



## Tax Insights

# Notional GST: ATO's dispute resolution approach for government entities

On 13 April 2022, the ATO [published details](#) of the processes it requires government entities to adhere to when disputing a position taken by the Commissioner of Taxation on a notional GST matter.

This article covers the ATO publication in its current form, but this should be read with the assumption that the publication might be revised or perhaps withdrawn in light of the Federal Court's decision on 9 May 2022 in *Landcom v Commissioner of Taxation [2022] FCA 510* (more on this in the 'Observations' section below).

### Limited GST appeal rights for government entities

The ATO publication makes clear that in many circumstances government entities, whether at federal or state level, face reduced appeal rights and other barriers to obtaining an external review when receiving an unfavourable decision from the Commissioner about a notional GST issue.

We anticipate that this will be particularly acute for, but not limited to, land development/housing authorities in each of the states and territories, due to the often-complex GST issues associated with development and sale of government owned real property (whether unimproved or improved), particularly the application of Item 4 (in subsection 75-10(3)) of the GST margin scheme. It should be noted that this is an issue that will also impact local government authorities selling land, as they are "a State or Territory" for the purposes of Item 4.

The ATO's dispute resolution process for notional GST matters, as described in the publication, has been developed in consultation with, and is endorsed by, the treasury officials from the Commonwealth, the states and the territories who comprise a GST administration sub-committee formed under the Intergovernmental Agreement on Federal Financial Relations (IGA).

Significantly, the publication emphasises the ATO's expectation that state and territory government entities, when faced with an unfavourable position taken by the Commissioner on a notional GST matter, will work actively with the ATO to achieve an outcome that maintains the integrity of the GST base and system, and does not involve unnecessary costs. It may be that adherence to this principle could see government entities facing pressure to concede on finely balanced notional GST issues, rather than being free to contest them to the full extent.

Aside from that, any decision to pursue further avenues of challenging positions taken by the ATO on notional GST matters may also need to be considered in the context of relevant tax risk management and governance frameworks that government entities are subject to or have in place.

### Notional GST versus legally payable GST

Notional GST is the term used to refer to GST amounts which government entities are not **legally** required to pay under tax legislation, but about which the Commonwealth, the states and the two territories have made a political agreement (i.e., under the IGA) that their government entities (including at local government level) will pay voluntarily to ensure competitive neutrality with non-government taxpayers.

The ATO breakdown between notional GST and legally payable GST for government entities within each jurisdiction is as follows:

Jurisdiction	Legal GST	Notional GST
<b>Commonwealth</b>	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>All GST</li> <li>All input tax credits (ITCs)</li> </ul>
<b>States</b>	<ul style="list-style-type: none"> <li>GST (other than GST on property supplies)</li> <li>All ITCs</li> </ul>	<ul style="list-style-type: none"> <li>GST on supplies of property (including real property)</li> </ul>
<b>Local government (in NSW, QLD, SA, TAS, VIC and WA)</b>	<ul style="list-style-type: none"> <li>GST (other than GST on property supplies)</li> <li>All ITCs</li> </ul>	<ul style="list-style-type: none"> <li>GST on supplies of property (including real property)</li> </ul>
<b>ACT</b>	<ul style="list-style-type: none"> <li>GST (other than GST on real property supplied on behalf of the Commonwealth)</li> <li>All ITCs (other than ITCs on acquisitions made on behalf of the Commonwealth)</li> </ul>	<ul style="list-style-type: none"> <li>GST on property supplied on behalf of the Commonwealth</li> <li>ITCs on acquisitions made on behalf of the Commonwealth</li> </ul>
<b>NT</b>	<ul style="list-style-type: none"> <li>All GST</li> <li>All ITCs</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
<b>Local government (in the NT)</b>	<ul style="list-style-type: none"> <li>All GST</li> <li>All ITCs</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>

## Notional GST dispute resolution approach

In summary, the ATO publication provides as follows:

- Disputes can arise between the ATO and a government entity relating to questions of fact, questions of law, questions of valuation, etc., and can do so in the context of the ATO issuing GST guidance, providing advice to the government entity, or conducting GST engagement or assurance activity.
- The route for resolving disputes relating to GST that is legally payable is the normal one of objection, followed by AAT and/or court processes (legal review).
- For disputes relating to notional GST, the legal review route is unavailable. Instead, alternative dispute resolution (ADR) processes such as mediation or conciliation can be used, provided both parties agree. This can be during the course of, or at completion of ATO engagement/assurance activity, or while the ATO is conducting an internal review of the relevant decision.
- In limited circumstances, ADR in the form of an external review may be possible. Significantly, the ATO will not agree to an external review if:
  - The issue involves an interpretation of the GST law that has previously been considered by a court or in another external review;
  - The issue only involves the application of settled law to particular facts; or
  - The government entity has not obtained endorsement of their request for external review from their treasury representative on the IGA sub-committee.
- If the ATO agrees to an external review, this will only be on the basis that the review will proceed in a way that is consistent with:
  - The IGA;
  - The principles that the IGA sub-committee has agreed that all government entities must follow;
  - Prior court decisions on GST law interpretation;
  - The ATO's view on a GST interpretation issue in respect of non-notional GST issues; and
  - GST law interpretations adopted in previous court and external review decisions.
- In relation to the outcome of an external review relating to a GST law interpretation question, the ATO will not be bound by the reviewer's opinion. If the ATO:
  - Agrees with the reviewer's opinion, it will apply that view to all taxpayers
  - Disagrees with the reviewer's opinion, it will refer the matter to the IGA sub-committee for the sub-committee to decide next steps.
- The final stage of review for notional GST disputes is an ATO internal review. It should be noted that the ATO position's is that:
  - These will not be available to government entities in all circumstances (e.g., if there has already been an external review done at the stage of ATO engagement/assurance activity);
  - They will be done broadly in conformity with the statutory objection processes available to non-notional GST taxpayers; and
  - The non-government entity needs to have first notified their Treasury representative on the IGA sub-committee that it intends to seek an internal review.

## Observations

The ATO's notional GST dispute resolution approach in its current form will make it challenging for government entities to fully test whether a position they have taken on a disputed notional GST matter is the correct one. In some instances, the ATO will be the sole arbiter. In others, where an external review occurs, the ATO will not be bound by the reviewer's decision.

Government entities in disagreement with the ATO about a notional GST issue will face the added hurdle of needing to persuade their jurisdiction's treasury officials that their pursuit of an external review and/or ATO internal review should be supported.

A key assumption underpinning the guidance from the ATO in the ATO publication is that certain matters relating to notional GST cannot be heard by the Courts. However, on 9 May 2022, the Federal Court (Thawley J) handed down [judgment](#) in *Landcom v Commissioner of Taxation [2022] FCA 510* which appears to go against the grain of the ATO's key reasoning underpinning its notional GST dispute resolution guidance. With one of the core foundations of the ATO publication now being taken away, the application of the ATO publication is not clear.

The ATO is no doubt carefully considering how to proceed. There will be keen interest from stakeholders about whether the ATO will appeal the judgement or will accept the judgment as correct and go forward on the basis that government entities have exactly the same review and appeal rights as other GST taxpayers.

Deloitte considers that the pursuit of any further avenues of challenging the ATO should be assessed in the context of any tax governance or tax risk management frameworks that might apply to relevant government entities. In particular, government entities should be considering:

1. Whether they have taken uncertain GST positions (i.e., positions of high value or which are unable to be clearly reconciled with publicly available ATO guidance), are preparing private binding ruling requests or planning engagement with the ATO on GST issues;
2. If any of the above applies, which side of GST "classification" the GST obligations sit (i.e., 'notional' GST or legally payable GST);
3. Whether they have a line of communication with the ATO to proactively address their compliance and risk given the changing nature of the dispute resolution landscape; and
4. What their dispute resolution strategy is, in light of the above factors, for their notional GST position.

Further to the above, careful review of existing tax governance/risk frameworks should be the starting point for entities who are subject to notional GST as they may require updating/completing to reflect the dispute resolution landscape in this area.

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