

TAX BULLETIN

An update publication for our clients

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GST NOT PAYABLE ON FEES RETAINED FOR 'NO SHOWS' OR CANCELLATIONS

Qantas has won its case against the ATO in the Federal Court in relation to the GST status of amounts retained by Qantas when domestic passengers miss their flight or cancel their booking¹. The Federal Court's decision has potential implications for all domestic passenger transport operators as well as GST registered entities in other industries that take cancellation or similar fees from their customers.

The Qantas decision

The Full Bench of the Federal Court ruled in favour of Qantas on the issue of whether GST is payable on amounts retained by Qantas either because of 'no shows' or cancelled bookings. The Court held that in these circumstances GST is not payable.

The Federal Court overturned an earlier decision of the Administrative Appeals Tribunal (AAT)² which held that GST was payable by Qantas. The AAT came to its decision by splitting up the transaction into multiple supplies and finding that the relevant supply could be the act of recording the reservation, or other acts done by Qantas to prepare itself for the carriage of the passenger.

The Federal Court held that the AAT had erred and that the only relevant supply that was contemplated when the amount was paid by the customer was the carriage of the passenger by Qantas. As such, when that did not occur, there was no supply and hence no GST liability.

In reaching its decision, the Federal Court also distinguished the Qantas situation from the High Court's earlier decision in *Reliance Carpet*³, in which the High Court held that GST was payable on forfeited security deposits. The *Reliance Carpet* decision was distinguished on the basis that in that case the High Court had to come to its decision by taking into account the workings of the specific security deposit provisions within the GST legislation.

Potential opportunities for GST refunds

Given the different decisions in *Reliance Carpet* and *Qantas*, it is important to note that whether the *Qantas* decision will apply to a particular situation will depend largely on the contractual terms between the parties.

Nevertheless, the *Qantas* decision has potentially wide implications, specifically for entities that operate within the domestic passenger transport industry. Furthermore, the potential impact of the decision is not limited to the passenger transport industry. It could also apply to cancellation fees and similar amounts retained by entities in other industries. One example is accommodation providers who make supplies of accommodation in hotels, motels and other commercial residential premises. The decision could also result in potential opportunities for refunds in relation to GST paid on cancellation fees and other similar amounts in prior periods.

¹ *Qantas Airways Limited v Commissioner of Taxation* [2011] FCAFC 113

² *Qantas Airways Limited v Commissioner of Taxation* [2010] AATA 977

³ *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] 236 CLR 342

It is not yet known whether the ATO will seek leave from the High Court to appeal the Full Federal Court's decision. However, as the Federal Court's decision directly contradicts the ATO's current view expressed in its public ruling on cancellation fees, an application to the High Court for leave to appeal is possible.

Recommended action

If your business takes cancellation fees or similar amounts from your customers, we recommend that you review the GST status of those amounts going forwards in light of the decision in the *Qantas* case. We also recommend that you consider whether there is any opportunity to apply to the ATO for a refund of GST paid in prior periods.

We would be pleased to review the contractual terms under which you receive cancellation fees or other similar amounts from your customers, in order to determine their GST status in light of the *Qantas* decision.

FURTHER INFORMATION

Please contact either your regular Pitcher Partners tax contact or Craig Whatman on (03) 8610 5617 for further details on the issues raised in this Tax Bulletin.