Australian Banking Association

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Dear Ashley

Draft Goods and Services Tax Ruling GSTD 2020/D1

The Australian Banking Association (**ABA**) welcomes the opportunity to provide comments on Draft Goods and Services Tax Determination GSTD 2020/D1: *when is the supply of a transaction account GST-free under table item 3 or item 4(a) of subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999* (**GSTD 2020/D1**)[1].

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators, and other stake-holders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Executive Summary

The preliminary views and conclusions expressed in GSTD 2020/D1 are very concerning to the ABA. In particular, and in line with our views as expressed in our previous submissions to GSTD 2014/D1[2], GSTD 2018/D1[3] and GSTR 2019/D1[4], we continue to have significant reservations about the Commissioner's interpretation and application of the relevant GST provisions. In short, we consider that GSTD 2020/D1 is significantly flawed for the following reasons:

- the Commissioner's approach to the characterisation and GST classification of the contractual relationship between an account provider and an account holder is anachronistic, unduly narrow, novel and at odds with the commercial reality of modern day transaction account arrangements;
- the Commissioner's rationale for limiting the scope of "account holder present transactions" subject to the application table item 3 of subsection 38-190(1) of the GST Act is fundamentally mistaken and leads to the absurd and illogical result that account holders

[1] In this submission, all legislative references are to *the A New Tax System (Goods and Services) Tax Act 1999* (GST Act) unless otherwise stated. Furthermore, any reference to 'Australia' is taken to be a reference to the 'indirect tax zone'.
[2] Finalised as GSTD 2017/1: *when is the supply of a credit card facility GST-free under paragraph (a) of Item 4 in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999?.*
[3] Finalised as GSTR 2019/2: *determining the creditable purpose of acquisitions in a credit card issuing business.*
[4] *determining the creditable purpose of acquisitions in relation to transaction accounts.*

exercising their repayment rights while physically overseas will produce different GST outcomes for the account provider depending on the access method used; and

- the Commissioner's repudiation of the application of item 4(a) of subsection 38-190(1) of the GST Act to both "account holder present transactions" and "account holder not present transactions" is misconceived and leads to an inconsistency in the GST treatment of cross-border payment transactions performed inside the contractual framework of a transaction account and those performed outside that framework.

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ABA Statement

On a number of occasions over recent years, the ABA has expressed its significant reservations concerning the Commissioner's approach to characterising the nature of credit card and transaction account contractual relationships, and his views on the application of the GST-free provisions to these GST classifications. While the ABA acknowledges and appreciates that the release of GSTD 2020/D1 addresses a gap identified in our submission to GSTR 2019/D1, it's issue once again brings into sharp focus our reservations with respect to the Commissioner's interpretation and application of the relevant GST provisions.

Principally, the constant thread in our submissions has been the ongoing failure of the Commissioner to recognise, and give proper weight to, the extent to which payment system activities are a necessary, interrelated and sought-after feature of these arrangements. As previously explained, over time and concurrent with technological enhancements, ABA member account offerings have evolved to provide customers with "24/7 access" to both their funds and, importantly, a range of services that were previously confined to physical branch interactions.

Furthermore, the need for "24/7 access" over multiple mediums and access platforms is essentially being driven by customers principally viewing their transaction banking relationship as the means by which they discharge their payment obligations to third parties. To efficiently and effectively provide this capacity to customers, ABA members have established, or become members of, payment system networks (e.g. scheme debit / EFTPOS / BPay) by entering into contractual arrangements with system operators / other financial institutions, merchants and billers.

It is therefore frustrating to read GSTD 2020/D1 and discover that the Commissioner's view on the essential character of a transaction account facility continues to be shaped by a 19th century perspective on the nature of banking relationships. That is, the Commissioner appears fundamentally wedded to the primacy of the inherent debtor-creditor relationship (and the attendant repayment obligation) to the exclusion of the vast weight of evidence that payment system access is equally (or even more) important.

Consequently, while ABA members acknowledge the debtor-creditor relationship (that creates the repayment right) as the *starting point* for characterising the nature of the executory contract bargain between the parties, the Commissioner in GSTD 2020/D1 views this relationship as the beginning and end of the GST characterisation exercise. By extension, the Commissioner views the myriad of modern account access features and services as simply being integral to the provision of the repayment right.

This leads the Commissioner to mis-describe the repayment right as the provision of an ongoing single supply that is continued indefinitely by the supply of the account provider's performance of its contractual obligations (for example through the provision of access to different payment system options), which does not give rise to separate supplies. This is what we understand the Commissioner to mean when he refers to the "supply of a transaction account" in GSTD 2020/D1.

We further presume that this is the "thing" that the Commissioner considers is being supplied for the purposes of analysing the application of table items 3 & 4(a) of subsection 38-190(1), and that because of this characterisation it is only sparingly (if at all) used or enjoyed overseas. While this characterisation may have the advantage (from the Commissioner's point of view) of providing justification for a particular desired outcome, we submit that it is not supported from a technical or commercial viewpoint.

For the record, we contend that the nature of the supplies made under a transaction account facility is apt to be characterised by reference to the High Court's observations in *MBI Properties* (similar to any other executory contract[5]).

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[5] Indeed, it may be asserted from paragraphs 25-29 of GSTD 2020/D1 that the Commissioner is attempting to create a new class of executory contract.

In this regard, we consider that a transaction account contract is an executory contract that involves:

- the provision of a bundle of rights (including the right to repayment of deposited amounts on demand) at the time of entering into the contract; and
- separate supplies (of services) being made at the time of contractual performance when an account access method is initiated to make a payment.

That is, the terms and conditions of the transaction account contract (i.e. the bundle of rights) merely set the platform for what the account holder can expect when they use the transaction account facility. The High Court also stated in *MBI Properties* that there is a supply every time something of value is provided to the customer[6].

In general terms, the ABA considers that distinct 'things of value' are supplied by an account provider to an account holder under a transaction account facility, including when:

- a transaction account facility (i.e. a bundle of rights) is established;
- an account access method is initiated as payment for a transaction;
- currency is exchanged to settle a transaction in a foreign currency; and
- cash is advanced either via an ATM or by a merchant.

Additionally, the initial bundle of rights includes the ability to use the transaction account facility outside Australia. Therefore, where the supply of transaction account facility rights are intended to be available for use outside Australia, the supply of the rights will be GST-free to the extent of that intended use under item 4(a) of subsection 38-190(1)[7].

When (and each time) an account holder exercises its repayment right, this triggers the activation of contractual arrangements between the account provider and the merchant / biller's account provider and results in the account provider supplying the account holder with a payment transfer service. However, rather than physically transferring money, the account provider essentially reduces or extinguishes the value of the account holder's chose in action held against it and correspondingly arranges with the merchant's account provider (through the payment scheme operator) to increase the value of the merchant's chose in action that it holds against it.

Consequently, the supply of this payment transfer service by the account provider to the account holder (as evidenced by the payment transaction) amounts to a dealing in rights, being the service of transferring the value of its rights (against the account provider) to the merchant / biller. Furthermore, where the account holder instructs the account provider to transfer the value of its rights to a merchant or biller who is located offshore, the service supplied by the account provider is covered by item 4(a) of subsection 38-190(1) as it is a supply that is made directly in connection with rights that are for use offshore consistent with paragraphs 75-79C of GSTR 2003/8.

Moreover, this supply will be made GST-free regardless of whether the underlying payment transaction constitutes an "account holder card present transaction" or an "account holder card not present transaction".

The ABA therefore considers the notion that the contractual relationship between an account provider and an account holder constitutes a single ongoing supply of a transaction account is not reflected by the commercial reality of the arrangement, and is at odds with the views of the High Court. On this basis alone, the formulations expressed in GSTD 2020/D1 should be reconsidered.

[6] *MBI Properties* at [34].

[7] See a more detailed discussion under Issue 3.

Recommendations

1. GSTD 2020/D1 should not be finalised in its current form, as the Commissioner's views on the characterisation and GST classification of a transaction account facility are fundamentally shaped by a narrow and ultimately unsupported assessment of the essential character of the contractual relationship between the parties, leading to the draft determination advocating positions which are profoundly in error.
2. That the Commissioner should continue his industry consultations prior to issuing any preliminary views on the application of table items 3 or 4(a) of subsection 38-190(1) of the GST Act to the activities of an account provider in carrying on an enterprise that provides transaction account facilities to account holders.
3. The Commissioner should ensure that any subsequent (or revised) draft of the GSTD 2020/D1:
   - take into account industry views (in this regard ABA members are happy to participate in targeted workshops);
   - contain an 'alternative view' section expressing the dissenting industry view (where further industry consultations does not result in changes to the ATO view);
   - be reviewed again by the Rulings Panel and the ABA be invited to discuss in camera the Commissioner's preliminary views with Panel members.

Detailed Submission

The format of the ABA's submission to GSTD 2020/D1 will initially focus on the following key concerns:

Issue 1: Commissioner's characterisation of a transaction account facility for GST purposes.

Issue 2: Commissioner's interpretation and application of table item 3 of subsection 38-190(1) to his characterisation and GST classification of a transaction account facility.

Issue 3: Commissioner's interpretation and application of table item 4(a) of subsection 38-190(1) to his characterisation and GST classification of a transaction account facility.

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Issue 1:

Commissioner's characterisation of a transaction account facility for GST purposes

As previously acknowledged, the ABA appreciates that the release of GSTD 2020/D1 addresses a gap[8] in the views expressed by the Commissioner in GSTR 2019/D1 on the application paragraph 11-15(2)(a) of the GST Act to acquisitions made in relation to "transaction accounts" provided by a financial supply provider. Accordingly, the views expressed in GSTD 2020/D1 in terms of characterising and classifying the nature of the entry into and performance of the terms and conditions agreed between an account provider and an account holder are critical to the Commissioner providing a full explanation of his position on the application of paragraph 11-15(2)(a) for the purposes of GSTR 2019/D1.

Historically, in the absence of the Commissioner providing a specific view, ABA members have necessarily determined the extent of the application of the GST-free provisions to its transaction account acquisitions by reference to the guidance related to credit card arrangements provided by the Commissioner in GSTD 2017/1[9]. That is, while the ABA disputes the Commissioner's characterisation and classification of a credit card facility in GSTD 2017/1 (and for that matter in GSTR 2019/2 as well) [10], ABA members[11] have similarly adopted the practice of splitting their transaction account payment transactions into 'card present' and 'card not-present' categories and applied the GST-free treatment outlined in GSTD 2017/1[12] to 'card present transactions' only.

In the credit card context, we note from GSTD 2017/1 and GSTR 2019/2 that the Commissioner takes the view that the contractual relationship between the parties amounts to a singular supply of rights that is made on an ongoing basis in the form of a "credit card facility" [13]. Furthermore, the Commissioner regards this supply as constituting the totality of the supply being made to the cardholder, which includes the physical use of the card and any methods that are made available to access the facility[14].

With the issue of GSTR 2019/D1, the Commissioner did not explicitly address important characterisation questions and appeared to borrow the characterisation and GST classification expressed in GSTD 2017/1 by simply stating, without any supporting analysis, that the supply of a transaction account is an input taxed financial supply, except to the extent is it GST-free[15]. However, in GSTR 2019/D1 the Commissioner did in part describe the supply in a number of different ways albeit leaving the reader with the confusing impression that the Commissioner was advocating both a "single input taxed financial supply" and a "multiple input taxed financial supply" view on the characterisation and GST classification of a transaction account facility[16].

Accordingly, we understand that GSTD 2020/D1 serves the twin purposes of the Commissioner addressing the 'analysis' gap in GSTR 2019/D1 and removing any confusion in that draft ruling concerning his views on the scope of input taxed activity.

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[8] Identified in the ABA's submission to GSTR 2019/D1 issued 30 August 2019.
[9] Goods and Services Tax Determination Goods and services tax: *when is the supply of a credit card facility GST-free under paragraph (a) of Item 4 in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999 (GST Act)?.*
[10] Per ABA submissions to GSTD 2014/D1 and GSTR 2018/D1.
[11] As model taxpayers.
[12] See GSTD 2017/D1 at [23].
[13] See GSTD 2017/1 at [20] – [22] and GSTR 2019/2 at [8] – [13].
[14] See GSTD 2017/1 at [21].
[15] See GSTR 2019/D1 at [10], which at footnote 7 the Commissioner goes on to mention that the Ruling does not address the extent to which a supply of a transaction account is GST-free.
[16] See our Issue 1 comments in our submission to GSTR 2019/D1.

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Turning to the content of GSTD 2020/D1[17], we note that the Commissioner begins the exercise of characterising and classifying a transaction account facility by referencing the case law responsible for determining a number of key banking principles, namely:

- that the relationship between a banker and customer is one of a 'debtor-creditor', rather than being fiduciary or agency in nature[18];
- in the absence of any special agreement, there is obligation placed on the customer to demand payment from the banker before the customer can take action to recover the money deposited / lent to the banker[19]; and
- that each deposit into an account does not create a new contract between the parties (i.e. the arrangement between the parties constitutes a single continuing contract)[20].

Furthermore, based on this case law support and a consideration of the entire contractual arrangement regarded contextually and as a whole[21], the Commissioner reaches the conclusion that:

> "The supply of a transaction account is an ongoing periodic or progressive supply under that single continuing contract, which means that each transaction by the account holder which will involve the use of their repayment rights, will not constitute a separate supply being made by the financial institution"[22]

In arriving at this position, the Commissioner further explains (via footnote) that he had taken into account the observations of the High Court in *Commissioner of Taxation v MBI Properties Pty Ltd*[23] (**"*MBI Properties*"**) with regard to the supplies made under an executory contract, but was able to distinguish them on the basis that *MBI Properties* is only authority for determining:

> "… what is sufficient to constitute a supply, rather than whether a course of action that might involve more than one thing satisfying the definition of supply should be characterised as one or more supplies".

In response, the ABA firstly notes that we are in agreement with the Commissioner that the case law cited all identify principles that underpin the nature of the banking relationship between and banker and a customer. However, we disagree that they shed any particular light on the characterisation exercise confronting the Commissioner other than to reinforce the point that the contract between the parties is the logical starting point for determining the "relevant thing or things" being the supplied for GST purposes[24].

Accordingly, we consider that the case law cited provides the Commissioner with no basis to disregard as a separately identifiable "thing" the performance of obligations by an account provider in response to an account holder exercising their 'repayment right'. Consequently, the substance of the Commissioner's characterisation simply can be reduced to the unsupported assertion that there is a "single financial supply" being made to the account holder by the account provider[25], or in any event that the supply of the contractual performance by an account provider is a "single ongoing supply" [26].

[17] See GSTD 2020/D1 at [25] to [29].
[18] *Foley v Hill [1848*] 2 HL Case 28; 9 ER 1002.
[19] *Joachimson v Swiss Bank Corporation [1921]* 3 KB 110.
[20] *Hart(Inspector of Taxes) v Sangster [1957]* 1 Ch 329.
[21] See GSTD 2020/D1 at footnote 13 of [27].
[22] See GSTD 2020/D1 at [27].
[23] [2014] HCA 49.
[24] However, we do note for the record that even in *Foley v Hill* there is an acknowledgement by the learned judges that the 'repayment right' sat alongside a number of superadded obligations including honouring the 19th century equivalent of a modern day payment instruction.
[25] See GSTD 2020/D1 at footnote 13 of [27].
[26] See GSTD 2020/D1 at footnote 13 of [27], referencing MBI Properties at [35].

In contrast, the ABA believes that the nature of the supplies made under a transaction account facility is apt to be characterised by reference to the High Court's observations in *MBI Properties* (similar to any other executory contract[27]).

In this regard, we consider that a transaction account contract is an executory contract that involves:

- the provision of a bundle of rights at the time of entering into the contract; and
- separate supplies made at the time of contractual performance (including when a linked debit card is presented, or a BPay facility is accessed, to initiate payment) being separately identifiable 'interests' for the purpose of GST regulation 40-5.09.

That is, the terms and conditions of the transaction account contract (i.e. bundle of rights) merely set the platform for what the account holder can expect when they use the transaction account. The High Court also stated in *MBI Properties* that there is a supply every time something of value is provided to the customer[28].

With this in mind, and consistent with the High Court in *MBI Properties*, we consider that a transaction account facility is an executory contract which involves the account provider supplying two categories of supplies, namely:

- at the time of entering into the contract, the account provider creates in favour of the account holder a bundle of contractual rights, which may be referred to generically as the supply of a "transaction account facility". These rights will vary depending on the terms of the contract, but typically involve the right to access functions and features of the facility (sometimes for additional consideration)[29]; and
- each time the cardholder accesses the ancillary features, the account provider supplies the account holder with a transaction account service.

Summary

The ABA considers the notion that a transaction account facility constitutes a single ongoing supply is not reflected by the commercial reality of the arrangement and is squarely at odds with the views of the High Court. As stated, we consider that this is a fundamental error which informs the other issues we have with the Draft Determination. On this basis alone, the formulations expressed in the Draft Determination should be reconsidered.

[27] Indeed, it may be asserted from GSTD 2020/D1 at [25] to [29] that the Commissioner is attempting to create a new class of executory contract. It is also noted the Commissioner is seeking to distinguish the only case cited that actually deals with GST and the characterisation of an executory contract.

[28] *MBI Properties* at [34].

[29] These typically include the conferral of the things listed under Part 1 of Schedule 7 of the GST Regulations (noting that the examples listed are not exhaustive and in the case of any inconsistency, the description in item 1 in the table of subregulation 40-5.09(3), and by reference to the fees, charges and payments listed in Table A of Schedule 2 of GSTR 2002/2.

Issue 2:

Commissioner's interpretation and application of table item 3 of subsection 38-190(1) to his characterisation and GST classification of a transaction account facility

The ABA considers it incontrovertible that the bundle of rights comprising a typical transaction account facility includes the ability to exercise those rights outside Australia. This essential and sought-after feature manifests itself in the following ways:

- via the "access methods" offered to account holders'[30], and
- through the account provider' performance of its contractual obligations upon the account holder exercising its "repayment right" by accessing one of these methods (which ABA members contend is a supply made by the account provider to the account holder separate and distinct from the supply of the bundle of transaction account rights itself).

Indeed, how many prospective account holders would enter into the initial transaction facility supply with an Australian ADI if such overseas payment access was not included in that facility?

Accordingly, for the reasons detailed in our response to Issue 1, the ABA considers that the Commissioner's views in GSTD 2020/D1[31] regarding how table item 3 of subsection 38-190(1) of the GST Act applies to the supply of a transaction account are fundamentally in error because of the Commissioner's flawed characterisation of the essential nature of the contractual relationship between an account provider and account holder.

That said, we also maintain that the Commissioner has erred in GSTD 2020/D1 with regards to his interpretation and application of table item 3 to his preferred characterisation and classification of a transaction account facility (i.e. that it amounts to a single ongoing supply by the account provider to the account holder which includes the supply of contractual performance of its obligations owed to the account holder). In this respect, the ABA asserts that the Commissioner:

- has confusingly and inadequately described the "thing" being supplied for the purposes of applying the requirements of table item 3; and
- has selectively applied his own guidance (GSTR 2007/2) in reaching the conclusion that the application of table item 3 is limited to the category of offshore transaction account 'use' represented by "account holder present transactions".

The ABA notes that table item 3 firstly imposes a condition under paragraph (a) that the recipient of the supply must be outside Australia when the "thing" supplied is done. This therefore calls for an assessment of the nature of the "thing" being supplied in order to determine the temporal requirement of paragraph (a).

In this regard, GSTR 2007/2[32] provides guidance in the form of a detailed matrix which canvasses the scope of intangible "things" typically supplied (i.e. services, advice / instantaneous advice, rights, obligations), and the Commissioner's views[33] on the circumstances in which each of these "things" is supplied for the purposes of satisfying the requirements imposed by paragraph (a) of item 3.

In GSTD 2020/D1, the Commissioner interchangeably refers to the "thing" being supplied as either being the "transaction account" itself or the underlying "transaction"[34]. While we note from

[30] And the underlying cross- border bi-lateral & multi-lateral scheme payment system / network agreements that support these access methods.
[31] See GSTD 2020/D1 at [1] – [11], [20] – [21] & [37] – [47].
[32] See GSTR 2007/2 at [89].
[33] Consistent with GSTR 2004/7 and GSTR 2000/31.
[34] For example, see GSTD 2020/D1 at [2], [3], [4], Example 1, Example 2, [20], [37], [38], Example 3, [45], [46] & [47].

paragraph 23 of GSTD 2020/D1 that the Commissioner views the provision of a transaction account as a supply in relation to rights for the purposes of table item 4(a), it leaves open the question what exactly is the "thing" that the Commissioner considers is being supplied for the purposes of the application of paragraph (a) of table item 3.

From the Commissioner's own characterisation and classification exercise, the ABA can only surmise that he views the "thing" being supplied as either the 'bundle of rights' comprising the "transaction account", or else each underlying "transaction". Regardless of whatever formulation is applied, we struggle to understand:

- how precisely an account provider can supply a bundle of rights on an ongoing basis as a "thing" (unless the Commissioner is suggesting that a transaction account is akin to a physical banknote or coin that derives its value purely from its inherent rights, which would amount to the Commissioner establishing a new category of the "thing" for the purposes of the application of item 3 and item 4(a))[35]; and
- how recognising each underlying "transaction" for <u>item 3 purposes</u> is not endorsing the ABA view that a separate supply is being made by the account provider in performing its contractual obligations upon the account holder exercising its executory "repayment right"?

On this basis alone, we consider the Commissioner falls into error inadequately describing the "thing" being supplied for the purposes of applying the requirements of table item 3 in GSTD 2020/D1.

With regard to the requirement imposed by paragraph (b) of table item 3, that the recipient's effective use and enjoyment of the "thing" being supplied must take place outside Australia, the ABA notes from GSTR 2007/2 that:

- satisfaction of this requirement is conditioned on a determination that the recipient's location outside Australia is "integral" to, as distinct from merely being "coincidental" with, the provision of the supply[36]; and
- a determination of whether the recipient's location outside Australia is "integral" to the supply is primarily dependent on an examination of the facts and circumstances of the supply, but some indicators positively answering this question include:
    - the need for the supply arises from the individual's presence at that location; and
    - the presence of the individual at that location is integral to the performance, receipt or delivery of the supply[37].
- the need for a supply does not arise from a recipient's presence outside Australia where it merely arises as a consequence of the recipient's absence from Australia (i.e. it is merely coincidental that the recipient is outside Australia when the thing supplied is done)[38].

From GSTD 2020/D1, it appears to the ABA that the Commissioner has selectively used GSTR 2007/2 to assert that an account holder's location overseas will <u>only</u> be integral to the supply of a transaction account where there is a form of physical involvement is necessary on the part of the account holder to initiate the payment transaction with a merchant or a cash withdrawal[39]. The Commissioner justifies this position (including in relation to account holder not present transactions) by stating that:

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[35] In this regard, it strikes ABA members that the Commissioner maybe falling into the same 'explanation' trap that he found himself in with regards to his initial argument in the Travelex case (i.e. that something defined as a "financial supply" under the GST Regulations is of itself a separate category of "thing").
[36] See GSTR 2007/2 at [95] & [106].
[37] See GSTR 2007/2 at [107].
[38] See GSTR 2007/2 at [110] – [111].
[39] See GSTD 2020/D1 at [37].

“…The presence of the account holder outside Australia is integral to the performance, receipt or delivery of the supply as the account holder requires immediate access to the account at that time and place in order to physically withdraw cash or enable payment at the merchant’s location [40].”

“The account holder’s location generally does not impact on the initiation and completion of an account holder not present transaction. That is, technology means that in these cases the account holder need not be present at a bank or at the merchant’s location to initiate a transaction that accesses their transaction account. The account holder’s location is irrelevant and is therefore not integral to the performance, receipt or delivery of the supply of the transaction account. As such, account holder not present transactions will not contribute to the extent to which a transaction account is GST-free under table item 3[41].

In response, the ABA totally rejects the Commissioner’s position and arguments justifying this view as he overlooks the most obvious and intuitive factor (as recognised in GSTR 2007/2), namely that the singular reason for the transaction account supply needing to occur is because of the account holder’s overseas location overseas. Rather than accept the offshore use of the transaction account as a rational and realistic justification that can be drawn from the facts and circumstances of the supply of the transaction account, the Commissioner’s decision to elevate the physical acts of “initiation” as the defining criterion for determining the satisfaction of the condition imposed by paragraph (b) of table item 4(a) is fundamentally wrong.

In this regard, it strikes the ABA that the Commissioner has simply selected the indicator expressed in GSTR 2007/2 that best suits his desired outcome and then constructed a premise to make the circumstances fit. Furthermore, the Commissioner’s approach produces a counterintuitive outcome that he readily accepts[42].

The ABA considers it uncontroversial to assert that when an account holder is physically overseas and has a reason to access their transaction account (e.g. to buy a train ticket from Hiroshima to Osaka because they urgently need to visit the Australian Consulate to obtain a replacement passport to return to Australia), the immediate need in that circumstance logically arises from their presence overseas. This is a far more natural point of ‘initiation’ than looking back to years before this usage when the individual (being present in Australia) opened the account ultimately used to buy the ticket. Consequently, the ABA strongly contends, based on the facts and circumstances and the Commissioner’s own guidance in GSTR 2007/2, that GSTD 2020/D1 is profoundly in error concerning the Commissioner’s views on the interpretation and application of table item 3 having regard to the supply of a transaction account.

Furthermore, the fact that *Amanda* in Example 2 is found not to be using or enjoying the supply of her transaction account[43] when for instance she uses the online banking access feature via her mobile phone in the train station lobby, but presumably would be using or enjoying the supply of her transaction account overseas if she walked a few metres to the ticket booth and presented her debit card as payment, is frankly an absurd outcome that could never have been intended by the GST law or on any policy grounds. Similarly, if she chose to use a credit card (“card present”) to carry out either of these transactions, the Commissioner would treat the resulting transaction as GST free[44].

On this basis alone, the formulations expressed in the Draft Determination with regard to the interpretation and application of table item 3 of subsection 38-190(1) should be reconsidered.

[40] See GSTD 2020/D1 at [37].
[41] See GSTD 2020/D1 at [47].
[42] See GSTD 2020/D1 at Example 2.
[43] Based on the Commissioner’s formulation of the essential character of that supply which ABA members reject for the reasons mentioned in the Issue 1 response.
[44] See GSTD 2017/1.

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Issue 3:

Commissioner's interpretation and application of table item 4(a) of subsection 38-190(1) to his characterisation and GST classification of a transaction account facility

Similar to our response to Issue 2, the ABA considers that the Commissioner's views in GSTD 2020/D1[45] regarding how table item 4(a) of subsection 38-190(1) of the GST Act applies to the supply of a transaction account are fundamentally in error because of the Commissioner's flawed characterisation and classification of the essential nature of the contractual relationship between an account provider and account holder.

Consequently, the ABA rejects the Commissioner's conclusion in GSTD 2020/D1 that table item 4(a) does not apply to recognise as GST-free "account holder not present transactions"[46].

In support of his position, the Commissioner at paragraph 23, 30-31 and paragraphs 48-50 of GSTD 2020/D1 states the following:

> **Supplies in relation to rights that are for use outside Australia**
>
> 23. As discussed in paragraphs 26 to 30 of this Determination, at the centre of the supply of a transaction account is the debt owed by the account provider to the accountholder. The debt gives the account holder the right to repayment, in accordance with the contractual agreement. Therefore, the supply of a transaction account is a supply in relation to rights for the purposes of table item 4(a)
>
> …
>
> **Where is the account located?**
>
> 30. A transaction account is located where the account provider such as the authorised deposit-taking institution is located[15]. Similarly, as a general rule debts are deemed to be situated where the debtor resides[16]. Therefore, when the account holder demands payment[17] from an account held with an account provider at a branch in Australia, the debt is situated in Australia and the repayment is made in Australia[18].
>
> 31. As such, when an account holder opens a transaction account with an Australian account provider, the account will remain in Australia, irrespective of whether the account holder is in Australia at any particular time.
>
> …
>
> ***Table item 4(a)***
>
> 48. When the account holder exercises their repayment rights they will make a demand for repayment on the account provider through one of the access methods offered by the account provider[20]. Upon receiving a repayment demand, the account provider will discharge their existing obligation through following the directions in the repayment demand.
>
> 49. It is settled law that the repayment right will be exercised where the account is located[21]. Similarly, in European Bank v Citibank[22], the Court noted that regardless of the mechanism through which the parties contemplated repayment would be made, the debt was situated where the account is located, and that is where repayment would occur.

[45] See GSTD 2020/D1 at [22} – [24] & [48] – [57].
[46] See GSTD 2020/D1 at [50].

> 50. As the repayment will be made in Australia by the account provider, and the account holder's location is irrelevant for account holder not present transactions, the rights will not be for use outside Australia for the purposes of table item 4(a).

From these statements, and the characterisation previously discussed under Issue 1, the Commissioner takes the view that the totality of the contractual relationship between the parties amounts to the debt and attendant 'repayment right' created upon entry into the agreement and that this, together with the account provider's performance of its contractual obligations, constitutes a single and ongoing supply of a transaction account. Consequently, while the Commissioner accepts that the supply of a transaction account is a supply "in relation to rights" for the purposes of table item 4(a), the abovementioned characterisation, together with his views on the location of the account, debt and repayment right all serve as support for the position taken by the Commissioner at paragraph 50 of the GSTD 2020/D1, that the rights described at paragraph 23 are not for use outside Australia.

While the ABA agrees with the Commissioner's position that the supply of a transaction account is a supply in relation to rights, and accept the case law establishing the location principles, we fundamentally disagree that the totality of these elements provide a rationale or coherent argument for table item 4(a) having no application with regard to the supply of a transaction account. Principally, for the reasons discussed in our Issue 1 response, we consider that the Commissioner has fallen into error by taking a narrow and commercially unrealistic view on the essential character of the contractual arrangement between the parties.

Furthermore, we consider that the view expressed in GSTD 2020/D1 in relation to the application of table item 4(a) to the supply of a transaction account is inconsistent with the Commissioner's view expressed in PBR Authorisation Number 1012656660454 in relation the supply of money offshore in the form of a 'wire transfer' or 'foreign currency draft /cheque', and the statement made in footnote 32 of requirement 2 of paragraph 65 of Draft Schedule 2 to PCG 2019/8DC1[47].

With regard to the views expressed in PBR Authorisation Number 1012656660454, the Commissioner states the following in relation to the essential character and GST classification of the supply of a 'wire transfer':

> **"Wire transfers as rights**
>
> The essential character of a supply of a wire transfer is to transfer money to the bank account of an overseas third party (the payee). What is referred to as a 'transfer' from one account to another via the banking system does not involve the actual transfer of physical currency or the transfer or assignment of ownership of a chose in action (a right). Rather it involves the extinguishment (or reduction in value) of one chose in action (the payer's), and the creation (or increase in value) of another (the payee's), represented by the relevant accounting entries.
>
> Whilst the rights held by the payer are extinguished during the transfer process, it is accepted there is a dealing in rights, being the effective transfer of the value in the rights from the payer to the payee. Therefore, the essential character of the supply of the wire transfer is to facilitate a dealing in rights.
>
> In this context, the relevant right is the chose in action represented by the deposit into the payee's account at an overseas location (rather than the extinguished chose in action of the payer, or the payer's contractual rights under the terms of the underlying agreement).
>
> In this instance, as the essential character of the X's wire transfer is the facilitation (or effective transfer) of the rights to an overseas bank account, it is accepted that these rights are for use outside of Australia. Where the payer (the recipient of the wire transfer) nominates that the amount is to be transferred to the account of a payee who is located

[47] *ATO compliance approach to GST apportionment of acquisitions that relate to certain financial supplies.*

outside of Australia, the rights are for use outside of Australia and the supply of the wire transfer is GST-free under Item 4."

In relation to PCG 2019/8DC1, the Commissioner provides the following guidance in terms of the treatment for GST apportionment purposes of international money transfer and cheque transactions:

> "Depending on the facts, there may be circumstances where an account provider makes additional supplies in their transaction accounts business, such as for international money transfers or international cheques. We will accept that you may either identify if they are a separate supply and apply Step 5 to identify related acquisitions, or you may include these transactions as part of the overall GST-free percentage in Step 2."

In relation to the Commissioner's acceptance that table item 4(a) applies to the supply of a 'wire transfer', ABA members both agree with the view expressed and the reasoning offered. Furthermore, ABA members assert that when the description of the actions taken by "X" to transfer money overseas are compared to an account holder's performance of its contractual obligations to settle an overseas debt arising from the account holder's exercise of their 'repayment right', there is no material difference between the transactions as both involve the facilitation or dealing in a right that is for use outside Australia. The only difference is that one is a dealing in a right for offshore use that is being effected within the terms and conditions of a transaction account agreement and the other is being performed on a 'spot' basis.

The ABA contends that this distinction does not justify the Commissioner reaching different conclusions on the application of table item 4(a). Moreover, the untenable nature of the Commissioner's approach is brought into stark relief by the position he proposes to take in PCG 2019/8DC1 concerning the 'blue zone' apportionment method that a transaction account business is required to apply to determine the extent to which its supply of transactions accounts are GST-free.

In this respect, the Commissioner readily accepts that an account provider can determine the extent of GST-free treatment by including the number of its 'spot' international money transfer and international cheque transactions (presumably made GST-free under the application of table item 4(a)). However, he then goes on to insist, by implication, that the account provider must exclude from the formula the number of its 'account holder not-present transactions' (presumably on the basis of the application of GSTD 2020/D1 which asserts that table item 4(a) does not apply to such transactions).

This inconsistent treatment provides further evidence that the formulations expressed in GSTD 2020/D1 with regard to the interpretation and application of table item 4(a) of subsection 38-190(1) should be reconsidered. In this respect, the ABA believes that a more appropriate formulation of the application table item 4(a) can be based on the following reasoning:

- focusing on the entire transaction account contractual arrangement considered contextually and as a whole, the account provider is viewed as making a separate supply of transaction account services each time it performs its contractual obligations in response to the account holder exercising their repayment right. As a result, it is not necessary or relevant to consider the location of the exercise of the repayment right by the account holder in determining the application of table item 4(a).
- consistent with Commissioner's views in GSTR 2004/7[48] and PBR Authorisation Number 1012656660454, each supply of a transaction account service would be viewed as having a direct connection with rights for use offshore (i.e. the repayment right whose value is being

[48] See GSTR 2003/8 at [28] & [75] – [79C].

transferred overseas by the account provider per the account holder's instructions), such that the supply would fall within the scope of a "Category 3" GST-free supply.

The ABA finally notes that if the Commissioner takes the view that the account holder's location is irrelevant[49], then that would seemingly have implications for his interpretation of the application of table item 2 of subsection 38-190(1). That is, the Commissioner in GSTD 2020/D1 appears to be advocating that consumption in this context wholly occurs within Australia leading to the inevitable question whether table item 2 can have any application where the supply of the transaction account is being made to a non-resident account holder.

In this regard, the ABA unquestionably considers that table item 2 applies to the supply of a transaction account made to non-resident account holder, and the fact that GSTD 2020/D1 can be read as challenging this outcome provides further grounds for reconsidering the formulations expressed in the Draft Determination.

Thank you for the opportunity to provide comments on draft GSTD 2020/D1. Should you have any questions, please do not hesitate to contact me.

Sincerely

Essam Husaini
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Australian Banking Association

[49] See GSTD 2020/D1 at [31] & [50].