

**Rosebridge Nominees Pty Ltd (IN LIQ) and Commissioner of Taxation
(Taxation) [2019] AATA 426 (19 March 2019)**

Division: **TAXATION AND COMMERCIAL DIVISION**

File Number: **2018/3685**

Re: **Rosebridge Nominees Pty Ltd (IN LIQ)**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

Decision

Tribunal: **Senior Member G Lazanas**

Date: **19 March 2019**

Place: **Sydney**

The Commissioner's decision in respect of the objection to the assessments of net amount is affirmed.

.....[Sgd].....

Senior Member G Lazanas

Catchwords

TAXATION – GST – time limits on entitlement to claim input tax credits and GST refunds – whether special rules relating to representatives of incapacitated entities provide exemption from time limits – whether reviewable GST decision – objection decision affirmed

Legislation

A New Tax System (Goods and Services Tax) Act 1999 (Cth), ss 7-15, 17-5, 29-10, 31-8, 31-20, 33-3, 35-5, Division 58, Division 93, s 195-1

Acts Interpretation Act 1901 (Cth), ss 2, 7

Administrative Appeals Tribunal Act 1975 (Cth), ss 25, 43

Income Tax Assessment Act 1936 (Cth), s 6(1)

Taxation Administration Act 1953 (Cth), ss 8AAZLF, 14ZQ, 14ZS, 14ZZ, 14ZZK, 36, Schedule 1, ss 100-50, 105-55

Cases

Australian Leisure Marine Pty Ltd and Commissioner of Taxation [2010] AATA 620; 76 ATR 390

Clontarf Developments Pty Ltd and Commissioner of Taxation [2010] AATA 1065; 79 ATR 540

Linfox Australia Pty Ltd v Commissioner of Taxation [2019] AATA 222

Trustee for the SBM Trust and Commissioner of Taxation [2015] AATA 174

Sedgwick and Commissioner of Taxation [2015] AATA 690

Tom and Commissioner of Taxation [2013] AATA 28

REASONS FOR DECISION

Senior Member G Lazanas

19 March 2019

INTRODUCTION

1. Rosebridge Nominees Pty Ltd (in Liq) (**Rosebridge**) is in dispute with the Commissioner of Taxation (**Commissioner**) about GST assessments issued to it in respect of numerous tax periods, namely quarterly tax periods starting from 1 January 2002 and ending 31 March 2013. Rosebridge maintains it is entitled to claim input tax credits (**ITCs**) in the GST returns lodged in respect of those tax periods, which were lodged on 6 July 2017. Rosebridge further maintains that those ITCs result in it having negative net amounts for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) and therefore being owed GST refunds by the Commissioner pursuant to s 35-5 of the GST Act.

2. On the other hand, the Commissioner argues that Rosebridge is out of time to claim the ITCs because of statutory provisions which place time limits on entitlements to ITCs. Those provisions are contained in the current Division 93 of the GST Act as well as former s 105-55 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**) and in addition, the former s 36 of the TAA. There are additional issues raised in this case because Rosebridge is in liquidation. Those issues are concerned in part, with s 58-50 of the GST Act and the requirement for representatives to give GST returns for incapacitated entities, including the interaction of those special rules with the time limits for claiming ITCs and GST refunds, and whether representatives of incapacitated entities are exempted from the time limits.

3. I have decided that the Commissioner's objection decision disallowing the ITCs and in turn the GST refunds claimed by Rosebridge is correct. Rosebridge was out of time in claiming the GST refund and ITCs when its GST returns were lodged by the liquidator on 6 July 2017 because of the statutory time limits, as applicable. I have also

decided that outcome is not affected by the special rules for representatives of incapacitated entities, including s 58-50 of the GST Act, on the facts in the present case. Furthermore the Administrative Appeals Tribunal (the **Tribunal**) has no jurisdiction to make a direction requiring the representative of an incapacitated entity to lodge GST returns, nor to grant an extension of time for the lodgement of GST returns.

RELEVANT FACTS

4. The factual matrix is uncontroversial. Neither of the parties filed any evidence. Consequently, the following findings of fact are based on the Statements of Facts, Issues and Contentions filed by the parties and the T–Documents that were before the Tribunal.

5. On 11 July 2000, Rosebridge was registered for GST. The tax periods applying to Rosebridge are, pursuant to s 27-5 of the GST Act, each period of 3 months ending on 31 March, 30 June, 30 September and 31 December in any year. That is, it lodges its GST returns, also known as Business Activity Statements (**BASs**), on a quarterly basis. Further, Rosebridge has adopted the non-cash (accruals) method of accounting for GST.

6. On 2 June 2015, Mr Robert Jacobs was appointed as the liquidator of Rosebridge Nominees Pty Ltd as trustee for the Nightlife Unit Trust. As Rosebridge is an entity that is in liquidation it is an “*incapacitated entity*” as per the definition in s 195-1 of the GST Act. Mr Jacobs, as the liquidator, is a “*representative*” as defined in s 195-1 of the GST Act. Liquidator is further defined in s 195-1 of the GST Act to have the meaning given by s 6(1) of the *Income Tax Assessment Act 1936* (Cth); namely the person who, whether or not appointed as liquidator, is the person required by law to carry out the winding-up of a company.

7. On 8 June 2015, Mr Jacobs wrote to the Commissioner and advised that he had been appointed official liquidator of Rosebridge by an order of the Supreme Court of Western Australia. Relevantly, Mr Jacobs also stated as follows:

I kindly request that you advise as soon as possible if you are aware of any taxation liabilities owed by the Company to the Australian Taxation Office, together with details of any outstanding lodgements.

..

Please confirm the current status of the Business Activity Statements of the

Company which were required to be lodged prior to my appointment.

8. On 22 August 2015, the Commissioner advised Mr Jacobs as follows:

The above-named company is indebted to this office for a Running Balance Account deficit debt in respect of BAS amounts.

9. The Commissioner's letter included a proof of debt and noted that "*An amended proof of debt may be lodged when the full extent of the liability has been established. The table at "Attachment 2" details the outstanding lodgement obligations*". The table at Attachment 2 relevantly listed 30 quarterly tax periods from 1 September 2008 to 30 September 2015 in relation to which GST returns (or BASs) were outstanding.

10. On 6 July 2017, the liquidator lodged 30 BASs for the tax periods from 1 January 2002 to 31 March 2013. The BASs lodged for the two quarterly tax periods ending 30 June 2009 and 31 March 2010 disclosed net amounts of \$87 and \$1,503, respectively, owed by Rosebridge to the Commissioner pursuant to Division 33 of the GST Act. The net amounts were worked out in accordance with the formula "GST – Input tax credits" set out in s 17-5 of the GST Act. Those two BASs are not relevant to this proceeding as they involved positive net amounts.

11. The other 28 BASs lodged by Rosebridge, which are the subject of this proceeding (referred to as **the relevant BASs**), all disclosed negative net amounts, having been worked out using the same formula set out in s 17-5 of the GST Act. The net amounts in these BASs were negative because Rosebridge reported nil GST liabilities and amounts of ITCs totalling \$95,055 resulting in a GST refund for the same amount. Division 35 of the GST Act is about the Commissioner's obligation to pay to an entity GST refunds, namely, entitlements to ITCs that remain after off-setting any amounts of GST. Where the net amount is less than zero, the Commissioner must pay that amount (expressed as a positive amount) to the taxpayer: s 35-5(1) of the GST Act. See also s 8AAZLF of the TAA which provides for when the Commissioner must refund Running Balance Account surpluses and credits.

12. On 26 July 2017, the Commissioner issued nil assessments to Rosebridge for the BASs lodged by Rosebridge on 6 July 2017 except in respect of the two BASs referred to above at [10] that reported positive net amounts. Relevantly, the Commissioner did not accept that Rosebridge was entitled to claim the ITCs and GST

refunds because of the four year statutory time limits for claiming ITCs, to which I will come shortly. Therefore, the Commissioner did not accept that he was required to refund any GST amount to Rosebridge.

13. On 22 September 2017 the liquidator caused Rosebridge to lodge an objection with the Commissioner referring to the ITCs claimed in the BASs for the tax periods after 1 July 2012 and separately, for tax periods prior to 1 July 2012.

14. Relevantly, the liquidator explained as follows in relation to claims made in tax periods after 1 July 2012:

8. *Reading these two provisions [ss 93-5 and 58-50] together:*
 - a. *A liquidator, as a representative of an incapacitated entity, is not subject to a 4 year limitation period in respect of unfiled returns where s 58-50 applies;*
 - b. *Section 93-5 starts a 4 year time period running for the application of s 58-50 from the appointment of the representative. That is, the obligation of the representative to lodge a return for a prior period commences on the date of appointment of the representative (this would be consistent with s 27-39(2)).*
9. *The GST Act notes that a decision of the Commissioner under s 58-50(1) (b) is a reviewable decision of the Commissioner. To the extent that the Commissioner has not already exercised that discretion, the liquidator seeks an exercise of that discretion to require returns to be lodged for all periods in which GST has already been paid by the Trustee but not claimed by it.*
10. *For the purposes of s 58-50(4)(a), the ability of the liquidator to pay a dividend to unsecured creditors is dependent upon the receipt by the Trustee of the GST refunds.*
11. *Further it is a matter of appropriate public policy that a representative should not be at risk of not fulfilling his duties to creditors of an incapacitated entity by reason of the effluxion of time limits that the representative may not become aware of until some time into the administration. That is, there is a good reason for the 4 year time limit to apply to that which the liquidator can control, namely the lodgement of returns once the administration has commenced.*

15. With respect to claims for ITCs made in BASs and the resulting refunds for tax periods prior to 1 July 2012, the liquidator stated:

13. *The basis of denying the refunds [in respect of periods 1 January 2002 to 30 June 2012] is s 105-55 of the Taxation Administration Act 1953 (TAA).*
14. *Section 105-55 is no longer part of the TAA having been repealed with effect from 1 January 2017, by reason of s 2 of the Indirect Tax Laws*

Amendment (Assessment) Act 2012 and Schedule 1 Part 2.

15. *That being the case, the law to be applied in relation to any further consideration of these GST returns is the GST Act and in particular s 58-50*

...

16. On 2 May 2018, the Commissioner disallowed Rosebridge's objection in full on the basis that:

- (a) in relation to relevant tax periods ending before 1 July 2012, the ITCs were first attributable to tax periods that ended more than 4 years before the BASs were lodged and were thus no longer claimable by reason of s 105-55(1) of Schedule 1 to the TAA or s 36 of the TAA; and
- (b) in relation to relevant tax periods ending after 1 July 2012, the ITCs were first attributable to tax periods where the due date for lodgement was more than 4 years before the date the BASs were lodged and were thus no longer claimable by reason of s 93-5(1) of the GST Act.

17. On 2 May 2018, Rosebridge lodged an Application for Review with the Tribunal in respect of the Commissioner's objection decision. The hearing took place on 30 November 2018 with both parties making extensive legal submissions.

THE ISSUES

18. The key issue for determination by the Tribunal is whether the Commissioner's assessments issued on 26 July 2017 that disallowed the ITCs in each of the GST returns for the relevant tax periods are excessive or otherwise incorrect pursuant to s 14ZZK(b)(i) of the TAA. The resolution of that issue essentially depends on the operation of the applicable statutory time limits for claiming ITCs and GST refunds and whether

s 58-50 of the GST Act, which is primarily concerned with the requirement for representatives to give GST returns for incapacitated entities, affects the four year cut off.

19. There is a related issue of whether the absence of a direction by the Commissioner to the liquidator pursuant to s 58-50(1)(b) of the GST Act to give GST returns is a "*taxation decision*" for the purposes of the definition in s 14ZQ of the TAA,

namely, a decision against which an objection may be made pursuant to Part IVC of TAA. This issue arose because Rosebridge argued that a representative of an incapacitated entity is not subject to the statutory time limits where the Commissioner has directed the representative to lodge GST returns.

20. Further, there is an issue raised by Rosebridge as to whether the Tribunal can set aside the Commissioner's objection decision and itself make a direction under s 58-50(1)(b) of the GST Act for the representative of an incapacitated entity to give to the Commissioner the GST returns. Additionally, Rosebridge argued, in the alternative, the Tribunal should make a determination pursuant to s 31-8(1)(b) of the GST Act to extend the period for the liquidator to lodge the GST returns or, in the further alternative, remit the matter to the Commissioner for reconsideration in accordance with any directions or recommendations pursuant to s 43(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).

THE LEGISLATIVE FRAMEWORK

21. It is important to note at the outset that s 14ZZK(b)(i) of the TAA provides that the taxpayer bears the burden of proving in these proceedings that each of the assessments of net amount for the quarterly tax periods is excessive or otherwise incorrect.

22. Before addressing the legislative provisions that are specifically raised by the issues in this case, it is helpful to set out some general provisions of the GST Act that are essential for an understanding of the operation of the GST Act as regards GST payments and refunds and the claiming of ITCs. The general provisions are set out below but, for simplicity I have omitted the notes and examples. Also, although these statutory provisions have been amended they have been set out in their form as at the time the liquidator lodged the BASs for Rosebridge on 6 July 2017. This is a convenient reference, particularly as the legislative changes to these statutory provisions do not affect this dispute.

23. Section 7-15 of the GST Act states:

7-15 Payments and Refunds

*The amount *assessed as being the *net amount for a tax period is the amount that the entity must pay to the Commonwealth, or the Commonwealth must refund to the entity, in respect of the period.*

24. Section 17-5 of the GST Act relevantly states:

17-5 Net Amounts

(1) The **net amount** for a tax period applying to you is worked out using the following formula:

GST - Input tax credits

Where:

GST is the sum of all of the GST for which you are liable on the *taxable supplies that are attributable to the tax period.

Input tax credits is the sum of all of the input tax credits to which you are entitled for the *creditable acquisitions and *creditable importations that are attributable to the tax period.

25. Section 29-10(1) of the GST Act relevantly provides as follows in relation to attributing ITCs for creditable acquisitions for an entity that accounts on a non-cash basis:

29-10 Attributing the input tax credits for your creditable acquisitions

(1) The input tax credit to which you are entitled for a *creditable acquisition is attributable to:

- (a) the tax period in which you provide any of the *consideration for the acquisition; or
- (b) if, before you provide any of the consideration, an *invoice is issued relating to the acquisition – the tax period in which the invoice is issued.

26. Section 31-8(1) of the GST Act states as follows in relation to when GST returns must be given for quarterly tax periods:

31-8 When GST returns must be given – quarterly tax periods

(1) If a tax period applying to you is a *quarterly tax period, you must give your *GST return for the tax period to the Commissioner:

- (a) as provided in the following table; or
- (b) within such further period as the Commissioner allows.

When quarterly GST returns must be given		
Item	If this day falls within the quarterly tax period...	Give the GST return to the Commissioner on or before this day:
1	1 September	The following 28 October
2	1 December	The following 28 February

3	1 March	The following 28 April
4	1 June	The following 28 July

27. Section 31-20 of the GST Act relevantly states in relation to the topic of additional GST returns:

Additional GST returns

- (1) You must, if required by the Commissioner, whether before or after the end of a tax period, give to the Commissioner, within the time required, a *GST return or a further or fuller GST return for the tax period or a specified period, whether or not you have given the commissioner a GST return for the tax period under section 31-5.

28. The main provisions in the GST Act regarding payments of GST and entitlements to refunds of GST, relevant to this dispute, are as follows:

33-3 When payments of assessed net amounts must be made – quarterly tax periods

If:

- (a) the *assessed net amount for a tax period applying to you is greater than zero; and
- (b) the tax period is a *quarterly tax period;

You must pay the assessed net amount to the Commissioner as follows:

When quarterly GST payments must be made		
Item	If this day falls within the quarterly tax period...	Pay the assessed net amount to the Commissioner on or before this day:
1	1 September	The following 28 October
2	1 December	The following 28 February
3	1 March	The following 28 April
4	1 June	The following 28 July

...

35-5 Entitlement to refund

- (1) If the *assessed net amount for a tax period is less than zero, the Commissioner must, on behalf of the Commonwealth, pay that amount (expressed as a positive amount) to you.

...

29. As to the statutory time limits for claiming ITCs and GST refunds, it is necessary because of the numerous tax periods involved in this dispute ranging from 1 January 2002 to 31 March 2013, to have regard to the various iterations of the statutory provisions which applied throughout the relevant period. Broadly, for tax periods ending before 1 July 2012, former s 36 of the TAA and, later, former s 105-55 of Schedule 1 to the TAA applied, as indicated below. Although s 105-55 was amended, nothing turns on the differences in the language in the present case. For tax periods after 1 July 2012, s 93-5 of the GST Act applied.

30. Section 36 of the TAA sets out the statutory time limits for GST refunds and credits from the start of the GST up until 30 June 2006. That section relevantly provided as follows, as at

6 June 2006:

36 Time limit on credits and refunds

(1) *You are not entitled to:*

(a) *a refund under section 35-5 of the GST Act in respect of a particular tax period; or*

(b) *an input tax credit that is attributable to a particular tax period; or*

...Unless:

(e) *within 4 years after the end of the tax period, or after the making of the importation (as the case requires), you notify the Commissioner (in a GST return or otherwise) that you are entitled to the refund or credit; or*

...

31. With effect from 1 July 2006, the statutory time limit for GST refunds and credits was inserted into s 105-55 of Schedule 1 to the TAA and relevantly provided at that time, as follows:

105-55 Time limit on refunds and credits

(1) *You are not entitled to a refund or credit to which this subsection applies in respect of a *tax period or importation unless:*

(a) *within 4 years after:*

(i) *the end of the tax period; or*

(ii) *the importation;*

*as the case requires, you notify the Commissioner (in a *GST return or otherwise) that you are entitled to the refund or credit; or*

(b) *within that period the Commissioner notifies you (in a notice of*

*assessment or otherwise) that you are entitled to the refund or credit;
or*

(c) *in the case of a credit—the credit is taken into account in working out a *net amount or *net fuel amount that the Commissioner may recover from you only because of paragraph 105-50(b).*

(2) *Subsection (1) applies to:*

(a) *a refund under section 35-5 of the *GST Act or section 61-5 of the Fuel Tax Act 2006 in respect of a particular *tax period; or*

(b) *an *input tax credit or *fuel tax credit that is attributable to a particular tax period; or*

...

32. Section 105-55 was amended by the *Tax Laws Amendment (2008 Measures No. 3) Act 2008* (Cth) to apply to tax periods starting on or after 1 July 2008, in the following terms, although nothing turns on the different wording in the present case:

105-55 Time limit on refunds etc. from the Commissioner

(1) *You are not entitled to a refund, other payment or credit to which this subsection applies in respect of a *tax period or importation unless:*

(a) *within 4 years after:*

(i) *the end of the tax period; or*

(ii) *the importation;*

*as the case requires, you notify the Commissioner (in a *GST return or otherwise) that you are entitled to the refund, other payment or credit; or*

(b) *within that period the Commissioner notifies you (in a notice of assessment or otherwise) the you are entitled to the refund, other payment or credit; or*

(c) *in the case of a credit – the credit is taken into account in working out:*

(i) *a *net amount or *net fuel amount that the Commissioner may recover from you only because of subparagraph 105-50(3)(b)(i);
or*

(ii) *an amount of excess referred to in subsection 105-50(2) that the Commissioner may recover from you only because of subparagraph 105-50(3)(b)(ii).*

(2) *Subsection (1) applies to:*

(a) *a refund in relation to a *net amount or *net fuel amount in respect of a particular *tax period; or*

...

Section 105-55 was later repealed by the *Indirect Tax Laws Amendment (Assessment)*

Act 2012 (Cth) with respect to payments and refunds that relate to tax periods starting on or after 1 July 2012, being the start of the self-assessment regime for GST. Those amendments commenced on 1 January 2017.

33. It is convenient at this point to deal with one of Rosebridge's arguments regarding s 105-55 to the effect that once s 105-55 of Schedule 1 to the TAA was repealed, Rosebridge's entitlements to ITCs beyond the four years statutory time limit were revived.

34. On the other hand, the Commissioner submitted that s 7 of the *Acts Interpretation Act 1901* (Cth) (**AIA**) addresses the situation of the effect of repeal of part of an Act.

35. Section 7 of the AIA relevantly states as follows:

7 Effect of repeal or amendment of Act

No revival of other Act or part

(1) *The repeal of an Act, or of a part of an Act, that repealed an Act (the old Act) or part (the old part) of an Act does not revive the old Act or old part, unless express provision is made for the revival.*

No effect on previous operation of Act or part

(2) *If an Act, or instrument under an Act, repeals or amends an Act (the affected Act) or part of an Act, then the repeal or amendment does not:*

(a) *revive anything not in force or existing at the time at which the repeal or amendment takes effect;*

(b) *affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part;*

...

36. By s 2(1) of the AIA, the AIA applies to all Acts and s 2(2) states its application is subject to any contrary intention.

37. On the basis of ss 2 and 7 of the AIA, I agree with the Commissioner's submission that, in the absence of any express provision with respect to the revival of any provision, of which there was none, the repeal of s 105-55 did not enliven the liquidator's entitlements to claim GST refunds and ITCs beyond the four years cut off. Indeed, the GST refunds and ITCs would have already progressively extinguished upon

the expiry of four years from the end of each tax period pursuant to the operation of s 105-55, notwithstanding the GST returns were only lodged after the effective repeal of s 105-55. That is, the ITCs were not extinguished at any single point in time such as to be enlivened, as argued by Rosebridge, upon repeal of s 105-55.

38. The Commissioner's approach is supported by the *Explanatory Memorandum to the Indirect Tax Laws Amendment (Assessment) Bill 2012* (Cth) which explains that the amendments only apply to tax periods that start on or after 1 July 2012 and to payments and refunds which do not relate to tax periods arising on or after 1 July 2012 (paragraph 1.146). Consequently, for tax periods ending before 30 June 2012, s 105-55 of Schedule 1 to the TAA continued to apply to claims arising in those tax periods. This is also reinforced by the statement in paragraph 1.147 of the Explanatory Memorandum that "*the Commissioner may still make an assessment under Division 105 in Schedule 1 to the TAA 1953 for tax periods ... commencing before 1 July 2012, and payments and refunds made before 1 July 2012, even after the provisions in Division 105 are repealed on 1 January 2017*".

39. Furthermore, while s 105-55 was repealed, a provision to similar effect was legislated and inserted in Division 93 of the GST Act (see [40] below), to apply in relation to payments and refunds that relate to tax periods starting on or after 1 July 2012. That is, the relevant time limits effectively continued to apply, albeit in a different statutory form, lending credence to the seamless operation of the four year limits.

40. For tax periods after 1 July 2012, s 93-5 (1) of the GST Act relevantly states as follows, as at 1 July 2012:

93-5 Time limit on entitlements to input tax credits

- (1) *You cease to be entitled to an input tax credit for a *creditable acquisition to the extent that the input tax credit has not been taken into account, in an *assessment of a *net amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a *GST return for the tax period to which the input tax credit would be attributable under subsection 29-10(1) or (2).*

There are several exceptions set out in Division 93 to the application of s 93-5(1), however, none of the exceptions applied in Rosebridge's case.

DID THE STATUTORY TIME LIMITS EXTINGUISH ROSEBRIDGE'S ENTITLEMENTS

TO CLAIM THE GST REFUNDS AND INPUT TAX CREDITS?

41. The analysis as to the application of the statutory time limits in the present case starts with the general rules regarding time limits on claiming GST refunds and ITCs and then considers the special rules relating to representatives of incapacitated entities contained in Division 58 of the GST Act.

Tax Periods Before 1 July 2012

42. As Rosebridge had not lodged any notification to preserve its claims at any time, Rosebridge was not entitled to any GST refunds and ITCs in respect of the quarterly tax periods 1 January 2002 to 30 June 2012, by reason of the operation of former s 36 of the TAA and former s 105-55 of Schedule 1 to the TAA, as applicable, which were in substantially the same form. That is, Rosebridge's entitlement to any refund, payment or credits was progressively extinguished, as four years passed after the end of each quarterly tax period. This is on the basis that the sections expressly state that "*you are not entitled*" "*unless ... within 4 years after the end of the tax period ... you notify the Commissioner ... that you are entitled*". There is no discretion for the Commissioner to extend the period except if the requisite notifications within the 4 year period took place.

43. It follows that, by 1 July 2016, Rosebridge was no longer entitled to a refund, payment or credit for the quarterly tax period ending 30 June 2012, as well as the quarterly tax periods before that which had already progressively expired. This conclusion is consistent with several decisions describing the operation of the former statutory time limits, including *Australian Leisure Marine Pty Ltd and Commissioner of Taxation* [2010] 620; 76 ATR 390 at [17]; *Clontarf Developments Pty Ltd and Commissioner of Taxation* [2010] AATA 1065; 79 ATR 540 at [29]; and *Tom and Commissioner of Taxation* [2013] AATA 28 at [14]-[18].

Tax Periods After 1 July 2012

44. With respect to tax periods following 1 July 2012, s 93-5(1) of the GST Act similarly makes it abundantly clear that the entitlement to the ITCs is extinguished in certain circumstances. The use of the word "*ceases*" is unequivocal in describing the end of the entitlement to claim ITCs, unless certain events have occurred. This conclusion is consistent with the following decisions describing the operation of Division

93: *Trustee for the SBM Trust and Commissioner of Taxation* [2015] AATA 174 and *Sedgwick and Commissioner of Taxation* [2015] AATA 690. Again, Rosebridge had not notified its entitlement to claim ITCs within four years after the due dates of the BASs for the tax periods to which the ITCs would have been attributable. Rosebridge had also not, on any view, "taken into account" any ITCs in its assessed net amounts as Rosebridge had not lodged its BASs within four years of their due dates (cf *Linfox Australia Pty Ltd v Commissioner of Taxation* [2019] AATA 222). Accordingly, Rosebridge's entitlements to claim the ITCs had ceased.

Division 58 of the GST Act

45. It is necessary to further consider the operation of s 58-50 of the GST Act as Rosebridge submitted that the four year time limit did not apply to representatives lodging GST returns for incapacitated entities when directed to do so by the Commissioner under s 58-50(1)(b) of the GST Act.

46. Section 58-50 relevantly states as follows:

58-50 Representatives to give GST returns for incapacitated entities

(1) A **representative of an *incapacitated entity must give to the Commissioner a *GST return for a tax period applying to the incapacitated entity if:*

- (a) *the incapacitated entity has failed to give to the Commissioner a GST return for a tax period; and*
- (b) *the Commissioner, in writing, directs the representative to give to the Commissioner a GST return.*

Note: Deciding to direct a representative of an incapacitated entity to give to the Commissioner a GST return is a reviewable GST decision (see Subdivision 110-F in Schedule 1 to the Taxation Administration Act 1953).

(2) *The tax period may be any tax period applying to the *incapacitated entity, including:*

- (a) *a tax period that ends before the *representative became a representative of the incapacitated entity; and*
- (b) *a tax period that starts after the representative became a representative of the incapacitated entity.*

(3) *The *GST return by the *representative:*

- (a) *must be in accordance with the requirements of Division 31 as they would apply in relation to the *incapacitated entity except to the extent that the direction under paragraph (1)(b) modifies those*

requirements; and

(b) *must be given to the Commissioner within the period specified in the direction.*

...

(7) *This section has effect despite section 31-5 (which is about who must give GST returns).*

47. The legislative note to s 58-50 states:

Deciding to direct a representative of an incapacitated entity to give to the Commissioner a GST return is a reviewable GST decision (See Subdivision 110-F in Schedule 1 to the Taxation Administration Act 1953).

48. Specifically, Rosebridge's position was that the Commissioner can determine any period of time that he considers appropriate for the representative of an incapacitated entity to lodge GST returns in reliance on s 58-50(2).

49. Construed in the context of ss 31-8(1)(b) and 31-20(1) of the GST Act (which are about the requirements regarding the lodgement of GST returns – see [26] and [27] above) there is considerable merit in Rosebridge's argument that where the Commissioner makes a direction under s 58-50(1)(b), an extension of time for the lodgement of GST returns may be given to a representative of an incapacitated entity. The foundation for this is s 58-50(3)(b) which states "*the GST return must be given to the Commissioner within the period specified in the direction*". That suggests there is some flexibility as to the date for the representative of an incapacitated entity to give GST returns to the Commissioner. This is coherent with the fact the Commissioner can allow a taxpayer to give their GST returns "*within such further period*" as he decides (s 31-8). It is also consistent with the position where the Commissioner can require additional GST returns to be given to him "*within the time required*" as per the terms of s 31-20 of the GST Act.

50. On Rosebridge's interpretation, the four year cut off for claiming ITCs and GST refunds does not apply to the liquidator in the present case. However, the difficulty with Rosebridge's interpretation are the facts in the present case, namely, the Commissioner did not make any direction under s 58-50(1)(b) of the GST Act such as to specify a different due date. As noted above, Mr Jacobs as the liquidator lodged the GST returns on 6 July 2017 of his own accord, during the liquidation.

51. I accept, however, that if the Commissioner had directed the liquidator to give GST returns within a further period (because of a s 58-50(1)(b) direction or under s 31-8 or s 31-20 of the GST Act), then that later date would substitute as the due date of the GST returns and importantly, the four year time limit would start to run after that due date for the purposes of s 93-5 of the GST Act. It follows that I agree with Rosebridge's argument in principle, with respect to the interaction of ss 58-50 and 93-5(1) of the GST Act. This is because the point of reference in s 93-5(1) is "*4 years after the day on which you were required to give to the Commissioner a GST return for the tax period to which the input tax credit would be attributable*". Relevantly, the day on which a taxpayer is required to give to the Commissioner a GST return can be the day the Commissioner directs the representative of the incapacitated entity. This approach is supported by s 58-50(3)(a) which expressly contemplates the modification of the requirements set out in Division 31 regarding the lodgement of GST returns (see [46] above). Additionally, s 58-50(7), which is set out at [46] above, also provides contextual support.

52. Although it is strictly unnecessary to make any further decision in the absence of any direction by the Commissioner, in my view it is helpful to observe that a different result would likely ensue as to the interaction of s 58-50 of the GST Act with the former s 36 of the TAA and s 105-50 of Schedule 1 to the TAA. This is because the four year time limits in those sections apply from the end of the respective tax periods to which the ITCs would be attributable under s 29-10(1) of the GST Act. In other words, the former time limits did not operate on the due dates of the GST returns. Therefore, even if the Commissioner had extended the due dates of GST returns for tax periods ending before 1 July 2012, the time limits for claiming ITCs and GST refunds would still apply four years from the end of the respective tax periods.

IS THERE A REVIEWABLE GST DECISION?

53. Rosebridge further submitted that, although Mr Jacobs as the liquidator had not been given a direction pursuant to s 58-50(1)(b), which is a "reviewable GST decision", the Commissioner's exercise of that discretion not to give a direction to Mr Jacobs is also a reviewable GST decision. That is, Rosebridge argued it is the exercise of the discretion that is reviewable, not the outcome of that exercise. In this way Rosebridge wanted to challenge the fact that the Commissioner had not directed the liquidator to lodge the GST returns.

54. The Commissioner submitted that the absence of the making of a direction under s 58-50(1)(b) is not a reviewable discretion as it is not listed as a “reviewable GST decision”. The Commissioner also stated that the ability to issue a direction pursuant to s 58-50(1)(b) was confined to him directing the representative to lodge a GST return for any tax period applying to the incapacitated entity, including for a prior tax period before the representative was appointed and did not permit him to change the due date for lodging the GST return. The Commissioner accepted, however, that s 31-8(1)(b) of the GST Act authorises him to allow a taxpayer to give a GST return within such further period as the Commissioner allows.

55. Dealing firstly with the issue of whether the due date for the lodgement of GST returns can be changed by the Commissioner, it is clear from the reasons set out above that, in my view, the Commissioner can extend the time for the lodgement of GST returns in a direction given to a representative of an incapacitated entity. See, in particular, s 58-50(3) of the GST Act (set out at [46] above), which contemplates the Commissioner changing the time for lodgement of GST returns.

56. Turning to Rosebridge’s substantive submission that the Commissioner’s failure to make a direction under s 58-50(1)(b) of the GST Act is a “reviewable GST decision”, I was not persuaded that that is the case. The TAA specifies the list of “reviewable GST decisions” such that there is no room for vagaries. Relevantly, only *“deciding to direct a representative of an incapacitated entity to give to the Commissioner a GST return”* (asterisks omitted) under s 58(1)(b) of the GST Act is specifically listed at Item 49B in s 100-50 in Subdivision 110-F of Schedule 1 to the TAA as a “reviewable GST decision”. This construction is consistent with s 58-50(4) of the GST Act which canvasses some of *“the matters the Commissioner may take into account when deciding whether to give a direction”*. Therefore, it is only when the Commissioner makes such a direction under s 58-50(1)(b) that a taxpayer has a right to make an objection under Part IVC of the TAA. It follows that the absence of the making of such a direction by the Commissioner under s 58-50(1)(b) is not a *“reviewable GST decision”*. Consequently, Rosebridge had no right to object to the fact that the Commissioner has not made a direction under s 58-50(1)(b).

SHOULD THE TRIBUNAL DIRECT THE LIQUIDATOR TO LODGE THE GST RETURNS OR EXTEND THE TIME FOR LODGEMENT OF THE GST RETURNS?

57. As a fall-back position, Rosebridge requested the Tribunal to direct Mr Jacobs under s 58-50(1)(b) of the GST Act to lodge the GST returns and, in the alternative, to extend the time for the lodgement of the GST returns, pursuant to s 31-8 of the GST Act. Rosebridge submitted that it would then be in a position to claim the ITCs in its BASs and obtain the GST refunds, without the interference of the statutory four year time limits.

58. Rosebridge argued that it is appropriate for the Commissioner's discretion under s 58-50(1)(b) to be exercised by the Tribunal to require the liquidator to lodge the outstanding BASs for a number of reasons.

59. First, Rosebridge pointed out that the Commissioner had written to Rosebridge by letter dated 22 August 2015 noting that it had outstanding BASs from 30 September 2008 onwards (outside any four year period) and the Commissioner expressly reserved his rights to lodge an amended proof of debt in respect of any debts owed to the Commissioner on the basis of those outstanding BASs. Rosebridge submitted that the basis on which the Commissioner could amend the proof of debt to include GST debts for the periods 30 September 2008 to 30 June 2011 (being more than four years prior to the letter dated 22 August 2015) is consistent with Rosebridge's position that it should also be able to claim the GST refund and ITCs in the amount of \$95,055. It was appropriate, Rosebridge argued, for the Tribunal to give effect to that outcome.

60. Secondly and relatedly, Rosebridge argued that a fair and equitable exercise of the discretion by the Commissioner under s 58-50(1)(b) should not be limited to allow the Commissioner to collect unpaid GST from an incapacitated entity by the Commissioner lodging an increased proof of debt. Rosebridge argued that an incapacitated entity and its creditors should also be able to benefit from unclaimed ITCs resulting in GST refunds.

61. Thirdly, Rosebridge asserted that there is a sound policy reason for an extension of time for lodgement of GST returns because it takes time for a representative to fully understand what has been done by an incapacitated entity. A strict four year time limit may have unintended results for the representative in relation to the timeliness of the lodgement of outstanding GST returns.

62. The Commissioner pointed out that a difficulty with Rosebridge's request was that the GST returns had since been lodged by the liquidator for Rosebridge and were no longer outstanding. Therefore, the direction and the extension of time were unnecessary in all the circumstances. The Commissioner also pointed out the Tribunal lacked jurisdiction.

63. I am unable to accept any of the arguments put on behalf of Rosebridge because the Tribunal does not have the jurisdiction to direct the liquidator, or anyone else, to lodge GST returns nor does the Tribunal have jurisdiction to grant extensions of time for lodgement of GST returns. Section 25(1) of the AAT Act relevantly states that the Tribunal has jurisdiction to review decisions where an enactment authorises it to do so. Section 14ZZ of the TAA provides that the Tribunal only has jurisdiction to review a "reviewable objection decision" which is defined in s 14ZQ of the TAA as an objection decision that is not an "ineligible income tax remission decision" (the latter is, in turn, defined in s 14ZS of the TAA but not presently relevant). A "reviewable GST decision", as canvassed in [56] above, is a "reviewable objection decision". While it is acknowledged there are many other decisions made by the Commissioner in the administration of the taxation laws that have the potential to affect reviewable objection decisions that are before the Tribunal, the Tribunal's jurisdiction does not extend to all these decisions.

64. Finally, this is also not a case where it is appropriate for the Tribunal to remit the matter for reconsideration by the Commissioner pursuant to s 43(1)(c) of the AAT Act, as the Commissioner's objection decision cannot be set aside on the basis of the conclusions reached by me in respect of the various issues.

CONCLUSION

65. The Commissioner's decision in respect of the objection to the assessments of net amount is affirmed.

I certify that the preceding 65 (sixty -five) paragraphs are a true copy of the reasons for the decision herein of

.....[Sgd].....
Associate

Dated: 19 March 2019

Date of hearing:	30 November 2018
Counsel for the Applicant:	Mr T Castle and Ms E Kovacs
Counsel for the Respondent:	Mr C Slater
Solicitors for the Respondent:	ATO Review & Dispute Resolution