

# The Business Letter

MARCH 2008

## Alert - Car dealership awarded GST refund

The Federal Court of Australia has handed down an important decision that deals with whether a taxpayer is entitled to a refund for GST incorrectly paid to the ATO for 'holdback payments' *KAP Motors Pty Ltd v FCT [2008] FCA 159*. The case addresses the key issue of when the Commissioner is entitled to withhold a refund if a taxpayer has overpaid or incorrectly remitted GST. The *Taxation Administration Act 1953* contains a set of rules which allows the Commissioner to withhold the refund in certain circumstances. However, the Court's decision confirmed that the Commissioner's discretion to withhold was not as broad as he believed.

### BACKGROUND

The taxpayer, a motor vehicle dealership (the Dealership), had been receiving holdback payments from manufacturers/importers, including a component on account of GST. The dealership had been remitting this GST to the ATO.

The ATO released a determination in 2005 (GSTD 2005/4) stating that in its view, holdback payments were not subject to GST, as the dealership was not making a 'supply' for which the holdback payment is consideration. Following this determination, the dealership sought to obtain a refund from the ATO for the GST previously remitted in respect of the holding payments. **The ATO refused to pay the refund until the dealership had reimbursed the manufacturers/importers.**

### KEY CONTACTS



**Paul Ingram** Partner  
P 08 8233 5601  
E paul.ingram@minterellison.com



**Pasqualina Callea** Solicitor  
P 08 8233 5522  
E pasqualina.callea@minterellison.com

Professional advice should be obtained before applying this information to particular circumstances. The information should not be used or relied upon for detailed advice or as the basis of formulating decisions.

For further information on Minter Ellison and its range of legal services, please visit our website: [www.minterellison.com](http://www.minterellison.com)

Minter Ellison Lawyers  
25 Grenfell Street  
ADELAIDE SA 5000

Tel: 08 8233 5555  
Fax: 08 8233 5556  
Email: [adelaide@minterellison.com](mailto:adelaide@minterellison.com)

## DECISION

The Commissioner raised two arguments in support of his refusal to refund the GST until the manufacturers/importers had been reimbursed:

- that under section 105-65 of Schedule 1 of the *Taxation Administration Act*, the Commissioner was not required to give a refund where the person overpaid the amount because a 'supply' was treated as a taxable supply, the supply was not a taxable supply, and the Commissioner was not satisfied that the person has reimbursed a corresponding amount to the recipient of the supply (in this case the manufacturer/importer), and
- that under general law, any amounts refunded by the ATO to the taxpayer should be held on constructive trust for the manufacturers/importers.

The court dismissed both arguments, finding that the dealership was entitled to a refund irrespective of whether it had reimbursed the manufacturers/importers.

## IMPLICATIONS

For dealerships who have remitted GST on holdback payments in the past, this decision clears the way for a potential windfall refund from the ATO. However, the decision does not protect them from any commercial or legal claims by manufacturers and importers who originally paid a GST component as part of their holdback payments.

For manufacturers/importers, the implications of this decision are less clear cut and will depend on the individual circumstances. Some manufacturers/importers do not pay holdback; others have been paying it excluding GST. Manufacturers/importers that have not yet arranged for refunds of the GST component paid to dealerships should consider ways of ensuring that their dealers do not make a windfall gain at their expense.

Of more concern to manufacturers/importers is that if dealerships take advantage of this decision and seek mass refunds from the ATO, the ATO is likely to investigate each refund claim, and focus in particular on the manufacturers/importers who have incorrectly claimed input tax credits over the past four years in relation to the holdback payments. Manufacturers/importers who have not already made adjustments to refund these incorrectly claimed input tax credits to the ATO may be levied with penalties and interest in addition to paying back the input tax credits.