide copies of any briefings or reports (including those in draft).

ATO response

Operation Nosean commenced in May 2013 and was principally concerned with the conduct of two identified syndicates where the Australian Federal Police (AFP) and the ATO (PGH), in concert with the Australian Crime Commission (now the Australian Criminal Intelligence Commission), were monitoring the acquisition of Gold Bullion (Input Taxed) for ultimate sale as “scrap gold” (taxable supply) to Refiners of Precious Metals (addressed in the responses to IGT-GSTR-TOR1-REQ1, and IGT-PM-REQ1 and REQ2).

In October 2013 Operation Nosean proceeded to the execution of section 3E (*Crimes Act 1914*) search warrants by the AFP at the premises of a number of Bullion Dealers, Refiners of Precious Metals and others. While later ongoing compliance and other efforts ultimately revealed that the conduct of concern extended wider in the industry, with multiple syndicate topologies and arrangements identified including in some instances direct involvement of certain Bullion Dealers and Refiners of precious metals, the extent and nature of the issue was not known prior to the execution of the search warrants. It is evident the exploitation of GST by syndicates became more complex and sophisticated as the time moved on.

PGH Audit issued GST assessments and garnisheed bank accounts in connection with the two identified syndicates at the time of Search Warrant Execution in October 2013. At the same time Indirect Tax (ITX) Complex Assurance & Evasion (CA&E) commenced compliance actions on other entities believed to have some connection to the conduct of concern.

In addition to the conduct of compliance verification other concurrent actions the ACIC provided assistance with intelligence activities with the Criminal Assets Confiscation Taskforce instigating

Proceeds of Crime actions while PGH Investigations were considering what criminal offences might be pursued with respect to particular individuals. This body of work was generally referred to as Operation Nosean related with PG&H assuming overall management responsibility within the ATO at this time.

Whilst Serious Non Compliance (now PGH) was responsible for overseeing the interaction with the AFP and progressing investigations in relation to Operation Nosean, the ITX business line was also involved as the associated risks within the precious metals industry involved compliance action on GST refunds being issued to Refiners. The two business lines have continued to work concurrently on various compliance verifications with PG&H remaining as the management lead until July 2014 where, following a joint agency meeting on 24 June 2014 (Document 1), it was agreed that ITX CA&E would assume principal responsibility in managing the ongoing Audit work in the project.^{s22}

While ITX has managed the effective lead of the GST compliance component of the project activities since July 2014, PGH has continued with some compliance actions and effectively managed any work with respect to the investigation element. This has ensured the ATO has addressed the associated risks within the precious metal industry in a holistic manner in order to collaboratively develop appropriate treatment strategies, such as:

- Review of existing legislative provisions, clarification of the ATO position and advice given to the community
- Continuing appropriate targeted compliance activities (both audit and investigations) relating to entities operating in the precious metals industry
- Working across government to ensure a coordinated approach was taken to managing the precious metals industry risk and Operation Nosean
- Seeking industry wide regulation opportunities and compliance strategies
- Considering viable options for legislative reform regarding the GST treatment of precious metals and required changes to existing legal definitions
- Issuing appropriate marketing and educational material to industry participants, alerts to staff and media releases to the community regarding the precious metals risk.

To summarise, the key documents held by the ATO relevant to Operation Nosean and the precious metals industry risk include:

- Executive briefing notes
- Minutes of cross agency operational workshops (including the AFP and Commonwealth Department of Public Prosecutions)
- Project status reports relating to Operation Nosean and Gold Bullion
- SES updates on criminal law treatment activities
- Updates on warrant activity relating to criminal investigations undertaken as part of Operation Nosean
- PGH Criminal Law Investigations strategic outlines and proposed treatment plans
- Investigations plans for Operation Nosean
- Treatment strategies agreed upon for Operation Nosean

The 'Operational Intelligence Assessment Nosean Business Model', along with the 'Project Outline – Gold Bullion(v1.3)' and the 'Gold Bullion Risk Timeline', supplied in response to IGT-GSTR-TOR1-REQ1, and IGT-PM-REQ1 and REQ2 provides an overview of the genesis of Operation Nosean.

Further details in respect to resource commitments relevant to Operation Nosean and the precious metals risk will be addressed in response to IGT-PM-REQ5.

Supporting documents

- 1. 24 June 2014 Minutes of joint agency meeting (not provided due to case sensitive information)
- 2. Indirect Tax Executive submission template (3) (not provided due to case sensitive information)
- 3. 20150409 Gold resourcing – RI BC Final

ITX Precious Metals Project

- > We are reviewing, auditing and investigating sophisticated and complex arrangements that attempt to obscure transactions of recycled 'investment form' precious metals to unlawfully access GST refunds.
- > We are undertaking an ATO cross business line integrated approach to the conduct of our work in the Precious Metals Project.

Key messages

- > The Precious Metals Project (PMP) was implemented on 1 July 2015 and is sponsored by ITX. To date \$550 million in liabilities have been raised on PMP entities. A diagram illustrating the scheme is contained in **Attachment A**.
- > Pursuant to the governance of the SES Band 2 Steering Committee led by Deputy Commissioner ITX Tim Dyce, the major PMP participating business lines (ITX, RDR, TCN, PGH and Debt) have worked collaboratively to facilitate a holistic compliance and litigation response to the risk.
- > The most significant case completed to date which has provided impetus to the current integrated approach, was presented to the General Anti-Avoidance Review (GAAR) panel in February and March 2016. The panel found it was reasonable to apply Division 165 *Goods and Services Tax (A New Tax System) 1999*, Anti Avoidance, to these schemes. Assessments were raised, the objection was subsequently disallowed, and the entity has since entered liquidation. Other cases have progressed to the GAAR panel.
- > The ATO considers that while the long term solution to the mitigation of the risk is legislative amendment, and we are working with Treasury to progress this law change as a matter of priority, other integrated compliance strategies have been adopted in the interim.
- > To stem the current revenue leakage which has continued and escalated (from \$3m per month in January 2016 to \$13m per month in August 2016), we have developed an integrated approach including advice to industry, retention of refunds pending verification and potential escalation to audit, engagement with the Serious Financial Crime Taskforce, and referrals for prosecution.

Compliance	<p>ITX are actioning:</p> <ul style="list-style-type: none"> ➤ Refund watch lists to alert for BAS lodgements claiming GST credits resulting in refunds which may be fraudulent ➤ Refiner refund retention strategy as at August 2016, to verify monthly BAS lodgements by ^{s38} [redacted] refiners, who are the entities that financially benefit from the exploitation of the GST Act re Gold Bullion transactions.
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ITX Precious Metals Project

	<ul style="list-style-type: none"> ➤ Refiner Controlling mind reviews/audits. ➤ Mail out of Serious Financial Crime (SFC) Intelligence Bulletin to the entirety of the gold risk population.
Criminal Investigation and Prosecutions	<p>PGH to undertake:</p> <ul style="list-style-type: none"> ➤ Criminal investigations/reviews. ➤ To refer criminal investigations to the AFP via the FACC (Fraud and Anti-Corruption Centre) ➤ To utilise the Serious Financial Crime Taskforce (SFCT) to communicate the criminal implications of involvement in the PMP to the Australian community. The SFCT Intelligence Bulletin titled 'Targeting Fraud in the Precious Metal Refining Industry' was released on 12 October 2016. ➤ Utilise in house prosecutions to prosecute non lodgers/non-compliance with information gathering formal notices
Litigation	<p>RDR are providing litigation advice, support and assistance for:</p> <ul style="list-style-type: none"> ➤ ADJR Statement of Reasons requests ➤ FOI requests ➤ Objections ➤ Engagement of counsel for advice on GST technical issues in particular the application of the understanding of "1st supply after refining" ➤ Refiner refund retention strategy outcomes (objections) ➤ Obtain advice on GST issues
Tax Technical	<p>TCN, Case Leadership and GST Technical Product Leadership:</p> <ul style="list-style-type: none"> ➤ GAAR Panel submissions and application of consistency across all PMP position papers and reasons for decision. ➤ GST Determination on interpretation of second hand goods, and the use of the PBR to manage taxpayer expectations on this issue ➤ Advice on interpretation of GST Act Explanatory Memorandum, in particular the definition of "Investment Form", and its current application> ➤ We are seeking independent and expert opinion on the definition
Recovery	<p>Recovery Strategy undertaken by Debt, arising as a result of audits conducted in PMP. Advice and action on 'Phoenixing' of entities, and remedies to address this issue including the issuing of garnishee notices, writs, removal of liquidators etc.</p>

ITX Precious Metals Project

Attachment A: Diagram Notes

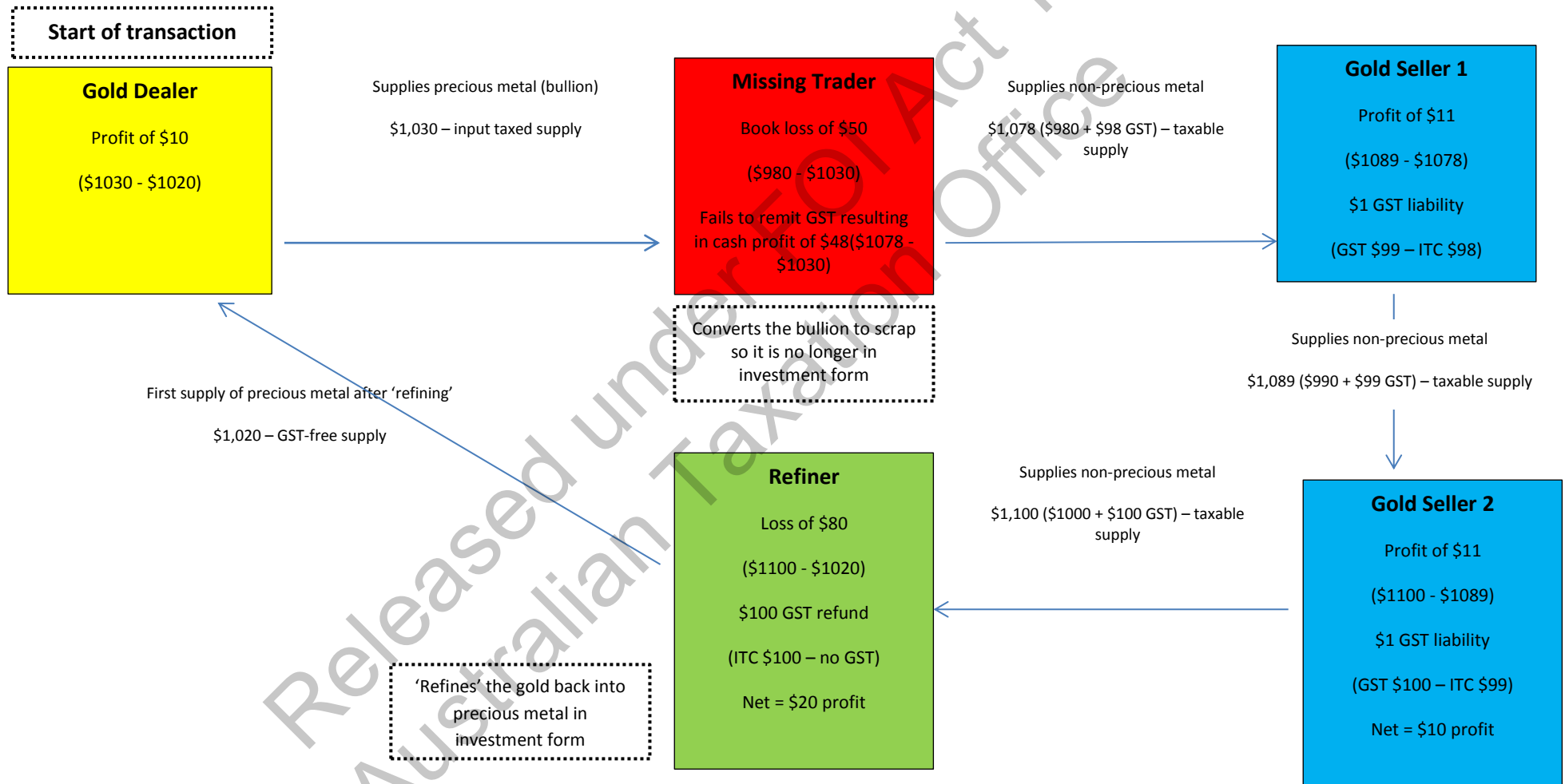
Entity	GST liability	ITC entitlement	Net GST position	Profit
Gold Dealer	Nil	Nil	Nil	\$10
Missing Trader	\$98	Nil	\$98 liability (not remitted)	\$48
Gold Seller 1	\$99	\$98	\$1 liability	\$10
Gold Seller 2	\$100	\$99	\$1 liability	\$10
Refiner	Nil	\$100	\$100 refund	\$20
ATO	-	-	\$98 revenue loss	-

Treatment of a supply of precious metal under the GST Act		
First supply of gold after refining	GST-free	s 38-385
Supply of precious metal (gold of at least 99.95% fineness and in investment form)	Input taxed	s 40-100
Other supplies of gold (does not meet the definition of precious metal)	Taxable supply	S 9-5

1. In the current scheme all of the participants make a profit by sharing in the GST refund which is received by the Refiner.
2. By interposing the two Gold Seller entities, the ATO receives \$2 GST but ultimately refunds \$100 of ITCs to the Refiner
3. Gold Seller 1 claims an ITC of \$98 but the corresponding GST liability is not remitted by the Missing Trader
4. This results in a leakage of \$98 from the GST base.

ITX Precious Metals Project

Current GST treatment of precious metals (missing trader scheme)



GST and precious metals (gold bullion)

Senate Estimates | March 2017

- > We have detected complex 'carousel fraud' type arrangements that have created an artificial market for gold, in an attempt to obscure transactions of recycled 'investment form' precious metal, to unlawfully access GST refunds.
- > We have committed significant resources to combat the issue and are using compliance, litigation, investigation, and use of the anti-avoidance provisions, where appropriate.
- > \$19 million in refunds arising from business activity statements lodged by gold refiners between July 2016 to December 2016 are currently retained and subject to verification.
- > As of 1 January 2017, we have offered a voluntary reverse charge arrangement to gold industry supply chain participants, whereby the supplying entity has its GST remitted to the ATO by the acquirer of the taxable supplies.

Potential line of questioning

- > What is the ATO doing to address suspected fraud and evasion in the precious metal industry?
- > What are the expected impacts of the introduction of the voluntary reverse charge arrangement?

Key messages

- > We are continuing to see complex schemes that attempt to obscure transactions of recycled 'investment form' precious metal. These schemes:
 - Involve a network of industry participants, including refiners, bullion dealers, dealers and buyers who form supply chains that facilitate gold recycling arrangements, that seek to exploit the GST rules regarding precious metals.
 - Have established an artificial and contrived market for gold, to obtain a benefit from the tax system where there is no entitlement. Numerous and unnecessary interposed entities are positioned within supply chains to disguise the alteration of the gold between investment and non-investment forms.
- > At its simplest form, bullion (input taxed) is sold to a missing trader who melts it (now taxable) and sells it up the chain ending up with a refiner. The parties claim a refund however the transactions are not profitable without the refund. The refiner sells to the bullion dealer (GST Free) and the gold circulates again.
- > We estimate the risk to revenue is over \$250 million per annum. This is difficult to quantify precisely due to the sophisticated and ever changing nature of the schemes being investigated as well as the complexity of the GST law in this area.
- > ^{s22} [REDACTED] Since 2012 when this issue was first identified, we have raised approximately \$611 million from ^{s38} [REDACTED] audits. For 2016-2017, ^{s38} [REDACTED] audits are on hand and are expected to raise approximately \$107 million.
- > We are also using litigation, debt action, investigation and the application of anti-avoidance provisions to combat the behaviour.

GST and precious metals (gold bullion)

Senate Estimates | March 2017

- > Our current compliance strategy focuses on the retention of BAS refunds payable to certain gold refining entities.
 - From July 2016 to December 2016 refiner entities subject to compliance action have had \$19 million in refunds retained.
 - The retention strategy reviews each of the refiner supply chains in a linear manner, whilst contemporaneously laterally reviewing the totality of the gold network, to verify the legitimacy of the refunds for each refiner, and also confirm the risk hypothesis that the gold is simply being recirculated through the industry via each of the supply chains, from scrap to investment form gold, and back again.
- > In an attempt to address the risk, on 1 January 2017 the ATO introduced a voluntary reverse charge arrangement whereby gold industry participants have been provided with the opportunity to remit the GST that they would ordinarily pay to the supplier of gold, to the ATO. The purpose of this arrangement is to seek to ensure that all entities within the supply chain are responsible for remitting GST to the ATO on their gold purchases, thereby overcoming the current issue where traders go ‘missing’ and fail to remit the GST. In these arrangements the entity buying gold from the missing trader remits the GST. A voluntary reverse charge is unlikely to fully mitigate all current issues identified in the precious metals industry. The more participants there are, the more effective it will be. However, some entities may not take up this option.

Additional information

- > From 2011 to 2016 the turnover of scrap gold (jewellery and non-investment form gold bars) within the Australian gold industry, by the entities that are the subject of ATO compliance activity, has increased from \$116 million to \$1.8 billion.
- > Analysis of refunds for the refiners from 2001-2016 indicate that for 2001-2011 they remitted to the ATO a net amount of \$14 million in GST. For 2012-2016 the ATO has paid \$300 million in GST refunds.
- > Monthly BAS refunds issuing to the refiners increased from \$3 million to \$13 million from January 2016 to August 2016. From July 2016 to December 2016 refunds retained from BAS lodged have totalled approximately \$19 million. November 2016 BAS refunds arising from December 2016 lodgements for the known participants have reduced to \$322,000.
- > No criminal charges have been laid to date. A Brief of Evidence in relation to one syndicate is being assessed by the Commonwealth Director of Public Prosecutions.

GST and precious metals (gold bullion)

Senate Estimates | March 2017

Media article on General Anti-Avoidance Rules (GAAR) Panel review process

- > A recent media article ('Taxman could kill gold industry before courts have chance to decide', R. Gottliebsen, *Australian*, 10 December 2016) alleges that Australia's internal tax appeal system is flawed and, in particular, that an ATO tax counsel executive (Jonathan Woodger) "issued an opinion" about a gold refining GST scheme case to the "GAAR tax review body", that he chairs.
- > This is not accurate. The body in question is the General Anti-Avoidance Rules Panel. The Panel is not an 'internal tax appeal system'. It is an advisory body set up voluntarily by the ATO to deal with anti-avoidance cases; it is not a tribunal or appeal board.
- > In the case in question, the Panel held a preliminary hearing to advise on whether the ATO's case appeared to be reasonable at that stage. The taxpayer's representatives were not involved at this stage. This is standard, long-standing Panel practice. The Panel advised that the case should continue to be investigated.
- > After that stage, but before the full Panel hearing where the taxpayer was invited to attend, the ATO team approached the Panel chair (Woodger) for further clarification as to the arguments that should be put to the taxpayer as to why the General Anti-Avoidance Rule appeared to apply in the case. Woodger gave some further advice, that was accepted and those arguments were put to the taxpayer.
- > This is standard, long-standing practice. This conduct, entirely consistent with the proper role of an advisory Panel and its chair, does not give rise to any reasonable claim of bias or lack of independence - contrary to the implication in the media article.
- > Whenever any realistic suggestion of perceived bias, conflict of interest or similar arises at the General Anti-Avoidance Rules Panel, it is dealt with appropriately - usually by the relevant persons excluding themselves entirely from the Panel process for that case.
- > In any event and quite apart from the General Anti-Avoidance Rules Panel, a further level of rigour and independence applies at the objection stage, after a tax assessment is issued. In this case the objection was decided by new ATO experts without any reference to Woodger or the Panel and with the benefit of advice from independent barristers.

Note: Application of the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* to gold schemes

Background to the GST

1. GST is effectively a tax on final private consumption in Australia.¹ Taxable supplies are subject to GST.² GST-free and input taxed supplies are not taxable supplies,³ and hence are not subject to GST.
2. A GST registered entity is entitled to an input tax credit (ITC) for acquisitions made for a creditable purpose⁴ in carrying on its "enterprise", provided the acquisition was made as the result of a taxable supply, and the entity provided or was liable to provide "consideration" for the acquisition.⁵ "Consideration" includes any payment, act or forbearance, in connection with a supply.⁶ An "enterprise" means an activity, or a series of activities, done in any of a number of specified ways including "in the form of a business".⁷
3. GST registration is mandatory for entities that carry on an enterprise and whose turnover exceeds \$75,000.⁸ Registered entities are required to lodge GST returns.⁹ The Business Activity Statement (BAS) is an approved form for lodging a GST return. Registration is voluntary for entities that carry on an enterprise with turnover under the threshold, or, who intend to carry on an enterprise from a particular date.¹⁰
4. Input tax credits are not available for acquisitions that result from GST-free or input taxed supplies,¹¹ acquisitions of a private or domestic nature, and, acquisitions, to the extent they relate to making input taxed supplies.¹² Input tax credits are intended to ensure GST is effectively borne by consumers, as registered entities (e.g. businesses) are entitled to an ITC in order to offset the GST on things they acquire in conducting their enterprise.¹³
5. Acquisitions conferring ITC entitlements are "creditable acquisitions".¹⁴ Ordinarily, the ITC for a creditable acquisition equals the GST payable on the taxable supply of the thing acquired.¹⁵

¹ Explanatory Memorandum (EM) to the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)*, Chapter 1 – Executive Summary; see also *HP Mercantile Pty Ltd v. Commissioner of Taxation* [2005] FCAFC 126 at [10] – [18].

² Sections 7-1 and 9-40 of the GST Act.

³ Section 9-5 of the GST Act.

⁴ Section 11-15 of the GST Act.

⁵ Sections 11-20 and 11-5 of the GST Act.

⁶ Paragraph 9-15(1)(a) of the GST Act.

⁷ Paragraph 9-20(1)(a) of the GST Act.

⁸ Section 23-15 of the GST Act and regulation 23-15.01 of the *A New Tax System (Goods and Services Tax) Regulations 1999*.

⁹ Section 31-5 of the GST Act.

¹⁰ Section 23-10 of the GST Act.

¹¹ Sections 11-20 and 11-5(b) of the GST Act, although special rules modify this in the case of second-hand goods; see section 45-5 and Division 66 of the GST Act.

¹² Subsection 11-15(2) of the GST Act.

¹³ EM to the GST Act Chapter 1 – Executive Summary. See also *HP Mercantile* [2005] FCAFC 126 at [10] – [18].

¹⁴ Sections 11-20 and 11-5 of the GST Act.

¹⁵ Section 11-25 of the GST Act.

6. The GST payable on a taxable supply is equal to 10% of the “value” of the taxable supply.¹⁶ The “value” of a taxable supply is equal to ten elevenths of the “price” of the supply.¹⁷ Where the consideration for a taxable supply is expressed as an amount of money, the “price” is that amount.¹⁸

Second-hand goods

7. The ordinary rules for ITC entitlement are subject to modification in the case of “second-hand goods” as defined under the GST Act.¹⁹ If a GST registered entity acquires second-hand goods from an unregistered entity, the supply of the goods to the GST registered entity is not a taxable supply.²⁰ Hence the GST registered entity is not entitled to an ITC for the acquisition, even if the second-hand goods were acquired for use in its business.²¹
8. The price originally paid for the goods by the unregistered entity will have included GST.²² However, as they are unregistered, the entity could not have claimed an ITC to offset the GST included in the price. Therefore GST is embedded in the cost of the goods when the unregistered entity sells them to the registered entity. If the registered entity then makes a taxable supply of the second-hand goods, GST is payable. This would mean that there is GST charged on GST.²³
9. Special rules relieve this cascading of GST by allowing a registered entity an ITC for second-hand goods acquired for the purposes of sale or exchange in the ordinary course of their business, even though the supply of the goods to them was not a taxable supply.²⁴ The ITC is equal to the lesser of one eleventh of the consideration for the acquisition of the goods, or, the GST payable on a subsequent taxable supply of the goods.²⁵
10. Gold satisfying the definition of “precious metal” under the GST Act is excluded from the definition of “second-hand goods” as is gold in an “investment form” of less than 99.5% fineness.²⁶ Aside from these relevant exclusions, the term “second-hand goods” takes its ordinary meaning. In the context of the GST law, the ATO considers that “second-hand goods” ordinarily means goods that are not new or which have been previously used.²⁷

¹⁶ Section 9-70 of the GST Act.

¹⁷ Subsection 9-75(1) of the GST Act.

¹⁸ Paragraph 9-75(1)(a) of the GST Act. Where consideration for the taxable supply is non-monetary, the “price” is the GST inclusive market value of the consideration; see paragraph 9-75(1)(b) of the GST Act.

¹⁹ Section 45-5 and Division 66 of the GST Act.

²⁰ This is because paragraph 9-5(d) of the GST Act requires an entity to be registered, or, required to be registered for GST, in order to make a taxable supply.

²¹ For further explanation see paragraph 6.68 of the EM to GST Act.

²² On the assumption that the goods were purchased on or after 1 July 2000, being the commencement of the GST; see section 1-2 of the GST Act.

²³ For further explanation see paragraph 6.69 of the EM to the GST Act.

²⁴ Section 66-5 of the GST Act.

²⁵ Section 66-10 of the GST Act. Other rules, not presently relevant, apply where second-hand goods cost \$300 or less.

²⁶ Section 195-1 of the GST Act, definition of “second-hand goods”.

²⁷ Paragraphs 15 & 57-59 of Goods & Services Tax Ruling (GSTR) 2000/8; see also paragraphs 37-41 of GSTR 2005/3.

Accounting for GST liabilities and entitlements

11. GST registered entities generally account for GST liabilities and entitlements for each quarterly tax period (although, entities with annual turnover above \$20m are required to use monthly tax periods),²⁸ adopting either an accruals or cash (receipts) system of accounting.
12. The GST liability for a taxable supply is attributable to the tax period in which any of the consideration for the supply is received. If an invoice relating to a taxable supply is issued before any consideration is received, the GST liability for the supply is attributable to the tax period in which the invoice is issued.²⁹
13. The ITC entitlement for a creditable acquisition is attributable to the tax period in which the entity that made the acquisition provides any of the consideration for it. If an invoice relating to the creditable acquisition is issued before any consideration is provided, the ITC entitlement is attributable to the tax period in which the invoice is issued,³⁰ subject to the entity claiming the ITC, holding a valid "tax invoice".
14. A GST registered entity offsets amounts of GST on its taxable supplies for each tax period against the ITCs on its creditable acquisitions to produce a "net amount".³¹

Payments under the GST Act

15. The net amount for a tax period is the amount which, if positive, a GST registered entity must pay the Commonwealth, generally within 28 days of the end of the tax period, or, which if negative, the Commonwealth must pay the entity expressed as a positive sum.³² Payment of a negative net amount (as a positive sum) is commonly referred to as a GST refund. A GST refund arises where an entity's ITC entitlements exceed the GST, if any, on its supplies for a tax period.
16. The Commissioner of Taxation (Commissioner) is deemed to have assessed an entity's net amount upon lodgement of its BAS for a tax period, in an amount equal to the net amount calculated in the BAS.³³ The assessed net amount becomes payable or refundable as described above. The Commissioner is empowered to amend the assessed net amount disclosed in a BAS in certain circumstances.³⁴

²⁸ Sections 27-5 and 27-15 of the GST Act. It is also noted that a taxpayer with a turnover less than \$20m can elect to report GST liabilities and entitlements on a monthly basis.

²⁹ Subsection 29-5(1) of the GST Act. Under section 195-1 of the GST Act, an "invoice" is defined as a document notifying an entity of an obligation to make a payment.

³⁰ Subsections 29-10 (1) and 29-10(3) of the GST Act. However, if an entity accounts for GST on a cash basis, different attribution rules that are not presently relevant apply; see subsections 29-5(2) and 29-10(2) of the GST Act.

³¹ Sections 7-5, 7-10 and 17-5 of the GST Act. The net amount may be subject to adjustments; see section 17-10 of the GST Act.

³² Sections 7-15, 33-4, 33-5 and 35-5 of the GST Act of the GST Act. The Commissioner of Taxation's obligation to pay a GST refund is subject to refund retention provisions, including in section 8AAZLGA of the *Taxation Administration Act 1953* (TAA 1953), that generally apply for refund verification purposes.

³³ Section 155-15 of Schedule 1 to the TAA 1953.

³⁴ For example, within four years of lodgement of a BAS whether at the application of a taxpayer or in exercise of the Commissioner's discretion, or, outside of four years, where there has been fraud or evasion; see Subdivision 155-B of Schedule 1 to the TAA 1953.

Tax invoices

17. An entity cannot claim an ITC that is attributable to a tax period, unless it holds a “tax invoice” for the creditable acquisition when it lodges its BAS for the tax period.³⁵ A “tax invoice” is a document containing information about a taxable supply that is generally issued by the supplier, and, which must also comply with certain statutory requirements.³⁶
18. A tax invoice also includes a “recipient created tax invoice” (RCTI), which is a tax invoice the Commissioner has determined can be issued by the recipient of a taxable supply.³⁷ The circumstances in which RCTIs may be issued are limited, and, both the supplier and acquirer must agree in writing to use RCTIs.³⁸

Gold as precious metal under the GST Act

19. The GST Act defines gold in an “investment form” of at least 99.5% fineness as “precious metal”.³⁹ Supplies of precious metal are either GST-free⁴⁰ or input taxed.⁴¹
20. Supplies of gold or goods made from gold that are not “precious metal” as defined, are taxable supplies, if delivered or made available in Australia,⁴² and, made for consideration by a GST registered entity in the course of their enterprise.⁴³
21. A supply of gold satisfying the definition of “precious metal” is GST-free, provided:
 - a. it is the first supply of that precious metal after it has been “refined” by, or on behalf of, the supplier;⁴⁴
 - b. the metal was “refined” by a “refiner of precious metal”;⁴⁵ and
 - c. the recipient of the supply is a “dealer in precious metal”.⁴⁶
22. A supply of “precious metal”, as defined in the GST Act, that is not GST-free (e.g. because it is not the first supply of the metal after being refined) is input taxed.⁴⁷

³⁵ Subsection 29-10(3) of the GST Act. This is subject to limited exceptions, not presently relevant.

³⁶ Subsection 29-70(1) of the GST Act specifies the statutory requirements for a tax invoice. These include that the tax invoice be dated and identify the supplier and its ABN, and, contain enough information to enable the identity or ABN of the recipient to be ascertained where the price of the supply exceeds \$1,000. The amount of GST (if any) payable in relation to each supply included on the invoice must also be shown.

³⁷ Subsection 29-70(3) of the GST Act; see also *A New Tax System (Goods and Services Tax) Act 1999 Classes of Recipient Created Tax Invoice Determination (No. 1) 2000*. Broadly, the recipient of a taxable supply can issue the tax invoice for the taxable supply (i.e. an RCTI), where it has an annual turnover of at least \$20,000,000, is together with the supplier registered for GST, and, has a written agreement in place with the supplier acknowledging that RCTIs will be issued.

³⁸ GSTR 2000/10 further explains the circumstances in which RCTIs can be issued.

³⁹ Section 195-1 of the GST Act, definition of “precious metal”.

⁴⁰ Under section 38-385 of the GST Act.

⁴¹ Under section 40-100 of the GST Act.

⁴² Sections 9-5(c) and 9-25(1) of the GST Act.

⁴³ Section 9-5 of the GST Act.

⁴⁴ Paragraph 38-385(a) of the GST Act.

⁴⁵ Paragraph 38-385(b) of the GST Act.

⁴⁶ Paragraph 38-385(c) of the GST Act.

⁴⁷ Section 40-100 of the GST Act.

Dealers and refiners

23. The GST Act defines a “refiner of precious metal” as an entity that satisfies the Commissioner that it regularly converts or refines precious metal in carrying on its enterprise.⁴⁸ The GST Act defines a “dealer in precious metal” as an entity that satisfies the Commissioner that a principal part of its enterprise involves the regular supply and acquisition of precious metal.⁴⁹

Refining

24. Neither “refining” nor “refined” are defined by the GST Act. The *Macquarie Dictionary* defines “refining” as – “1. to bring to a fine or a pure state; free from impurities; to refine metal, sugar, petroleum, etc ... 3. to bring by purifying, as to a finer state or form”.

25. The *Australian Oxford Dictionary* defines “refine” to mean “free from impurities or defects; purify, clarify.”⁵⁰ The *Dictionary of Mining, Mineral, and Related Terms* compiled by the American Geological Institute defines “refine” as “(a) to free from impurities; to free from dross or alloy; to purify, as metals; to cleanse ...”.⁵¹ The word “refining” in turn is defined as the “purification of crude metallic products.”⁵²

26. The GST Act does not expressly restrict the “first supply of precious metal after its refining,” to the initial supply of precious metal after it has been refined from ore (i.e. after the metal has been mined or extracted).

Investment form

27. “Investment form” is not defined by the GST Act. In the ATO’s view, to be in an “investment form” and satisfy the definition of precious metal, gold must be in a form that:

- a. is capable of being traded on the international bullion market, that is, it must be a bar, wafer or coin;
- b. bears a mark or characteristic accepted as identifying and guaranteeing its fineness and quality; and
- c. is usually traded at a price determined by reference to the spot price for gold.⁵³

Gold jewellery and granules

28. Neither jewellery made from gold nor gold granules are “precious metal” as defined under the GST Act.⁵⁴ Jewellery made from gold does not have the essential character of being gold in its metallic form. Rather, it has the character of being a good manufactured from gold (and possibly other components).⁵⁵ Gold granules do not bear any mark guaranteeing their fineness or quality and hence are not in an “investment form”.⁵⁶

⁴⁸ Section 195-1 of the GST Act, definition of “refiner of precious metal”.

⁴⁹ Section 195-1 of the GST Act, definition of “dealer in precious metal”.

⁵⁰ *Australian Oxford Dictionary* (at 1083).

⁵¹ *Dictionary of Mining, Mineral, and Related Terms* (at 450).

⁵² Citing *Fay A Glossary of the Mining and Mineral Industry* (1920).

⁵³ Paragraph 29 of GSTR 2003/10.

⁵⁴ Paragraphs 11 and 33 of GSTR 2003/10.

⁵⁵ Paragraph 11 and 12 of GSTR 2003/10.

⁵⁶ Paragraphs 24 and 33 of GSTR 2003/10.

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GST Product Committee

SENSITIVE

Internal

Issue date:	21 April 2017		
To:	GST Product Committee		
From:	Liz Simpkin, A/g Assistant Commissioner		
Business line:	ITX	Section:	Complex Assurance & Evasion (CA&E)
Contact officer:	Liz Simpkin	Contact phone:	x48598
Response date:	N/A		
Subject:	Precious Metals Project (PMP) Update		

Purpose

The purpose of this paper is to provide an update on the progress of the PMP.

Background

The previous presentation to the GST Product Committee in regard to the PMP was conducted in December 2015. (**Attachment A**).

In September 2016 ITX CA&E developed and subsequently implemented a refocussed project strategy. The strategy and treatment plan sought to holistically mitigate the GST revenue risk and seek to change the behaviour identified within the precious metals risk population (**risk population**). The strategy was an ITX led, cross business line integration approach that included compliance activity, debt action, advice to industry, reform to the GST Act, engagement with the Serious Financial Crime Taskforce (SFCT), and referrals for prosecution (**Attachment B**).

A number of events have occurred since December 2015 which have influenced the PMP treatment plan, and are detailed on the timelines at **Attachment C**. The timeline of events in the PMP are focussed from two perspectives; the broader project (2013–2017), and the narrower focus period for this update - on/around December 2015 to date.

The following is a summary of activity undertaken in the PMP since the December 2015 update.

ITX Compliance

Compliance activity to date has been completed through the conduct of 180 audits which has raised liabilities inclusive of penalties in excess of \$700million. There are approximately 81 reviews/audits currently being actioned.

Refiner Refund Retainment Strategy

The ITX compliance strategy from September 2016 onward has been to focus on the recipients of the BAS refunds (refiners/gold dealers), to review and where applicable, retain the refunds subject to verification and assessment pursuant to the provisions contained within s.8AAZLGA (TAA). This approach seeks to analyse each of the refiner supply chains in a linear manner, then to laterally review the encompassing gold network, to both verify the legitimacy of the refunds for each refiner/dealer, and to confirm the risk hypothesis that the gold is simply being recirculated through the industry via each of the supply chains (**Attachment D**). To date refunds retained pursuant to this strategy total approximately \$20million. From a significant monthly payout of \$13million in BAS refunds in August 2016, the ATO is currently paying negligible refunds to the risk population entities.

This result from the strategy implementation has directly supported the ATO's assertion that the scheme perpetuated by the risk population has created an artificial and contrived scrap gold market, whereby turnover increased from \$165million in 2011 to \$1.8billion in 2016. The inability to obtain a financial benefit (through the receipt of BAS refunds) appears to have subsequently reduced the scrap gold industry turnover to pre-2011 levels. The ATO contends that were it not for the GST refund, the business models of the entities would largely be non sustainable.

The verification of the retained refunds, through analysis of the complex supply chains is well advanced, and it is expected that assessments will issue within the next 3 – 6 months ^{s38}

The ATO position for these assessments is currently under discussion and there are a number of arguments currently under consideration with ITX case leadership and TCN, including the Division 165 scheme argument (GST Act Anti-avoidance provision).

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Voluntary Reverse Charge/Second Hand Goods

On 1 January 2017 a voluntary reverse charge (**VRC**) arrangement was offered to the gold industry, whereby the supplying entity has its GST remitted to the ATO by the acquirer of the taxable supplies. A VRC working group was established to process VRC worksheets including ITX branches CA&E, BASE and R&S, together with CAS, OPAL and Debt representatives.

A draft GSTD on the definition of second hand goods was issued on 22 February 2017 for consultation, with an expected completion date of 31 May 2017. The definition of second hand goods excludes goods to the extent that they consist of gold, silver, platinum or any other substance which, if it were of the required fineness, and in an investment form, would be precious metal. The consultation period for the GSTD was extended to April 2017.

Law Reform

Ongoing discussions and the provision of information have been undertaken with both Treasury and ministerial advisors, to expedite the legislative reform required to the GST Act.

As of 1 April 2017, a reverse charge of GST was introduced and applies to all business to business taxable supplies of gold, silver or platinum (precious metals). This change to the law was announced on 31 March 2017 and will apply retrospectively when introduced (expected during winter session of Parliament). The law change makes the acquirer of the taxable supply responsible for remitting the GST on the supply thereby aligning the GST payable on the supply with the acquirer's credit entitlement.

Debt Action

Compliance action undertaken has led to some phoenix activity by gold supply chain participants. Various refiners, missing traders, bullion dealers, coin dealers and gold traders have entered administration/liquidation following ATO audit action. Debt is working closely with ITX on a number of cases including:

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Criminal Investigations and Prosecutions

In October 2016 the SFCT released an Intelligence Bulletin alerting the community to potential fraudulent activities in the precious metals refining industry, through the conduct of carousel arrangements and the use of missing traders in schemes (**Attachment E**).

A PGH criminal investigation was commenced on a gold syndicate following the conduct of AFP led search warrants in October 2013. A Brief of Evidence was delivered and accepted by the CDPP in April 2015. Pursuant to the completion of forensic/financial analysis, a

decision will be made by the CDDP Director as to whether charges will be laid (Conspiracy to Defraud the Commonwealth (Section 135.4(3)), and Conspiracy to Deal in the Proceeds of Crime (Section 400.3(1)), Criminal Code Act). It is anticipated that such decision will be provided in late 2017.

Additionally the SFCT (AFP/ATO) has recently commenced an investigation following an ATO referral for the treatment of certain risk population entities.

Client/Industry Engagement

ITX has undertaken to meet with all refiners that have sought meetings with the ATO following the commencement of the refund retention strategy. ^{s38}

Workshops were held with industry participants following the announcement of both the VRC in January 2017 and the RC in April 2017.

Media

The PMP has attracted considerable media coverage in late 2016/2017. The articles can be viewed at **Attachment F**.

Next steps

1. ITX CA&E to determine the most appropriate argument for the amendments to refiners (may include Division 165 and the GAARP).
2. Issue amended GST assessments (where applicable) for all ^{s38} retention cases by December 2017.
3. Continue and finalise controlling mind audits by June 2018.
4. Finalise all other risk population legacy audits by June 2018.
ITX Risk (with Smarter Data) will develop the risk population for monitoring following the enactment of the reverse charge legislation in June 2017. An initial 12 month compliance monitoring programme will be established.
5. ITX Base to assist with monitoring activities.
6. ITX CA&E to undertake reviews/audits of non-compliant entities, where appropriate
7. Undertake a Project Debrief and Assessment of Project Outcomes Report (February – June 2018).
8. ITX CA&E to continue to provide support and assistance to RDR for ongoing litigation and objection matters.
9. ITX CA&E to continue to provide support and assistance to PGH Criminal Investigations.

Liz Simpkin
A/g Assistant Commissioner

Attachments

Attachment	Description	Document
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Action Brief

GST treatment of precious metals

Timing

The ATO considers that legislative changes are urgently required regarding the GST treatment of precious metals.¹ Compliance activities and other actions to date have demonstrated a significant risk to revenue. These risks are unable to be satisfactorily addressed interpretatively, or by applying resources to detection and compliance action. If Government agreed to such changes, the ATO recommends consideration be given to making them effective from the date of the announcement. There will be transitional issues that need to be managed however the ATO will deal with industry stakeholders in a practical way.

Recommendation

The ATO recommends amendments to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to:

- establish a scheme to subject the supply of gold, and certain goods consisting of gold, to a reverse charge; and
- amend the definition of 'second-hand goods' to align it with changes to the definition of 'precious metals'.²

A number of matters would need to be addressed during the law design phase, such as specifying the range of gold products to which the reverse charge should apply, and implementing a potential reporting regime for gold transactions, and a potential accreditation scheme for gold refiners. These administrative matters should not hold up the progression of the policy.

Key Points

- As previously advised in the Advocacy Alert dated 20 January 2016, the current GST framework as it applies to precious metals (in particular, gold, due to its high value), combined with egregious arrangements, creates opportunities to improperly exploit GST outcomes.
- The subsequent revenue loss is the highest risk that the Commissioner currently faces in the indirect tax space.
- The Commissioner has made a significant resource investment to address non-compliance in this area. ATO compliance activity has generally only been effective in making short term

¹ Throughout this paper we refer to gold, however it is anticipated that the legislative amendments would apply to all precious metals as defined in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

² The definition of precious metal was altered in *A New Tax System (Indirect Tax and Consequential Amendments) Act (No. 2) 1999* to include the words "in an investment form". Amendments were also made to the effect that a first supply of precious metal no longer needed to be from a dealer in precious metal *for investment purposes*, to obtain GST-free treatment (italicised text deleted from Act).

modifications to the egregious behaviours. Scheme participants have continuously evolved around the Commissioner's compliance efforts. There is a significant risk of proliferation of these schemes if left unaddressed.

- Current participants have demonstrated a propensity to liquidate, phoenix, and implement revised structures and practices, in an effort to resist the Commissioner's compliance activities. Recovery opportunities remain limited and recently the ATO has observed an increase in criminals entering the industry. The subsequent Work Health & Safety (WH&S) concerns for ATO staff further limits our means of detection and compliance treatment.
- We now believe that law change is by far the most effective way to address these issues.
- The changes that the ATO proposes will shift the GST obligations from the supplier to the purchaser on a taxable supply of gold, by way of a reverse charge. As the reverse charge operates at each stage in the supply chain, the effect is a wash of GST obligations and input tax credit (ITC) entitlements, thereby stemming the current revenue leakage caused by the schemes (see diagrammatic representation at p. 8 below). As such, the need for sustained and resource intensive compliance activity to recover illegitimately claimed GST refunds should be reduced.

The core schemes observed by the ATO

- The ATO has observed two principal schemes:
 - "Missing trader" schemes: under this scheme, a supplier of scrap gold evades its obligations to pay GST by "phoenixing" so that there is ultimately one more ITC claim than GST payment. As there is no value add in the supply chain, all entities profit through sharing in the GST that is not remitted to the ATO, but for which an ITC is claimed (see diagrammatic representation at p. 7 below); and
 - "Second-hand goods" schemes: under this scheme, a supposedly unregistered supplier of scrap gold purchases bullion as an input-taxed supply. It transforms the bullion in a minor way so that it no longer has the tradeable characteristics of precious metal, and then supplies the gold to a registered second-hand goods dealer. The registered dealer claims an ITC under the second-hand goods rules, which has the effect that there is one more ITC claim than GST payment after the gold is ultimately re-refined. The unregistered supplier is able to profit because it can on-sell the damaged bullion to second-hand dealers at above the gold spot-price, where the second-hand goods dealer is entitled to an ITC. In effect, the unregistered supplier shares in the dealer's illegitimate ITC.
- The core observed behaviours involve networks of suppliers being recruited to acquire 'investment form' precious metal, alter and on-sell it within structured supply chains and within a short timeframe. This occurs with the façade of bona fide commercial transactions. These suppliers are interposed to conceal the true origin or source of precious metal, which if traded in an altered form, would generate ITC entitlements for the entities involved; these activities are attractive to individuals with criminal links. Each supplier in effect shares in the distribution of GST refunds that become available to refiners who acquire scrap at the end of the supply chains, with minimal or no profit being generated from gold spot price fluctuations.

Reverse charge mechanism to address missing trader schemes

- The ATO recommends a reverse charge mechanism, along the same lines as implemented in the United Kingdom in their Value Added Tax (VAT) legislation,³ to combat the missing trader schemes.
- A reverse charge mechanism has the effect that the recipient of a supply is responsible for remitting GST that would otherwise be remitted by the supplier. There is no purpose in any entity phoenixing as the payment of GST and the claim to ITCs are aligned in the same entity.
- The recipient is also entitled to claim ITCs where it has made a creditable acquisition. Thus the GST payable by the recipient and its entitlement to ITCs will generally offset one another, while not affecting the GST base.

³ *Value Added Tax Act 1994 (UK)* s 55.

- This would prevent entities from directly engaging in, or otherwise benefiting from, fraudulent conduct in carousel style arrangements. In the missing trader schemes observed, it is the GST that is not remitted by the missing trader that effectively funds the profits made by the participants in the arrangements.
- In discussion, HMRC advised that their reverse charge mechanism and administrative framework for gold transactions have been highly effective in mitigating the missing trader and phoenixing risks within the gold industry.

Recommended amendments to address second-hand goods schemes

- Generally, the second-hand goods provisions do not apply to supplies of either:
 - a) precious metal, or
 - b) goods containing substances that would be precious metal, if it were of the required fineness.⁴
- However on a plain reading of the second-hand goods provisions as they interact with the definition of precious metal,⁵ the goods in part (b) would also have to be in investment form, in which case they would fall within part (a).
- This means that part (b) is unable to be administered, with the effect that ITCs become claimable on so-called 'scrap gold' (damaged bullion) sold by unregistered suppliers. This outcome is not consistent with policy intent as no GST was previously paid on the supply of the bullion earlier in the supply chain.
- The ATO is currently drafting a GST Determination (GSTD) that will set out a purposive interpretation of the provision. However, it is anticipated that this view will be controversial and there is a real risk that those responsible for these schemes will disregard the interpretation and carry on as before.
- The ATO has attempted to overcome the second-hand goods schemes on the basis that:
 - the unregistered supplier is carrying on an enterprise and, if over the turnover threshold of \$75,000, is required to register for GST. However attempting to register such entities likely exacerbates the phoenixing issue. Additionally, suppliers could contrive to make supplies that do not exceed the annual registration threshold; or
 - Division 165 (anti-avoidance provision) applies to this artificial market, therefore negating the benefit from the schemes. However, applying Division 165 is not without difficulty. It can be a lengthy and protracted exercise and it also suffers from the phoenixing risk.
- Consequently, the ATO believes an amendment is desirable to remove doubt about how the law applies to second-hand supplies, to prevent misuse of the provision, and address any disputes about the provision's operation.

Reporting and accreditation regimes

- The UK model, on which the ATO recommended approach is based, also involves certain reporting requirements on gold transactions, and requires refiners to be accredited with the London Bullion Market Association (LBMA).
- Further consideration will therefore be required as to whether these regimes should also be implemented as part of a package of proposed reforms.
- The ATO's preliminary view is that a reporting regime will improve access to data, where the gathering of information via compliance activities has been problematic.
- Further, a form of accreditation requirement on refiners would likely bolster the ATO's efforts in preventing the proliferation of illegitimate entities in the gold industry.
- However, there are sensitivities on this matter surrounding the current LBMA accredited refiners within Australia. The ATO is happy to engage with Treasury to discuss these issues further. These administrative matters should not hold up the progression of the policy.

⁴ See definitions of 'precious metals' and 'second-hand goods' in section 195-1 of the GST Act.

⁵ See footnote 1.

Sensitivities

- The reverse charge will impact some legitimate industry players, however, the ATO believes that legislative action is required, and will work in consultation with these industries in designing the administrative system for a reverse charge.
- The amendments to the second-hand goods provisions may also affect legitimate pawn brokers or second-hand dealers who are making genuine acquisitions of scrap jewellery. However the ATO will consult with affected industries as part of developing the draft GSTD referred to above.

Revenue Impact

- The ATO's Revenue Analysis Branch is currently examining the revenue effects of the proposed legislative change.
- However, in the absence of any legislative change, even with continued compliance activity, it is expected that taxpayers will alter their behaviour to claim ITCs they are not entitled to under the legislation.
- Based on the analysis of s38 cases and s38 entities on the ATO's watch list, compliance activities have prevented the leakage of GST revenue in the order of \$160 million to \$200 million per annum. In addition, audits on the precious metals industry have raised further liabilities of approximately \$80 million in 2013-14 and \$70 million in 2014-15, of which \$23 million has been collected by the ATO to date.
- In the 2015/16 year, the ATO raised \$181 million in assessments as a result of compliance activity in this space.
- There are currently s38 cases at litigation stage over assessments with a total value of approximately \$110 million.

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Additional information

Current GST treatment of gold

- Broadly speaking, under the GST law, the first supply of refined precious metal is GST-free and subsequent supplies are treated as input taxed.⁶ If the metal is altered and is no longer of the required fineness or 'in an investment form', it no longer meets the definition of precious metal, and the supply is taxable.
- These different GST treatments, together with the ease with which the form and fineness of precious metal can be modified, create opportunities to manipulate whether the supply of the precious metal is taxable, GST-free or input taxed. The application of the second-hand goods provisions provides additional exploitation opportunities.
- The 'form' of precious metal can readily be changed without any sophisticated process. This may include defacing, scratching off hallmarks, melting, granulating, cutting or chopping the metal, meaning it is no longer in 'investment form', or adding a small amount of alloys to reduce the fineness.
- 'Asset Flipping' activities have been identified in ongoing repetitious circular arrangements between refiners, dealers and suppliers. Precious metal is 'flipped' from an input taxed supply ('in an investment form') to taxable (scrap gold) to GST-free (refining), with the refiner able to recover by way of ITC, any GST charged, but GST is ultimately not remitted by other participants earlier in the supply chain. Each supplier is able to take a share in the distribution of GST refunds with minimal or no profit being generated from gold spot-price fluctuations.
- Most of the schemes identified by the ATO appear to have commenced in 2013, resulting in an immediate significant increase in GST refunds being issued from the ATO to these entities.
- The behaviour observed in the schemes does not seem to be replicated by legitimate industry players. The schemes differ from legitimate activity in that numerous unnecessary entities are interposed to obscure the alteration of the form of the gold. There has also been a proliferation of entities entering the industry that appear to be otherwise unable to fund their operations from trading profits, apart from the profit generated from GST refunds obtained by participation in the fraud.⁵³⁸

Effect of ATO compliance action to address behaviour

- Significant resources have also been put into compliance activities in an attempt to address the issue. Unfortunately these have proven to be of limited effectiveness for a number of reasons, including:
 - significant third party enquires are required to establish supplier networks to identify at which point in the supply chain precious metal has been altered;
 - compliance activities to date have prompted the diversification of the risk, with more frequent trading (lower volumes per trade), structuring of payments and the implementation of more complex supplier networks that obscure the fraud;
 - an extensive degree of fraud and evasion is evident within clandestine supplier networks, with high levels of collusion in concealing the alteration of 'investment form' precious metal;
 - compliance activities require a high degree of industry knowledge (e.g. refining processes and pricing) to determine transaction legitimacy, which includes intensive analysis of artificial assay results and transaction splitting;

⁶ See section 38-385 and 40-100 of the GST Act.

- the lack of industry accreditation and other regulatory requirements for dealers and refiners, significantly limits the ATO's ability to verify 'investment form' requirements (i.e. purity/fineness) in assessing ITC entitlement;
 - the presence of known criminals infiltrating the industry creates serious WH&S issues for ATO staff;
 - missing trader and phoenix activities are prevalent, resulting in limited opportunity to verify the bona fides of transactions and limited success in debt recovery; and
 - the cost of fully investigating and litigating against individual entities, when the schemes are able to be modified to get around the Commissioner's compliance activities.
- In the absence of reform, significant limitations exist in effectively applying the core provisions to prevent revenue leakage. The anti-avoidance provisions may prove effective in some instances; however, this requires significant investment of time to address the complexities of Division 165, with unknown prospects of success in potential litigation, after the fact.

Limited ability to retain refunds under the Commissioner's refund retention power (section 8AAZLGA)

- The efforts to retain refunds and contain revenue leakage are significantly limited by section 8AAZLGA of the Taxation Administration Act 1953, in particular the requirement that it must be 'reasonable' to retain the refund. The complex nature of the schemes means that there is insufficient time to make required enquiries prior to the release of refunds. It is not "reasonable" to retain a refund on a suspicion of tax avoidance or evasion alone, without evidence. ^{s37}

Discussions with HM Revenue & Customs

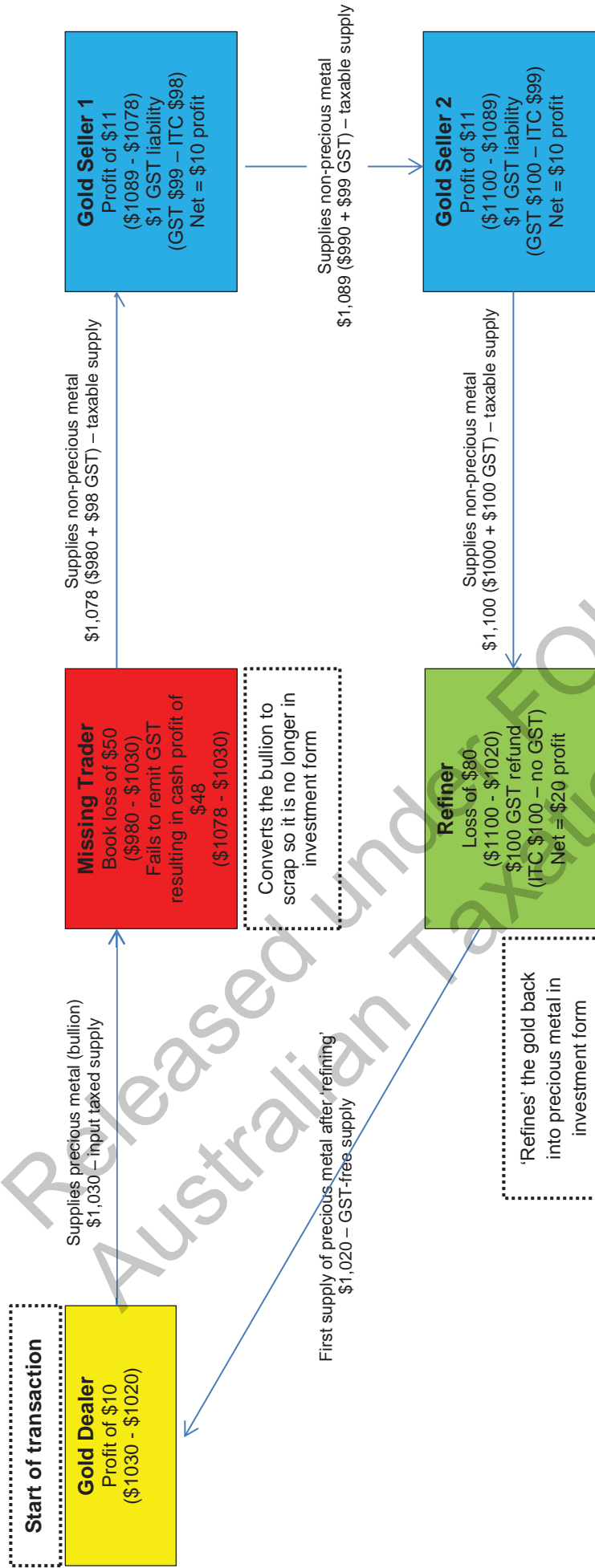
- The ATO spoke with HMRC on 4 July 2016 to discuss their treatment of carousel fraud in the gold industry. HMRC advised that their measures were highly effective in mitigating the missing trader and phoenixing risks.
- More generally, the European Union (EU) has addressed carousel fraud through an EU case law rule.⁷ The EU case law, which applies across all VAT transactions, denies VAT credits to a taxpayer that knew or ought reasonably to have known (for example due to overly favourable pricing or conditions) that someone in the supply chain is committing VAT fraud, such as the non-remittance of VAT.

The reverse charge solution

- The ATO has considered a number of possible solutions to the schemes, including treating all supplies of gold as input-taxed and limiting ITCs to accredited entities. However, many of these options would result in a change to the tax base, by either reducing revenue, or affecting the profits of legitimate industry players.
- The substantial benefit of a reverse charge mechanism is that it merely changes the revenue collection mechanism without changing the underlying tax base.
- Additionally, there would be an opportunity to use the reverse charge in other high-risk industries in which egregious arrangements are known to occur, such as the supply of mobile phones.
- The diagrams in the Attachment sets out how the current schemes operate and how a reverse charge mechanism would address the resulting revenue leakage.

⁷ *Axel Kittel v Belgian State (C-439/04)* and *Belgian State v Recolta Recycling SPRL (C-440/04)*.

Current GST treatment of precious metals (missing trader scheme)

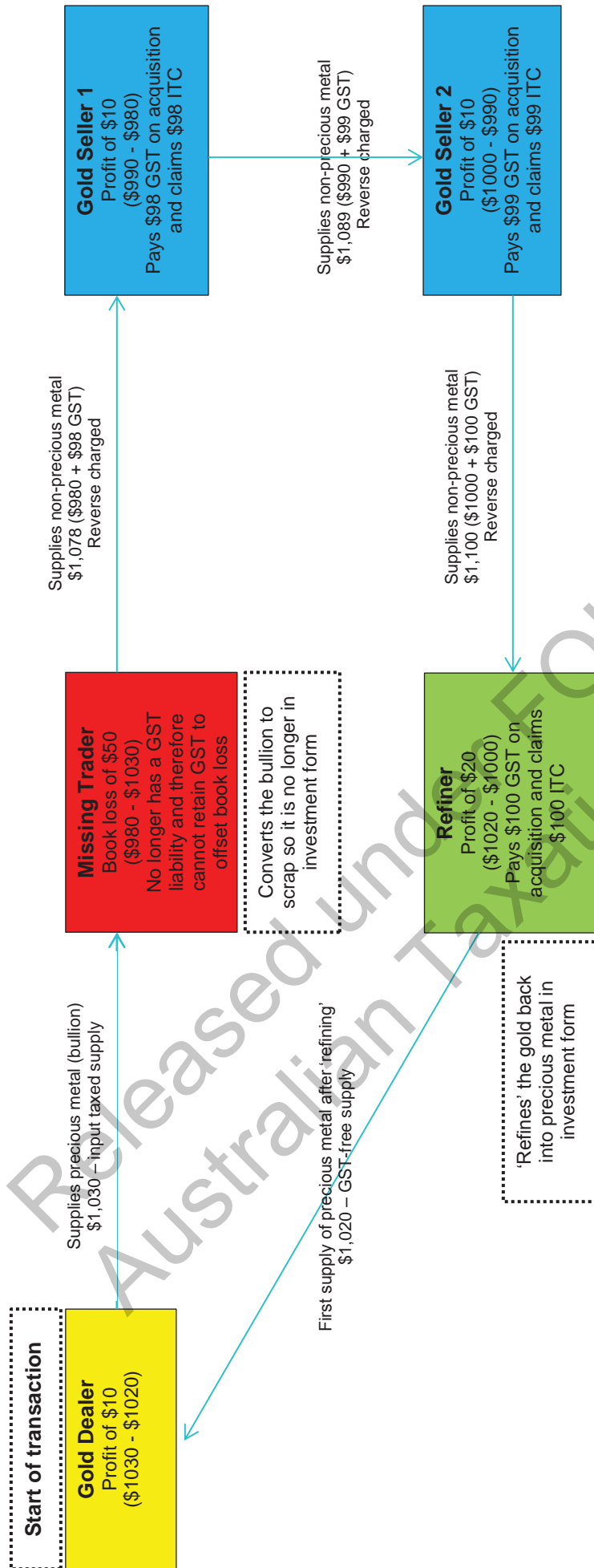


Entity	GST liability	ITC entitlement	Net GST position	Profit
Gold Dealer	Nil	Nil	Nil	\$10
Missing Trader	\$98	Nil	\$98 liability (not remitted)	\$48
Gold Seller 1	\$99	\$98	\$1 liability	\$10
Gold Seller 2	\$100	\$99	\$1 liability	\$10
Refiner	Nil	\$100	\$100 refund	\$20
ATO	-	-	\$98 revenue loss	-

Treatment of a supply of precious metal under the GST Act	
First supply of gold after refining	GST-free
Supply of precious metal (gold of at least 99.95% fineness and in investment form)	Input taxed
Other supplies of gold (does not meet the definition of precious metal)	Taxable supply

- In the current scheme all of the participants make a profit by sharing in the GST refund which is received by the Refiner.
- By interposing the two Gold Seller entities, the ATO receives \$2 GST but ultimately refunds \$100 of ITCs to the Refiner.
- Gold Seller 1 claims an ITC of \$98 but the corresponding GST liability is not remitted by the Missing Trader
- This results in a leakage of \$98 from the GST base.

Reverse Charge GST treatment of precious metals (missing trader scheme)



Entity	GST liability	ITC entitlement	Net GST position	Profit
Gold Dealer	Nil	Nil	Nil	\$10
Missing Trader	Nil	Nil	Nil	(\$50)
Gold Seller 1	\$98	\$98	Nil	\$10
Gold Seller 2	\$99	\$99	Nil	\$10
Refiner	\$100	\$100	Nil	\$20
ATO	-	-	Nil	-

Treatment of a supply of precious metal under the GST Act	
First supply of gold after refining	GST-free \$ 38-385
Supply of precious metal (gold of at least 99.95% fineness and in investment form)	Input taxed \$ 40-100
Other supplies of gold (does not meet the definition of precious metal)	Reverse charged -

Reverse Charge GST treatment of precious metals (missing trader scheme) cont.

- A reverse charge mechanism would effectively negate the GST benefit in the missing trader schemes.
- Currently the fraud is funded by the Missing Trader not remitting their GST obligation.
- The reverse charge removes this benefit as the obligation to pay GST on the supply from the Missing Trader now lies with Gold Seller 1.
- As this reverse charge systems moves along the chain, Gold Seller 1, Gold Seller 2 and the Refiner all end up in a net GST position of \$0. As they are responsible for remitting the GST paid amount and would theoretically be able to claim an ITC, the transaction for GST purposes is a wash, as is the intention of the system.
- The reverse charge prevents GST leakage, as the right to an ITC credit relies on the remission of the corresponding GST.
- Under a reverse charge system, the only way for each entity to make money is by running a profitable business.

Impact of Reverse Charge by entity

- **Gold Dealer:** Likely to have no impact as they deal with GST-free purchases and input-taxed supplies
- **Missing trader:** Would be adversely affected, which is the intended outcome. They rely on not remitting GST to make their profit. The reverse charge would have an anti-avoidance effect in preventing this behaviour.
- **Gold Sellers:** Likely to have a positive impact in the form of better cash-flow. They are no longer required to outlay the GST payable to their supplier, and therefore not dependent on refunds from activity statements.
- **Refiner:** Same position as Gold Sellers. There is an additional compliance burden as they will now be required to report a 1A figure. This is a simple additional administrative task, and would likely be offset by the cash-flow benefit.

1. Issue one: the definition of 'precious metal', in particular, the meaning of 'investment form' in the definition

Opinions sought: Does our view in GSTR 2003/10 regarding the meaning of 'investment form' for precious metals need review and change so that 'only precious metal that bears a hallmark approved by the London Bullion Market Association (LBMA) and can be traded on the international bullion market' can be precious metal for GST purposes?

Critical to the application of the GST legislation is the definition of 'precious metal'. When the GST Act was originally enacted, the definition of precious metal (s195-1) did not contain the phrase 'in an investment form'. The definition was amended effective 1 July 2000 to replace the original phrase 'in any form'. The current dictionary definition (s195-1) provides that:

"precious metal means:

- (a) gold (in an investment form) of at least 99.5% fineness; or
- (b) silver (in an investment form) of at least 99.9% fineness; or
- (c) platinum (in an investment form) of at least 99% fineness; or
- (d) any other substance (in an investment form) specified in the regulations of a particular fineness specified in the regulations."

The original Bill and Explanatory Memorandum (EM) did not provide clarification in terms of a clear definition, however an amended EM that was presented to the House of Rep/Senate in considering the proposed Bill addressed the issue and is where the term "in an investment form" was added to the legislation - extract of the amended EM as below:-

"Precious metals

1.11 Following extensive consultation with industry it has been determined that the precious metal provisions do not reflect the way precious metals are mined and supplied in Australia. This Bill amends the precious metal provisions to reflect the following:

- *Where a precious metal producer retains title of the precious metal (the refiner is effectively an agent), the refiner does not make the first supply of the precious metal, and the transaction is not GST-free under the current provisions. Item 16 amends section 38-385 of the GST Act to allow the first supply of precious metal to be provided by an entity on whose behalf the refining has been done;*
- *The current provisions limit a GST-free supply to where a dealer acquires the precious metal for investment purposes. The restriction to investment purposes is unnecessarily restrictive and will be deleted [item 54] ;*
- *In order to ensure that the correct supply of precious metal is GST-free or input taxed, the definition of precious metal has been amended to refer to sales of precious metals in an investment form. Investment form means precious metal sold in a coin, wafer, bar or other tradeable form which has an internationally accepted hallmark. In the case of gold, this means a hallmark that has been approved by the London Bullion Market and means that the gold can be traded on the international bullion market. [Items 65 and 66]*

1.12 *The amendments will ensure that the precious metal provisions contained in the GST Act better reflect the way the precious metals industry currently operates."*

The third dot point is clear that precious metal must bear a hallmark approved by the London Bullion Market Association (LBMA) and can be traded on the international bullion market (Refer to LBMA accreditation information)

In 2003, the ATO view on the definition of precious metals and what is meant by 'in an investment form' was published (GSTR 2003/10 What is 'precious metal' for the purposes of GST) following consultation with smaller refiners and industry players.

GSTR 2003/10 broadened the EM significantly and included many of the gold bars produced by smaller Australian refiners who may only sell their product in the Australian Market. The ruling specifically mentions one such refiner Australian Bullion Company (NSW) Pty Ltd (ABC NSW) (para34) whose hallmark is not accredited with the LBMA and does not further appear on the Goldbars Worldwide or any other organisations website (paras34 -36).

s38

2. Issue 2: The correct interpretation of para (b) of the second-hand goods definition in s195 of the GST Act

Opinions sought: what is the correct reading of para (b) of the second-hand goods definition

Section 195-1 of "the GST Act" - provides definitions of terms referred to in the legislation. Second hand goods are defined by exclusion in section 195-1 as:

'second-hand goods' does not include:

- (a) * precious metal; or
- (b) Goods to the extent that they consist of gold, silver, platinum, or any other substance which, if it were of the required fineness, would be precious metal; or
- (c) animals or plants.

Competing views

There are currently two competing views on how paragraph (b) of the definition should be read:

- can apply to goods to the extent that they comprised of precious metal of the required fineness, **regardless of their form**;
- can only apply to goods which satisfy the definition of precious metal except for the fact that they are not of the required fineness. This means that the goods also **have to be in an investment form**.

Reasons for both views:

Goods to the extent that they comprised of precious metal of the required fineness, regardless of their form

The view is based on the following reasons:

- To adopt the view that paragraph (b) requires that goods must be 'in an investment form' would mean that the application of this paragraph is limited to exclude precious metal as defined in the GST Act. Thus, the effect of paragraph (b) is identical to the effect of paragraph (a), effectively making paragraph (b) redundant.
- When the GST Act was enacted, precious metal included gold, silver or platinum of the required fineness 'in any form'. With this construction, it is apparent that the policy was to exclude from second-hand goods, not only precious metals, but also goods that comprised of precious metals, to the extent of the precious metals content. The subsequent amendment to the definition of precious metal was made to substitute 'in any form' with 'in an investment form'. The fact that Parliament did not amend paragraph (b) of the definition of second-hand goods seems to indicate its intention for paragraph (b) to apply the same way before the amendment.
- The construction of paragraph (b) where it uses the phrase 'goods to the extent' implies that some degree of apportionment is inherent in the paragraph. To adopt the view that paragraph (b) requires that goods must be in an investment form defeats this aspect of the law.
- Whilst paragraph (b) contains the term 'precious metal', we do not consider that the term is intended to give paragraph (b) the same effect as paragraph (a). We think that the emphasis of paragraph (b) is on the term 'the required fineness', which is determined by reference to the requisite fineness stipulated in the definition of precious metals. In this regard, 'precious metal' in paragraph (b) does not have the same meaning as in paragraph (a).
- Paragraph (b) of the definition of second-hand goods uses the word 'goods'. 'Goods' is defined in the GST Act to mean any form of tangible property. Therefore, it would seem reasonable to conclude that paragraph (b) is intended to have a much broader application than paragraph (a). We think that the existence of the word 'goods' in paragraph (b) expands the exclusion for second-hand goods to also cover goods that are comprised of precious metal that are not in an investment form.
- GST is a consumption tax on taxable supplies and taxable importations. It is a multi-stage tax where suppliers are entitled to refunds of GST incurred on their business inputs. This feature of GST ensures that there is no cascading of tax in a chain of supplies, with end-consumers ultimately bearing its cost. The above outcome is achieved in the supply chain of previously owned jewellery items made up of precious metals (eg 24 carat gold chains) if the jewellery items were excluded from being second-hand goods.

It is clear that the Australian Courts have moved away from a strict literal interpretation of statutes especially when such an approach yields an absurd or unworkable result. The Court now favours a broader approach, taking into account the intention of Parliament (the purposive approach). In view of the apparent intention of paragraph (b) as stated above, we consider that in interpreting paragraph (b) the term 'in an investment form' should not be taken into account.

Goods which satisfy the definition of precious metal except for the fact that they are not of the required fineness.

When interpreting paragraph (b), it is important to take into consideration the existence of paragraph (a) in looking at the context of the definition of second-hand goods. That is paragraphs (a) and (b) are to be viewed as alternative mutually exclusive requirements.

The purpose of paragraph (b)

It can be argued that the purpose of the exclusion in paragraph (b) was to exclude goods that do that they decline in value once ownership is transferred. Unlike the ordinary nature of second hand good that decline in value upon a transfer of title, investment for gold increases in value.

‘Second hand’ gold, silver or platinum in investment form does not decrease in value because of title transfer. The value of investment gold is determined solely on its intrinsic value of the gold when it is in a recognisable tradeable form. For example, a gold bullion bar that does not meet the required fineness in section 195-1 can still be traded as an investment and will hold its intrinsic value.

The fact that the gold is in an investment form proves that bullion is used as an investment which will derive some financial benefit in the future. It is our view, that paragraph (b) does not annul paragraph (a), rather extends the definition of precious metals, so as to capture all bullion that retains its intrinsic value.

Amendments to the definition of precious metals in section 195-1

When the GST Act was originally enacted, the definition of precious metal did not contain the phrase ‘in investment form’ in s 195-1. The definition was amended with effect from 1 July 2000 to replace the original phrase ‘in any form’ with ‘in an investment form’. When the law was amended the related provisions such as Div 66 and s 195-1 should take on the amended definition. Therefore, the precious metal referred to in paragraph (b) adopts the amended definition of the precious metal being ‘in an investment form’.

‘Goods to the extent that’

The phrase ‘goods to the extent that’ implies that some degree of apportionment is inherent in this paragraph. However, it would be impractical to implement this interpretation, particularly if it was the intention to sell the object as is. For example, if a piece of jewellery was made up of both gold and copper the jewellery would have to be melted to extract the gold component to assay the fineness and the percentage of the gold in the good. The resale of the good would not long be saleable after the apportionment. The strict reading of the definition would not reflect industry practice and be impractical.

If it were of the required fineness, would be precious metal

The term, ‘if it were’ indicates that fineness is the only requirement that has **not** been satisfied for the good to be a precious metal. Evidently, the good would have to be gold, silver or platinum and **in an investment form**. It is our view that goods that are not in the investment form are not excluded from second hand goods.

Advice from TCN on the issue – in favour of the second view

The following is extracted from the written advice from Karin Collinson, Tax Counsel, on 24 July 2014

In my view, paragraph (b) of the definition of second-hand goods can only apply to goods which satisfy the definition of precious metal except for the fact that they are not of the required fineness. This means that the goods also have to be in an investment form. The fact that the words "precious metal" are not asterisked is of no relevance; it is a defined term, and the absence of asterisk indication is a common drafting convention and is specifically identified in s3-5(1) of the GST Act.

As a consequence, second-hand jewellery is not excluded from being second-hand goods under paragraph (b) of the definition of second-hand goods.

It seems that this may be an outcome which was not contemplated when the definition of precious metal was altered to remove the words "in any form" and replace them with the words "in an investment form" (refer comments in Office Minute dated October 2013 from Chris Barlow which are attributed to Owen Clancy who worked on the EM relating to this law change). It also leads to the words "to the extent that" having very little work to do, however, the requirements of the paragraph are very clear, and second-hand jewellery does not satisfy them.

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Precious Metals – Law Advocacy Minutes

Title:	Precious Metals – Law Advocacy Working Group		
Issue date:	20 th October 2015		
Venue:	Audio Conference		
Event date:	Tuesday 20 th October, 2015	Start: 2.00pm	Finish: 2.55pm

Chair:	Jasmine Edwards	Secretariat:	Jasmine Edwards
Contact	X33780 or s47E(d)	Contact phone:	X33780

ATTENDEES

Key stakeholders		
Business area	Business section	Representatives
Indirect Tax	Serious Evasion Risk and Strategy	James Webeck Jasmine Edwards
Indirect Tax	Integrated Tax Design (ITD)	Dominic Shore
Indirect Tax	Government & Parliamentary	Debra Rowe Vanessa Keane Jasmin Boncales
Indirect Tax	Large Market Compliance	Ashleigh Larner
Indirect Tax	Technical Leadership & Advice	Stephen Willis Grace Alinur

APOLOGIES

Business area	Business section	Representatives
Indirect Tax	Integrated Tax Design (ITD)	Nich Hills
Indirect Tax	Technical Leadership & Advice	Barry Chen

NEXT MEETINGTuesday 3rd November, 2015**AGENDA SUMMARY**

AGENDA ITEM NO.	AGENDA TOPICS	DISCUSSION LEADS
1	Welcome – update on prior working group activities	Jasmine Edwards
2	TCN advice	Jasmine Edwards
3	██████████ and ██████████ submissions	Jasmine Edwards
4	Compliance activities updates	James Webeck
5	Other jurisdictions and New Zealand	Jasmine Edwards
6	Advocacy alert redrafting	Jasmine Edwards
7	Risk assessment	Jasmine Edwards
8	Plan and approach	Jasmine Edwards
9	Meeting close and next meeting	Jasmine Edwards

Discussion Overview

The topics for discussion incorporated a historical overview of activities to date, current TCN advice incorporating consideration of ██████████ submission and views presented by industry players. The working group established that the current advocacy alert requires redrafting in addressing the issues for submission to Treasury and requires some additional activities prior to Advocacy Alert endorsement. Key documentation was provided for the discussion and additional documentation will be provided to ITD.

Summary of new action items

Action item 1

Reference	TREASURY ADVICE
Action item	<p>Request for advice in respect of the “intent” of the legislative provisions around the insertion of the term “in an investment form” for the following issues:</p> <ol style="list-style-type: none"> Paragraph 1.11 of the Explanatory Memorandum (EM) added the words ‘in an investment form’ to the definition of ‘precious metal’ with effect from 1 July 2000.¹ The EM stated at paragraph 1.11 that: <p style="margin-left: 40px;"><i>In order to ensure that the correct supply of precious metal is GST-free or input taxed, the definition of precious metal has been amended to refer to sales of precious metals in an investment form. Investment form means precious metal sold in a coin, wafer, bar or other tradeable form which has an internationally accepted hallmark. In the case of gold, this means a hallmark that has been approved by the London Bullion Market and means that the gold can be traded on the international bullion market. [Items 65 and 66]</i></p> <p>Seek additional clarification of whether LBMA accreditation is required in the context of precious metal “in an investment form”.</p> Gold satisfying the definition of ‘precious metal’ is excluded by paragraph (a) of the ‘second-hand goods’ definition. Paragraph (b) excludes goods to the extent that they consist of gold which if it were of the required fineness would be precious metal.² Aside from these relevant exclusions, ‘second-hand goods’ takes its ordinary meaning. <p>Seek additional clarification of the impact of the insertion of the term “in an investment form” and the impact on para b and whether the insertion intended to allow Div 66 credits for non-investment form metal (scrap gold, jewellery) where previously all precious metal “in any form” would have been excluded.</p>
Responsibility	Debra Rowe / Jasmine Edwards
Action required by	23 October 2015 (Request to be submitted to Treasury)

¹ See the *A New Tax System (Indirect Tax and Consequential Amendments) Act (No.2) 1999* section 3 and items 145 and 146 of Schedule 1. The GST Act originally sought to define ‘precious metal’ as being gold, silver etc, in the requisite fineness, taking any form. Unless GST-free, supplies of precious metal under this definition, were to have been input taxed. To be GST-free the recipient of the supply still needed to be a ‘dealer in precious metal’ but also needed to acquire the precious metal ‘for investment purposes’ (an undefined term). The amending Act introduced the requirement that precious metal be in an ‘investment form’, made the GST-free treatment conditional on a ‘refiner of precious metal’ refining the metal, and removed the requirement that dealer’s acquire the metal for ‘investment purposes’.

² Section 195-1 of the GST Act, definition of “second-hand goods”.

Action item 2

Reference	JURISDICTIONAL COMPARISON AND NZ DISCUSSION
Action item	Provide a framework of key elements in other legislative frameworks in other jurisdictions and identify solutions where similar experiences have been evidenced. A discussion with NZ authorities on the operation of the legislative framework will support this understanding in order to establish the most appropriate advocacy treatment.
Responsibility	Jasmin Boncales/ Jasmine Edwards/James Webeck
Action required by	30 October 2015

Action item 3

s47C(1)





Precious Metals – Law Advocacy Action Items

Title:	Precious Metals – Law Advocacy Working Group		
Issue date:	10 th November 2015		
Venue:	Audio Conference		
Event date:	Tuesday 10 th November 2015	Start: 2.00pm	Finish: 2.25pm

Chair:	Jasmine Edwards	Secretariat:	Jasmine Edwards
Contact	X33780 or s47E(d)	Contact phone:	X33780

ATTENDEES

Key stakeholders		
Business area	Business section	Representatives
Indirect Tax	Serious Evasion Risk and Strategy	James Webeck Jasmine Edwards
Indirect Tax	Integrated Tax Design (ITD)	Dominic Shore
Indirect Tax	Government & Parliamentary	Debra Rowe
Indirect Tax	Technical Leadership & Advice	Vanessa Keane Barry Chen Grace Alinur

APOLOGIES

Business area	Business section	Representatives
Indirect Tax	Integrated Tax Design (ITD)	Kathleen De Kleuver Nich Hills
Indirect Tax	Government & Parliamentary	Jasmin Boncales
Indirect Tax	Technical Leadership & Advice	Stephen Willis
Indirect Tax	Large Market Compliance	Ashleigh Lerner

NEXT MEETINGTuesday 17th November, 2015**AGENDA SUMMARY**

AGENDA ITEM NO.	AGENDA TOPICS	DISCUSSION LEADS
1	Welcome – overview of last action items	Jasmine Edwards
2	Treasury advice on clarification issues	Debra Rowe/Jasmine Edwards
5	Exchange of Information – other jurisdictions	Jasmine Edwards/James Webeck
6	Advocacy alert redrafting	Debra Rowe/Jasmine Edwards
7	Risk assessment	James Webeck/Jasmine Edwards
9	Meeting close and next meeting	Jasmine Edwards

Previous Action Items

s22



Discussion Overview

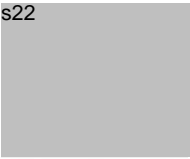
The topics for discussion incorporated a revisit of action items discussed at the last meeting and a progress update on current activities. Barry Chen has returned from leave and will continue work in place of Stephen Willis. Kathleen De Kleuver will represent ITD from this point forward. The audio conference line was poor due to ongoing system issues. Clarification of discussion points has been incorporated in to action items for attendees who experienced audio problems.

Summary of new action items

Action item 1

Reference	TREASURY ADVICE
Action item	<p>s22</p> <p>Debra has provided a preliminary draft for Treasury advice is in respect of the “intent” of the legislative provisions around the insertion of the term “in an investment form” for the following issues:</p> <p>Question 1: was it intended that LBMA accreditation be required in the context of precious metal “in an investment form”?</p> <p>Question 2: was it intended that the insertion of ‘in investment form’ in the definition of precious metals would then allow Div 66 credits for non-investment form metal (scrap gold, jewellery) where previously all precious metal “in any form” would have been excluded.</p> <p>Jasmine and James to provide preliminary commentary by COB 11th November for distribution to the wider group.</p> <p>Debra advised that she has a contact in Treasury and expects that a response may be received within 2 weeks from submission. The extent of any response will depend on Treasury and available information.</p>
Responsibility	Debra Rowe / Jasmine Edwards
Action required by	20 November 2015 (Request to be submitted to Treasury)

Action item 2

Reference	EXCHANGE OF INFORMATION – OTHER JURISDICTIONS
Action item	<p>The EOI information process has progressed. EOI for UK, South Africa, Malaysia, Singapore and New Zealand has been issued on the 4th and 5th November 2015 (<i>Refer EOI Attachments</i>).</p> <p>It is anticipated that discussions will take place at or around the end of November. Vanessa Keane advised that a Technical Leadership & Advice representative should be present at the meetings.</p> <p>Jasmin Boncales has prepared a draft guideline on topics that may be covered.</p> <p>s22 </p>
Responsibility	Jasmin Boncales/ Jasmine Edwards/James Webeck/Vanessa Keane
Action required by	30 November 2015

Action item 3

Reference	OPTIONS PAPER
Action item	<p>Options paper to be drafted, incorporating potential treatments which may include additional ATO publications. TCN has put forward some suggestions. It was agreed that Barry Chen will assist in preparing the Options Paper in conjunction with the working group and TCN.</p> <p>A meeting has been arranged for early next week to commence the writing of the Options Paper which will assist in the re-drafting of the Advocacy alert.</p>
Responsibility	Jasmine Edwards/James Webeck/Barry Chen
Action required by	30 November 2015

Action item 4

Reference	ADVOCACY ALERT REDRAFT
Action item	Redraft the advocacy alert removing the concept of the restriction of the concept of 'first refining' to the first refinement of Dore out of the ground which is not consistent with other jurisdictions. This will evolve from the options paper to determine the most appropriate treatment. Jasmin has commenced redrafting at a high level.
Responsibility	Jasmin Boncales/Jasmine Edwards
Action required by	30 November 2015 (to be assessed on an ongoing basis)

Action item 5

Reference	RISK ASSESSMENT
Action item	<p>Revisit the methodology of quantification for the purposes of the alert. Need to have a discussion with Senior Risk Directors on methodology and consider RAB quantification to provide the most accurate population and potential figure including providing consideration of potential proliferation if risk is left untreated.</p> <p>Smarter Data has advised that ownership of Risk Assessment remains in their BSL. Peter Borbiro has advised that he has assigned 2 staff members to review and approve (amend if necessary) the draft risk assessment. A date has not been received on expected completion – James to follow up.</p>
Responsibility	Jasmin Boncales/Jasmine Edwards
Action required by	15 November 2015 (or earlier date as applicable)

Action item 6

Reference	■■■■■■■■■■■■■■■■■■■■ DISCUSSIONS
Action item	Consideration of communications with ■■■■■■■■■■■■■■■■■■■■ and feedback on submissions requires assessment on an ongoing basis to ensure effective management of client expectations. No action items at this meeting as CRM not in attendance.
Responsibility	Ashleigh Larner
Action required by	Ongoing

EOI ATTACHMENTS

Exempt documents under section 33 of the Freedom Of Information Act 1982.

s22



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ITX Executive Briefing Minute

COMMISSIONER(S):	George Montanez Assistant Commissioner ITX Public Group Engagement	Copies To:	Les De Wind Assistant Commissioner ITX PERMS
Subject:	Precious Metals Industry	Contact Officer:	James Webeck ITX PERMS Director
Issue Date:	6 th May, 2016.	Response Date:	N/A

Purpose

- To update you on the current status in progressing Legislative Reform considerations of intended application to the Precious Metals Industry.

Key messages

- As is evident from compliance and other actions to date the risk presents complexities in identification and treatment, principally due to unique attributes of the operation of the Precious Metals Industry and the current GST legislative framework.
- The potential for law reform is being considered as a potential opportunity to enhance the corporate capability to appropriately treat and mitigate the risk and impact observed industry behaviours.
- The current estimated revenue at risk is estimated to exceed \$250M p.a. with very real prospects of proliferation if left unaddressed.
- While administrative changes remain subject to consideration law reform is the preferred opportunity for risk mitigation. We have established limitations in effectively applying core provision arguments to the entities claiming the refunds. The anti avoidance provisions may prove effective in some instances however application requires significant time investment and complexity in audit conduct..
- ITX GST Evasion Risk & Strategy has ownership of reform and is well advanced in the progression of potential Treasury recommendations for the Precious Metals Industry.
- The key stakeholder group includes ITX GST Evasion Risk & Strategy, Integrated Tax Design, Technical Leadership and Advice and Government Relations.
- Exchange of information activities have been undertaken by ITX GST Evasion Risk & Strategy and other interested stakeholders, with jurisdictions including Canada and New Zealand. Singapore has provided a written legislative overview - no further discussions are expected at this stage. Other jurisdictions further being considered include United Kingdom and South Africa. New Zealand has the most comparative regime and further discussions may be required in the future, pending potential recommendations to be adopted.
- An Advocacy Alert has been issued to Treasury on 21st January, 2016 advising that the ATO is considering options to reduce the prevalence of non-compliance within the industry.
- Potential solutions to the identified issues have been articulated in an Options Paper which is scheduled to be presented in a workshop on 10 May 2016 with multiple stakeholders (ITX Risk, CA&E, PGH Audit, RDR, Smarter Data, RAB, Parliamentary Services and IDT).
- Industry consultation is considered likely should Reform be progressed.

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We will keep you informed of the progress in this matter.



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Metal Advoca...

ATTACHMENTS



PMP Steering Committee Minutes of Meeting

FOR OFFICIAL USE ONLY Internal

Title:	PMP Steering Committee		
Issue date:	24 October 2016		
Venue:	15.710		
Event date:	10 October 2016	Start: 13:30	Finish: 15:30

Chair:	Tim Dyce	Facilitator:	Ian Read
Contact	Ian Read	Contact phone:	x41017

Attendees: names/section	Tim Dyce, Michael Cranston, Debbie Hastings, Len Hertzman, Ian Read, George Montanez, Deborah Jenkins, Grahame Tanna, Jason Heng, Steve Atkins, Steven Koufamonalis, Stephen Howlin, Jack Keshishian, Liz Simpkin
Apologies: name/section	Jonathon Woodger

Next meeting	February 2017 (TBC)
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Agenda item: Updates

ITX/PGH/Debt/RDR/TCN

Action item: Refund retention	Due date: Meeting to be held with RDR to discuss and	Responsibility (SES): Ian Read/Jason Heng/Grahame Tanna
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Agenda item: Updates

	organise engagement and briefing of counsel on retention strategy by 14/10/16	
SFCT Bulletin Mail-out	Bulletin to issue to entire risk population.	Stephen Howlin/Ian Read
	ITX Risk and Strategy to provide details of risk population for mail-out by 18/10/16	
Criminal Brief	ASAP referral of Brief to counsel. Narrow brief to PGH briefed Counsel, wider brief to ITX briefed Junior/Senior Counsel	Jacqui Smith/Ian Read
	PGH to meet with AFP FACC to discuss referral by close of October 2016	John Ford
GSTD	Draft on 'second hand goods' to Issue November 2016	Steven Koufomanolis



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Precious Metals Project Band 2 Steering Committee

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Title:	Action Item Register		
Issue date:	10 March 2017		
Contact	Elizabeth Simpkin	Contact phone:	(02) 9374 8598

Meeting Date	Action Item	Due Date	Outcome	Status	SES Responsibility
10-Oct-16	Refund retention strategy. Meeting to be held with RDR to discuss and organise engagement and briefing of counsel on retention strategy by 14/10/16	14 Oct 16	Meeting held, counsel engaged, advice obtained	Finalised	Ian Read, Jason Heng, Grahame Tanna
10-Oct-16	GSTD. Draft on 'second hand goods' to Issue	30-Nov-16	Draft GSTD has been sent to the Minister on 16 January 2017	Finalised	Steven Koufomanolis

Meeting Date	Action Item	Due Date	Outcome	Status	SES Responsibility
20-Dec-16	Meta data checks. PGH to undertake checks on SIMs of missing traders for ITX.	31-Jan-17	s47E(d) [Redacted] ITX teams have been advised that where there are concerns of false/misleading statements being made during formal interviews, these should be referred to PGH for their consideration of investigation. See action item 9/3/17	Finalised	John Ford, Ian Read, Peter Vujanic
10-Oct-16	Criminal Brief(s). ASAP referral of Brief to counsel. Narrow brief to PGH briefed Counsel, wider brief to ITX briefed Junior/Senior Counsel PGH to meet with AFP FACC to discuss referral; Current prosecution update	31-Oct-16	1. Narrow brief provided to counsel in December 2016. ^{s38} [Redacted]	Finalised	Peter Vujanic, John Ford
20-Dec-16	PGH Cross Agency Workshop. Discuss with other Commonwealth agencies potential for contribution to the PMP	31-Jan-17	PGH to convene a cross agency workshop with AUSTRAC/ASIC/DHS etc to discuss other potential avenues of investigation of relevant entities within the PMP. Workshop held on 15	Finalised	Peter Vujanic, John Ford

Meeting Date	Action Item	Due Date	Outcome	Status	SES Responsibility
9 March 2017	<u>PGH Investigation</u>	March 2017	<ol style="list-style-type: none"> 1. PGH to meet with AFP on 17 March 2017 to discuss the Investigation plan in further detail 2. John Ford advised that PGH would get back to ITX after 17/3/17 to advise of dates/times/places 3. John Ford to speak to Ian Read/Liz Simpkin re False/Misleading statement. 	NYS	Peter Vujanic, John Ford

s38

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Commissioner Briefing

Title:	GST and Precious Metals Project	
Contact:	Tim Dyce Deputy Commissioner, Indirect Tax	Phone: 02 937 42984 s47E(d)

Key Points

- > In response to, and in contemporaneous support of the compliance treatment of the GST risk identified in the precious metals industry known as the Precious Metals Project (PMP), we have now formalised the ATO's offer of a voluntary reverse charge arrangement which commenced from 1 January 2017, through a retrospective law change which took effect from 1 April 2017.
- > The purpose of the change in law is to seek to ensure that all entities within the supply chain are responsible for remitting GST on their gold purchases, thereby overcoming the current issue where traders go 'missing' and fail to remit the GST to the ATO. Pursuant to the reverse charge the entity buying gold/precious metals from the missing trader is responsible by law to remit the GST.
- > The immediate application of the law change is an attempt to avoid further manipulation of the GST Act in regard to precious metal transactions, together with seeking to remove the opportunity for new entities to participate in similar schemes during the period between 1 April 2017 and the enactment of the legislation.
- > No criminal charges have been laid to date on entities which have benefitted from the scheme. A Brief of Evidence in relation to one syndicate is being assessed by the Commonwealth Director of Public Prosecutions (CDPP), s38 [REDACTED]
- > The substantive compliance project is expected to be completed by June 2018.

Background/Context

- > To date compliance activity from 221 audits has raised liabilities inclusive of penalties of \$706m, and collections total approximately \$60m. There are 90 reviews/audits currently being undertaken, which will carry over into the 2017-2018 year. One outcome from audit was the identification of reasonable suspicion of alleged criminal activity by a gold refining syndicate, which resulted in the AFP (with ATO assistance), executing search warrants in October 2013.
- > s38 [REDACTED]

- > Analysis of the annual scrap gold turnover from the gold refiner risk population indicates that turnover has increased from \$116 million in 2011 to \$1.8 billion in 2016. Similar analysis of BAS refunds indicates that for the years 2001-2011 they remitted to the ATO a net amount of \$14m in GST however for the years 2012-2016 the ATO has paid \$300m in GST refunds. It is our view that the industry has largely created an artificial and contrived market for scrap gold.
- > In September 2016 a refocussed audit strategy undertook to retain gold refiner refunds subject to verification pursuant to s.8AAZLGA (TAA). This approach sought to review each of the refiner supply chains in a linear manner, then to laterally review the encompassing gold network, to both verify the legitimacy of the refunds for each refiner, and also confirm the risk hypothesis that the gold is simply being recirculated through the industry via each of the supply chains.
- > Monthly BAS refunds issuing to the refiners increased from \$3 million to \$13 million from January 2016 to August 2016. From July 2016 to March 2017 refunds retained from BAS lodged have totalled approximately \$20 million. The refund retention strategy has resulted in BAS refunds reducing to negligible amounts in 2017, prior to the law change. Additionally scrap gold turnover in 2017 has decreased by 50% to that which was traded for the same period in 2016.^{s42}

- > ATO criminal investigation on one gold syndicate was commenced following the conduct of the 2013 search warrants. A Brief of Evidence was delivered and accepted by the CDPP in April 2015.

- > Additionally gold syndicates were referred to the Serious Financial Crime Taskforce for investigation in November 2016. Any investigation arising from the referral will be AFP led, with ATO assistance.
- > The refocussed compliance strategy in the PMP has led to considerable litigation in varying stages from objection to retention decisions, to Part IVC and Judicial review matters listed for hearing in both the AAT and the Federal Court.^{s38} refiner refund retention objections have been disallowed to date, leading to further challenge in both the AAT and Federal Court, and additional retention objections are currently being considered. \$318million in GST and Income tax assessments is currently in dispute in the AAT for PMP legacy cases.
- > The ATO has engaged a number of senior and junior counsel across three states for advice on clarification of the GST Act, debt, criminal and administrative law aspects.
- > On 21 December 2016 correspondence was sent to the entities currently subject to review under the refund retention strategy (approximately 60), offering them the opportunity to participate in a voluntary reverse charge arrangement, whereby they remit the GST that they would ordinarily pay to the supplier for their purchase of taxable supplies, to the ATO. An additional 300+ known and identified gold industry participants received correspondence in January 2017.
- > The take-up of the voluntary reverse charge offer by the precious metals industry has been minimal,^{s38} in total participating. The announcement of the reverse charge law change has led to considerable industry feedback, particularly in regard to the application of the 10% threshold test and second hand goods.
- > The ATO will continue to proactively monitor the gold supply chains, to ensure that entities (and their associates) within the risk population, are not seeking to extract BAS refunds through other means.

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GST and precious metals

Senate Estimates | October 2017

- > The GST Act was amended on 1 April 2017 with the implementation of a reverse charge, to address manipulation within the precious metals industry of the application of GST to precious metals on business to business transactions.
- > Since we detected the carousel type schemes in 2012, we have conducted 221 cases resulting in assessments totalling \$879 million (GST and Income tax).
- > As at August 2017 approximately 87 cases are on hand, which are estimated to result in assessments greater than \$50 million.
- > Approximately \$14million in BAS refunds, which were retained prior to the law change, remain retained and are undergoing verification.
- > We continue to assist the Inspector General with his review into GST Refund Retention and Fraud Control Management.

Potential line of questioning

- > What is the effect on the GST of the law change to date?
- > Is the new law working as intended?
- > Have any of the promoters of the schemes been prosecuted?
- > Are audits continuing?
- > How much tax is at risk?

Key messages

- > With effect from 1 April 2017 the GST Act was amended to introduce a reverse charge for business to business transactions between suppliers and purchasers of valuable metal (gold, silver and platinum). The reverse charge requires the purchaser to pay the GST on precious metal purchases directly to the ATO (not the supplier), avoiding the risk of the supplier not passing the GST on to the ATO. This law change overcomes contrived arrangements whereby gold traders were interposed into supply chains and would go 'missing' or fail to remit the GST which we were owed.
- > The amendment also ensured that entities could no longer exploit the special tax treatment for second-hand goods, by claiming GST credits in respect of non-taxable supplies of goods containing valuable metals.
- > To date, post the legislative amendment, initial review of the risk population indicates that most entities appear to be complying with the reverse charge.

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GST and precious metals

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- > We continue to monitor the risk population through focused compliance activity and ensuring there is adherence with the new reverse charge rules. We are also monitoring the population to detect any proliferation of known and emerging schemes (particularly in regard to import/export activity and jewellery dealers).
- > There are currently 87 compliance cases on hand and 8 cases before the Tribunal. The litigation matters concern audits for periods prior to April 2017.
- > We have raised assessments of \$879 million and collected \$55 million.

Additional information

- > Since 2012 we have reviewed the precious metal industry and identified complex and contrived carousel type arrangements, which have created an artificial market for scrap gold, whereby GST refunds have been obtained by entities interposed within supply chains, to which they are not entitled.
 - The scheme operates where gold bullion is sold through a supply chain in investment form. Whilst the gold remains in investment form the sale does not attract GST. At some point the gold ceases to be in investment form. For example it is defaced and/or melted and mixed with other metals. At this point subsequent sales of the gold attract GST, but one or more of the traders in the supply chain go missing and fail to pay the GST. The gold travels through the chain to its finalisation point at the refiner level, where a refund of GST is obtained. Pursuant to the margins at which the gold is traded through the chain, the transactions are not profitable without the GST component. The refiner then on sells the refined gold GST free to a bullion dealer and the gold circulates through the supply chain again, to be altered and returned to the refiner.
- > From 2011 to 2016 the turnover of scrap gold (jewellery and non-investment form gold bars) within the Australian gold industry by the refiner risk population increased from \$116million to \$1.8 billion per annum.
- > In September 2016 we implemented a refiner retention strategy, whereby refunds issuing to refiners within the risk population were retained for verification. In total approximately \$21.7million in BAS refunds has been retained to date,^{s38}
[REDACTED]
- Compliance activity continues for the remaining retained refunds, which constitute part of the 87 compliance cases on hand.
- > Following the implementation of the reverse charge, turnover of gold within the risk population has reduced in June 2017 to \$141million. Examination of the data supports the understanding that the turnover is largely from the refining of primary source gold (dore). It is apparent at this early stage that a significant reduction in the circulation of scrap gold within the industry has resulted following the implementation of the refund retention strategy, and the reverse charge legislative amendment.

GST and precious metals

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- > The Inspector-General of Taxation is conducting a review of Fraud Control Management, which will include review of the 'precious metals industry' risk, and the retention of refund strategy.
- > A brief of evidence has been referred to the Commonwealth Director of Public Prosecutions (CDPP). The CDPP have requested that detailed forensic accounting analysis be undertaken to support any anticipated criminal charges. This work continues at this point in time.
- > A referral has been made to the Serious Financial Crime Taskforce, of which the ATO is a member. Any questions regarding this aspect of the Project should be directed to the AFP.

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Australian Taxation Office



Australian Government
Australian Taxation Office

Precious Metals Industry Workshop

Improving Industry Compliance

Australian Taxation Office
Risk & Strategy GST Evasion

James Webeck
Jasmine Edwards

10th May 2016



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Issues

- ❑ Silo approach audit are not effective - labour and time intensive audit enquiries on “supply chains” are critical to ascertaining the true nature of transactions.



- ❑ Formal “information gathering” processes required for supply chain participants (*suppliers, contractors and employees*) and extensive third party enquiries (*notices, interviews and affidavits*) may not assist in establishing change of form due to collusion.
- ❑ WHS issues are evident within the industry as “mules” are recruited with criminal backgrounds.
- ❑ Real-time ATO response required to address behaviours (liquidation and insolvency, introduction of new supply chain entrants and increased volume trading) as proliferation is evident despite compliance activities.
- ❑ Issues with consistency in taxpayer treatment including technical (Private Binding Rulings - conflicting ATO views) and audit decisions – core provision arguments are difficult to sustain requiring use of anti-avoidance mechanisms.
- ❑ Restricted opportunities to prosecute and apply Criminal Assets Confiscation Taskforce (CACT) treatment.
- ❑ Debt Recovery opportunities are limited due to movement of precious metal and funds (in transit).
- ❑ Lack of level playing field and industry bodies – self regulation is unlikely due to competitiveness and significant profit incentives.
- ❑ The defacing and altering of precious metal is not a criminal offence – common theme in schemes (conversion).
- ❑ High value of transactions means that minimal transactions can result in significant leakage in short time frames.
- ❑ Retention of refunds (*Multiflex decision*) presents difficulties due to time limitations to hold and time taken to verify.



Case for Reform

- ❑ **Tax administration** - should be effective in the sense of ensuring high compliance by taxpayers, and efficient in ensuring administrative costs are low relative to revenue collected. Well-designed tax policy is required to address industry practices and emerging avoidance schemes as identified through compliance activities.
- ❑ **Simplicity** – legislative provisions should be easy for the government to administer and enforce and simple and inexpensive for taxpayers to comply with.
- ❑ **Efficiency** - reduce the compliance burden on government and taxpayers and prevent revenue leakage.
- ❑ **Certainty** - Provide certainty to the industry on technical application of legislation and remove ambiguity on issues which are subject to interpretation and manipulation (protect the community from future harm)
- ❑ **Scheme Prevention** - Identified schemes all involve the altering or misclassification of the “form” of precious metal, mechanisms are required to mitigate the problems and opportunity for artificial markets and profits.
- ❑ **Equity** - Facilitate a level playing field and remove opportunities for non-legitimate players to enter the market.
- ❑ **Whole of government** response to address criminality (punish, deter, disable)



Advocacy Alert

GST on Precious Metal

Issue

Broadly speaking, the first supply of precious metal after its refining is GST-free under the GST Act¹ and subsequent supplies are treated as being input taxed. If the precious metal supplied no longer satisfies the meaning of 'precious metal' as defined in the GST Act, the supply becomes taxable. However the ease in which precious metal can be modified to alter the GST treatment from input taxed to taxable and subsequently back to GST-free (as the metal is capable of being re-refined as precious metal) combined with egregious arrangements creates exploitation opportunities. The application of the second-hand goods provisions provides a further avenue to exploit these provisions.

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The 'Additional information' and **Attachment A** sections of this Alert provide an overview of provisions and definitions relevant to precious metals. A simplified example of a typical gold scheme is represented at **Attachment B**.

Urgency

Notwithstanding ongoing compliance activities, it is expected that taxpayers will continue to claim input tax credits they are not entitled to under the legislation and/or misclassify taxable transactions because of the difficulties for the ATO in determining at what point in the supply chain the precious metal becomes taxable, accessing or identifying the 'controlling minds' and whether there has been collusion. There is also missing trader fraud involved.

Based on our analysis s38 the amount of revenue protected as a result of compliance activities is estimated to be in the order of \$160 to 200 million per annum.² In addition, audits on the precious metals industry have raised further liabilities of approximately \$80 million in 2013-14 and \$70 million in 2014-15, of which \$23 million has been collected by the ATO to date.

Next Steps

The ATO would like to alert Treasury to this problem and advise that the ATO is considering options to reduce the prevalence of this issue without unduly impacting legitimate market participants. If

¹ A *New Tax System (Goods and Services Tax) Act 1999* (GST Act). All references to statutory provisions are to the GST Act unless otherwise specified.

² These Revenue Analysis Branch estimates were derived by looking at the change in net GST reported by these entities on their BAS after the compliance activity occurred. The difference in net GST was calculated by comparing the amounts reported on each BAS for a period of one year after the compliance activity was undertaken to a 'base' amount of net GST reported on the BAS during the period of greatest mischief (that is, amounts reported on the July to October 2013 BAS – a 4 month average). The modelling assumed that approximately 10% of reported net GST represents legitimate amounts.

Treasury consider that the issue warrants immediate attention, we would welcome the opportunity to work together to identify the best available policy and law response.

ATO compliance activities are continuing with the intent of increasing industry coverage. Several matters are currently under criminal investigation or before the Federal Court and Administrative Appeals Tribunal. However, compliance activities and litigation would not deal with the wider issue, as we have seen that once certain suppliers are subject to a tax audit, assessment or investigation, they often phoenix and new suppliers that buy precious metal from dealers and sell it back to refiners as 'scrap' emerge. The ATO is observing more sophisticated and complex arrangements emerging that obscure transactions of recycled 'investment form' precious metals.

The ATO is liaising with foreign jurisdictions to share intelligence and understand their approaches to dealing with this behaviour. Other jurisdictions' legislative frameworks implement a combination of accreditation, limitation or denial of concessional treatments detailed reporting requirements for bullion transactions to revenue authority or other mechanisms in order to address and combat similar issues.

Contacts

Business Line ITD Lead: Paul Southwell (Indirect Tax, (02) 62162368)

ATO Policy Integration: Trent Jakubowski (Integrated Tax Design, (02) 6216 1915)

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Additional information

Current legislation and policy rationale

GST-free and input taxed treatment

1. The supply of 'precious metal' – defined as gold, silver or platinum of a certain fineness³ in an 'investment form' – is GST-free under section 38-385 if it is the first supply after refining and the recipient is a dealer of precious metals (GST is not payable on the supply but input tax credits can be claimed on acquisitions relating to the supply). Any other supplies of precious metal not caught by section 38-385 are input taxed under section 40-100 (GST is not payable on the supply and no input tax credits can be claimed on acquisitions relating to the supply).
2. 'Investment form' is not defined in the GST Act, but the ATO view is that it must be capable of being traded on the international bullion market (that is, it must be a bar, wafer or coin), bear an accepted mark or characteristic that guarantees its fineness and quality and is usually traded at a price that is determined by reference to the spot price.⁴
3. The policy rationale for the different treatment between the initial and subsequent supplies is to reflect that precious metal prices are internationally fixed (spot price) which means dealers cannot pass on the GST on precious metal sales.⁵ Making the first supply after refining GST-free ensures there is no GST embedded in the price of that supply. Subsequent supplies of precious metals are input taxed and the fixed price of the precious metal continues to be unaffected because there is no GST on the supply.

Second-hand goods

4. The second hand goods provisions also provide another avenue to exploit the provisions of the GST Act. Division 66 of the GST Act allows input tax credits on the acquisition of second-hand goods from non-GST registered entities purchased for resale. The rationale for this is to avoid GST being charged on GST (double-taxing) by allowing a credit for any embedded GST on second-hand goods GST-registered entities acquire from unregistered entities. For the purposes of Division 66, the 'second-hand goods' definition leads to the conclusion that regardless of the fineness, precious metal needs to be in an investment form to be excluded as second-hand goods.⁶
5. However the second-hand good provisions can be easily exploited because precious metal is required to be in an 'investment form'. It is very easy to make alterations to the precious metal (such as adding alloys, removing marks, cutting or granulating the bars) in order for it to lose its 'investment form' characteristics and satisfy the definition of 'second-hand goods'. The result is that purchasers/refiners can easily claim input tax credits for acquisitions of goods from unregistered individuals claimed to be second-hand, such as gold bars that have hallmarks removed but which would otherwise be precious metal in an 'investment form'.
6. The legislative framework is diagrammatically represented at **Attachment A**.

³ Gold must be at least 99.5% fineness, silver of least 99.9% fineness and platinum of least 99% fineness: definition of 'precious metal' in section 195-1.

⁴ Goods and Services Tax Ruling GSTR 2003/10: *Goods and Services Tax: What is 'precious metal' for the purposes of GST?*

⁵ Paragraph 5.125 of the Explanatory Memorandum to *A New Tax System (Goods and Services Tax) Act 1999*.

⁶ The rationale for this exclusion is that the first supply of precious metal after refining is GST-free, and subsequent supplies are input taxed, therefore there is no embedded GST in the precious metal price, and consequently do not attract the input tax credits available for second-hand goods acquired from unregistered entities.

Arrangements of concern

7. Despite the requirements in the GST Act regarding the required fineness of precious metal, it is extremely difficult to test the purity of each traded precious metal for the purpose of satisfying ourselves that the requirements of the GST Act has been satisfied. The global precious metal industry has generally relied on accreditation of refiners, as the refiners are the first point of supply into the market of purified and standardised precious metal.⁷ The most widely relied on accreditation is from the London Bullion Market Association (LBMA); for example Singapore only extends GST concessions to precious metal with LBMA hallmarks.⁸
8. In the Australian market, not all precious metal dealers or traders sell precious metals that bear hallmarks approved by the LBMA, and not all 'refiners' of the precious metals that are traded are LBMA accredited. Non-LBMA accredited hallmarked bullion bars appear to have been traded in this way and to have been accepted by the Australian market as precious metal.
9. The Explanatory Memorandum (**EM**) to the bill that added the words 'investment form' to the GST Act states: '*investment form means precious metal sold in a wafer, bar or other tradeable form which has an internationally accepted hallmark. In the case of gold, this means a hallmark that has been approved by the London Bullion Market and means that the gold can be traded on the international bullion market*'. The LBMA requirement is not reflected in the GSTR 2003/10 (the ruling requires that the item bear a hallmark guaranteeing fineness and quality, but it does not list the accepted hallmarks; the text of the relevant GST Act provisions also do not specifically require LBMA accreditation. The result is that any hallmark can be used, and the ATO relies on the refiners' claim that the mark on their metal satisfies the purity and 'investment form' requirements.
10. The impact of the differing GST treatments, the relaxation of regulatory and other accreditation requirements and the ease in which the form of precious metal can be altered has created opportunities for exploitation for the purpose of claiming input tax credits. A substantial volume of product never reaches 'investor' markets, rather the form is changed (principally by defacing, granulating or melting with or without the addition of alloys) for on supply, ultimately to a refiner or exporter, as 'scrap gold' at a GST inclusive price.
11. The principal arrangements identified in current compliance activities include:
 - (a) Carousel style arrangements with apparent collusion between participants. All feature the conversion of precious metal (input taxed) into a taxable supply at some point in the chain ultimately providing an entitlement for the refiner to claim an ITC on the subject acquisitions and, to the extent the metal is applied to production of precious metal, create a GST-free supply (under section 38-385). Compliance activities have revealed, for two major refiners of precious metals, the acquisitions with respect to these arrangements represented in excess of 90% of the total turnover. In many instances it was revealed that the purported scrap purchased by the refiner was directly sourced from precious metal produced by them.
 - (b) Persons or entities operating independently in supplying purported 'scrap gold' directly to refiners or to participants in the arrangement described in (a). These entities acquire precious metal and alter the form for re-supply as taxable.
 - (c) Second hand dealers, gold kiosks, gold buyers who principally acquire 'scrap gold' from non-registered individuals. These entities claim notional GST credits with respect to the acquisitions as provided for under Division 66. To the extent the metal meets the definition of precious metal as supplied it is often falsely described as scrap gold, or, in some instances, subject to a destructive test (cutting, drilling etc.) for the said purpose of allowing the internal composition to

⁷ See Perth Mint's information on 'Accreditation' at <http://www.perthmint.com.au/education-accreditation.aspx>.

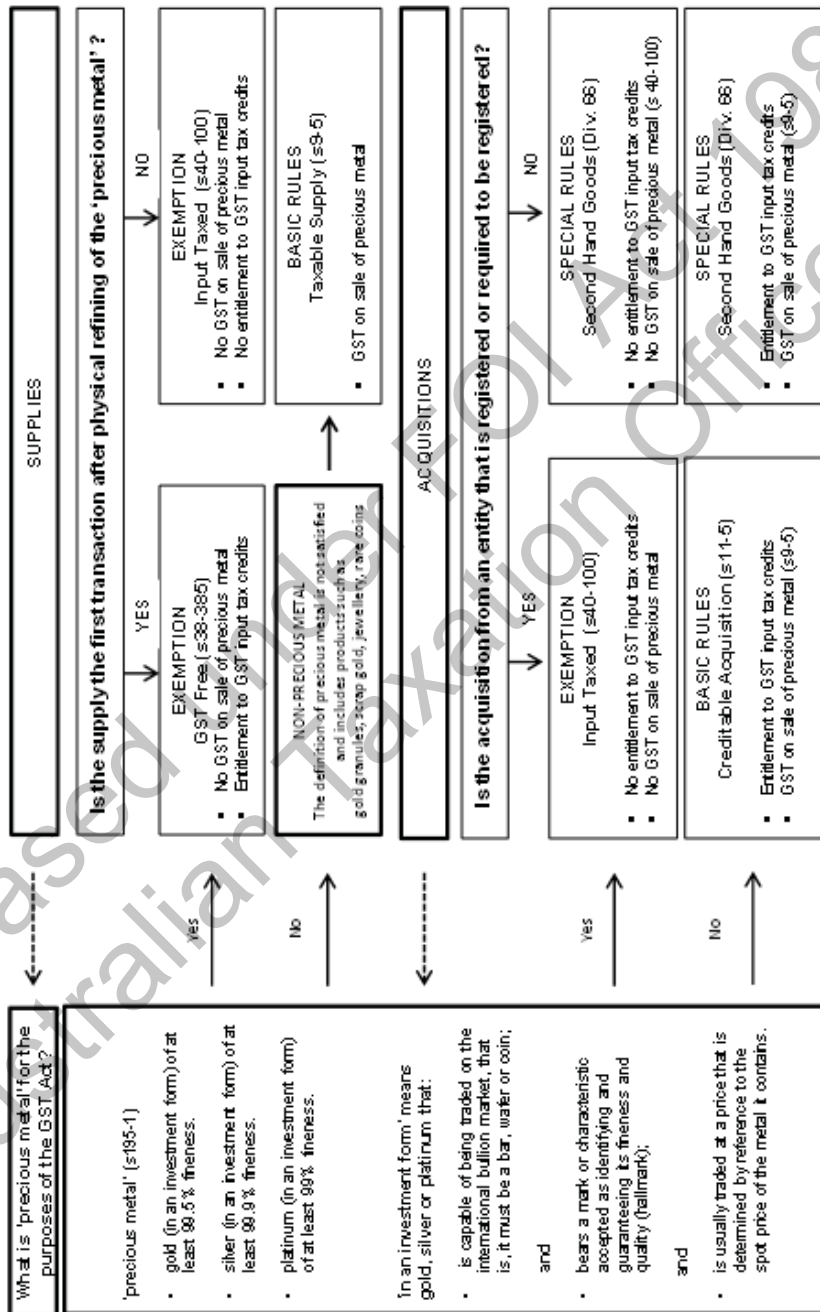
⁸ See Inland Revenue Authority of Singapore, *IRAS e-Tax Guide - GST: Guide on Exemption of Investment Precious Metals (IPM)*, 4th ed, accessible at https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/e-Tax_Guides/etaxguide_GST_GST%20Exemption%20of%20Investment%20Precious%20Metals.pdf.

be subject to analysis. To the extent the metal is purchased following testing the acquiring entity will argue that it was not precious metal at the time and claim the notional Division 66 credit.

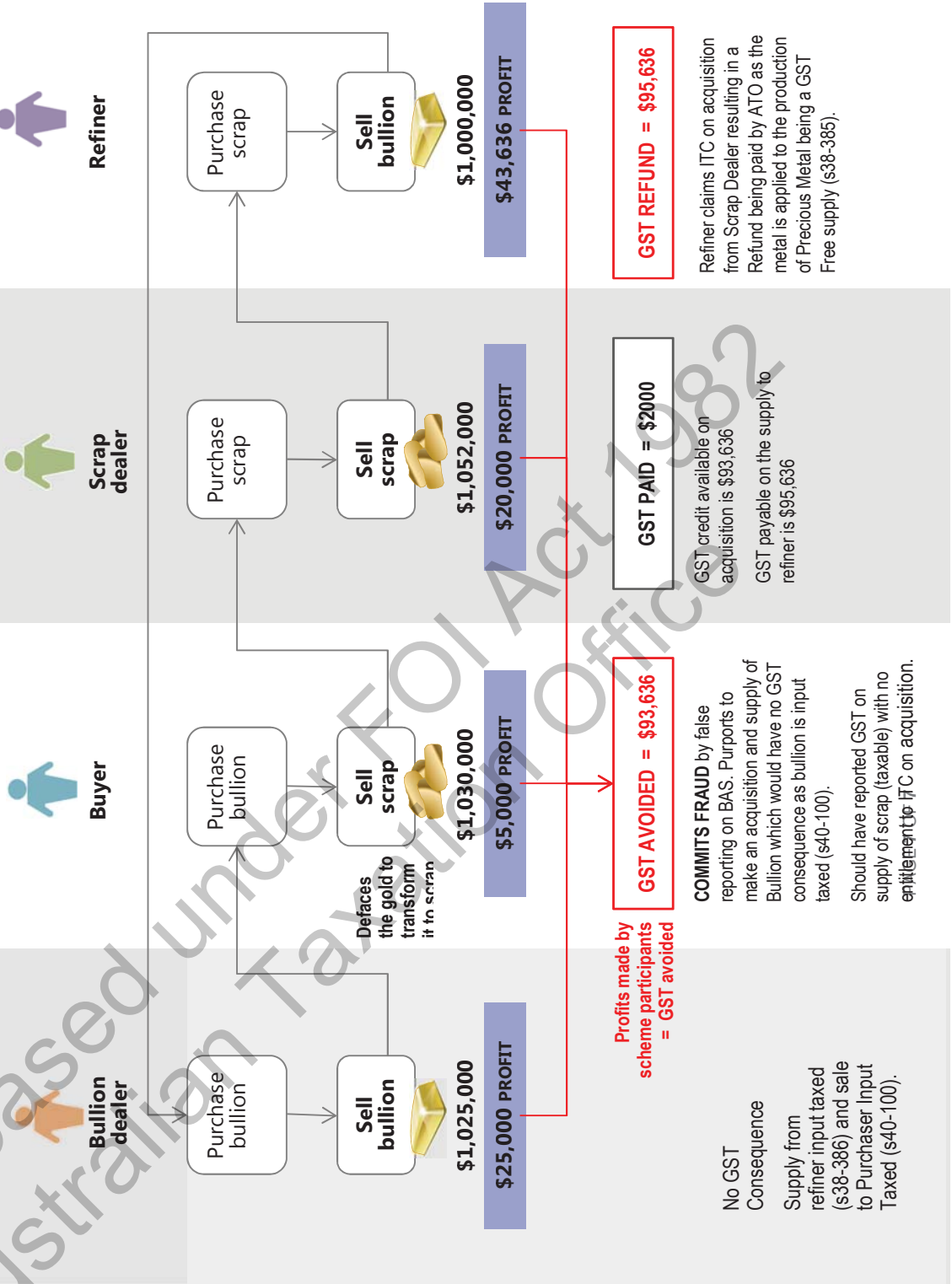
12. The principal observation with respect to the arrangements of concern is, to the extent precious metal is involved, that the profit(s) derived by the participants are effectively funded by the GST claimed by the refiner discussed in (a) and (b) in paragraph 12 above, or the refiner's GST credit and Division 66 credit with respect to (c) in paragraph 12 above. Given that precious metal is traded internationally with respect to prevailing 'spot price', as are the rates offered by refiners in acquiring metal, it is not ordinarily possible to purchase and on sell precious metal in a short period at a profit. Attachment B, which depicts a gold scheme typical of several matters subject to current compliance verification, serves to demonstrate this fact. It can be seen that the total of all profits derived by the participants in the arrangement are effectively funded by the nett GST paid by the ATO (GST refund ultimately claimed by the refiner less the GST liability reported and paid by the scrap dealer). While it might be argued by other participants in the arrangement that had the buyer correctly reported and paid the subsequent liability there would be no adverse GST impact, and that they are complying with their respective GST obligations, the buyer could not realise a profit on the transaction if the transactions were correctly reported and the resultant GST liability paid.
13. It is apparent that participants in this arrangement are exploiting the input taxed and taxable status of precious metals, principally gold, to derive a profit at the expense of the Commonwealth where the GST is effectively funding the opportunity for refiners and second hand/gold buyers to pay a GST inclusive price significantly above prevailing spot price.
14. Compliance activities have revealed that refiners are offering up to 108% (GST inclusive) of the prevailing spot price for scrap gold with some Second hand/Gold buyers offering 105%. Given bullion dealer margins may be as low as 0.7% above spot to large clients there is a significant opportunity and incentive for those who are prepared to enter into non-compliant behaviour.
15. While many of these arrangements involve a high degree of fraud or evasion, the incentive for this is being driven by the current structure of the GST Act. Applying compliance activity as a complete solution is difficult due to the following.
 - a. Monitoring compliance involves factually intensive analysis of the provenance of the gold in the supply chains to establish the form (and therefore the correct GST treatment of the gold) and the supply chains.
 - b. Compliance officers are unable to verify the fineness requirements which is a critical component of assessing concessional treatment entitlement.
 - c. Identifying at what point in a supply chain the form is altered presents a particular complication, particularly with respect to missing traders.
 - d. Phoenix activities are involved. Where we undertake compliance action and raise assessments to claw back evaded GST, suppliers cease operating in one entity and commence trade in another.
 - e. The legal argument has been raised, which a Court might agree with, that the matter is purely one of recovery and evasion/fraud, and therefore beyond the scope of the GST General Anti Avoidance Provisions. This argument is still to be tested before the Courts.
 - f. To the extent we are successful in raising liabilities recovery opportunities are often limited generally as the entities/persons have limited financial resources. In some instances the subjects are undischarged bankrupts or persons who have permanently left the jurisdiction.

Attachment A: Legislative Framework

LEGISLATIVE FRAMEWORK



Attachment B: Example of a typical gold bullion scheme



Gold bullion scheme participants exploit the legislative provisions that provide for:

- GST Free or input taxed status of precious metal in an investment form, and
- the taxable nature of non-precious metal.

While the structure and complexity of these arrangements varies, the principal apparent intent is to convert gold bullion to scrap, which creates a taxable supply. The GST attributed to this supply and paid by the refiner (claimed from the ATO) effectively funds the profit derived by all participants.

The operation of the scheme relies on these conditions:

- the GST refund ultimately claimed from the ATO entering the supply chain at the refiner level
- the form of the metal being changed (in the depicted arrangement by the dealer)
- the buyer not correctly reporting GST and/or paying GST liability

Without these conditions, there would be no opportunity for profit.

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