



Insolvency and winding up - avoiding GST traps and capturing GST refunds

Insolvency practitioners need to carefully consider GST issues very carefully prior to winding up a company or business, or run the real risk of being responsible for final GST owed to the ATO, or missing out on GST refunds.

For example insolvency practitioners may be liable for GST:

- arising, knowingly or unknowingly, during representation
- arising due to special adjustment rules for cessation of trading
- if residual assets are disposed of or are otherwise distributed (and take note of market value deeming rules)
- where the entity is a sole trader and any assets cease to be used for enterprise purposes

If an insolvency practitioner is personally liable, it is worth checking prior to winding up an organisation if there are any GST exposures before making final distributions as there may be credits available to offset this liability. The ATO may give refunds of previously unclaimed GST credits prior to cancellation of a GST registration, going back up to four years, but only if claimed prior to winding up.

GST is often paid in advance of a supply being made, where the supply can no longer occur because operations cease (ordered and paid for in advance, but not delivered). Special provisions allow that GST to be claimed back, noting that the person who paid for the supply will have to repay the ATO for any GST credits they claimed.

For example when Ansett failed in 2001, Ansett claimed back the GST paid on advance air fares, and the travelers not only lost the fares, they had to refund the GST to the ATO that they claimed (and then became creditors of Ansett for the GST inclusive price paid).

▶ *Bad debts*

GST paid on debts unpaid for 12 months, even if not written off, can be claimed back and vice versa. Management of GST regarding slow paid and bad debts should be considered at least annually, but also when businesses are sold or acquired, proportionate holdings are changed and trued up, and especially in regard to settlements of disputes.



▶ *Settlement of disputes*

The characterisation of elements making up ‘settlements’ are often incorrectly assumed to be free of GST. Whilst ‘global’ or ‘undefined’ amounts are sometimes agreed, there are always GST consequences. Opportunities and risks must exist, whether worked out before, or after. Windfall gains, or unexpected costs, arise depending upon which party you represent, especially if you have better knowledge than the other party. You could be 10% better off, or worse off.

For example, consider a settlement under which A received \$80,000 to “release” B from an obligation, and B then asked for a tax invoice (B always knew it was taxable, and A lost GST of nearly \$8000 by not thinking about it). Consider compulsory acquisitions, compensation for past breaches causing loss compared to amounts for tolerating future actions, recovery of costs, etc.

Settlements can sometimes become disputes again because of GST. If you receive money in the course of business, it will almost certainly be subject to GST unless you know there is a provision that says otherwise.

For further information or assistance in respect to GST issues pertaining to insolvency contact Ken Fehily at Fehily Advisory. Fehily Advisory is a specialist indirect tax advisory practice led by well known GST specialist Ken Fehily. Fehily Advisory has an alliance and close working relationship with Madgwicks Lawyers. The two firms often work together to provide bespoke commercial advice to clients in respect to indirect tax.

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▶ For information on Madgwicks’ Taxation & Revenue Group, please click [here](#)

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