Revenue Law Journal

Volume 11 | Issue 1 Article 8

1-1-2001

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Stephen Barkoczy
Monash University

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Recommended Citation
Barkoczy, Stephen (2001) "A Review of Peter McMahon and Amrit MacIntyre, GST and the Financial Markets ," *Revenue Law Journal*: Vol. 11: Iss. 1, Article 8.
Available at: http://epublications.bond.edu.au/rlj/vol11/iss1/8

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BOOK REVIEW

BOOK REVIEW: *GST AND THE FINANCIAL MARKETS*

Reviewed by Stephen Barkoczy[*]

The cornerstone of the Australian Federal Government's 'New Tax System' is the goods and services tax ('GST'). The GST replaced the antiquated wholesale sales tax, which was a single level, narrow based multi-rate tax that focused on the sale of goods. The wholesale sales tax was an impost that was peculiar to Australia and was plagued with what seemed to be many irrational characteristics, such as the rule that taxed toothpaste but not toothbrushes. The government's aim in introducing the GST was to implement a broad based multi-level indirect tax that would apply to not only the supply of goods, but also services and other things. The introduction of GST represents one of the most tumultuous changes ever witnessed to the Australian tax regime and it has had a profound impact on the system as a whole. It was accompanied by a lowering of income tax rates and changes to the FBT gross-up regime. Furthermore, in exchange for receiving GST revenue, the States have agreed to abolish a number of their taxes.

The Australian GST system evolved through much political manoeuvring and suffered several policy shifts and compromises along the way. It is complicated by the fact that it contains several special rules that are not found in corresponding GST or Value Added Tax ('VAT') regimes. Added to this is the fact that, in order to meet the 1 July 2000 deadline, the legislation was rushed through Parliament. Between the time of its enactment and the commencement of the GST, the *A New Tax System (Goods and Services) Act 1999* suffered many hundreds of last minute amendments that caused much confusion and angst to both the public at large and tax professionals specifically. Even though the barrage of legislative amendments has now ceased, a constant onslaught of lengthy rulings

* Associate Professor, Monash University.

continue to appear from the Australian Taxation Office. It has become apparent that while the shift towards consumption taxes has now become the norm in most developed countries, these taxes are by no means straightforward or uniform and have their own idiosyncratic complexities.

Without doubt, one of the most complex areas of GST lies in its application to financial supplies. In common with other GST and VAT jurisdictions, Australia has adopted a system of treating financial supplies as 'input taxed' (referred to in many foreign jurisdictions as 'exempt'). The effect of this treatment is that GST is not charged on financial supplies and input tax credits are not generally available for acquisitions or importations that relate to the making of financial supplies. Financial suppliers are therefore in a similar position to consumers of ordinary services who are charged GST on items they acquire, but who do not benefit from any input tax credits. This means that financial suppliers must either absorb the cost of GST or pass it on to their customers by way of the increased cost of their services. Therefore, the effect of GST is arguably most directly felt by these entities, since GST is not merely a timing cost (as it is to most other businesses), but a real expense.

In a number of important respects, Australia has dealt with financial supplies differently from other jurisdictions. A unique feature of the Australian regime is that it provides 'reduced input tax credits' designed to encourage financial suppliers to continue to outsource certain services. Another peculiar feature of the Australian regime is that the GST Regulations treat both the provision and the acquisition of a relevant interest as a financial supply.

The special features of the Australian GST system and the underlying general importance of GST in relation to financial markets has created a pressing need for a specialist book dealing with this topic. *GST and the Financial Markets* published by CCH Australia Ltd directly addresses this need. The authors, Peter McMahon and Amrit MacIntyre, are senior practitioners from Blake Dawson Waldron and Baker and McKenzie, who bring to the book a wealth of practical experience in the financial arena. They also share extensive writing experience as co-authors of the CCH looseleaf *Stamp Duty Service*. In this respect, it is not surprising to see stamp duty lawyers turn their expertise to another transactionally-based tax.

The book, which was published just after the anniversary of the introduction of the GST, is a timely well-structured and economically

written treatise that examines how GST interrelates with a wide range of important and common financial and commercial transactions. It contains 12 chapters and two appendices which, together with relevant indexes, span 295 pages.

The book is logically divided and easy to navigate. It commences by providing a general introduction to the GST system (Chapter 1). There is a brief outline of the scheme of the GST legislation and regulations followed by a discussion of the basic GST rules (Chapter 2 and Chapter 3). It is here that the key concepts relating to 'taxable supplies', 'GST free supplies' and 'input taxed supplies' are introduced. As there is obviously no extensive Australian GST case law yet on the meaning of fundamental terms, such as 'supply' and 'consideration', the authors have drawn on common law experience from other jurisdictions to assist with the interpretation of these expressions. The book is peppered with references to relevant case law from more established VAT and GST jurisdictions such as the United Kingdom and New Zealand.

The book moves on to focus on the key concept of a financial supply (Chapter 4). The elements of such a supply are outlined with each key term independently discussed. In undertaking this analysis, aspects of the Australian regime are briefly contrasted with overseas jurisdictions. Throughout this section of the book, the authors rely on established common law principles largely developed from cases dealing with stamp duty to interpret the meanings of key finance and related terms.

There is a separate chapter outlining the myriad of provisions in the GST law dealing with associated praties, namely the special rules relating to grouping, GST joint ventures, GST branches, associates and company amalgamations (Chapter 5). While these provisions do not relate directly to financial markets, they affect the general operation of the GST law and it is therefore appropriate to have them discussed in the book.

The remaining part of the book is where a reader will find the greatest value. The major portion of the balance of the text is broken down into a number of chapters that focus on special areas relevant to the financial markets. There are specialist chapters on banking and finance (Chapter 6), securities and investment (Chapter 7), superannuation and funds management (Chapter 8), insurance (Chapter 9), e-commerce (Chapter 10) and cross-border financing (Chapter 11). Within these chapters are sub-topics covering how the

GST law applies to various matters including floats, mergers and acquisitions, derivatives, swaps, share buy-backs, instalment warrants, futures contracts, gold trading, and hedging. In writing the specialist chapters, the authors have been mindful of the fact that GST operates as a multi-level transactional tax. They focus on the underlying transactions and analyse how GST applies to each step and each entity involved in them. It is this feature of the book which will be of most benefit to tax professionals.

The specialist chapters are particularly useful because they highlight the seemingly countless issues that confront enterprises involved in complex financial transactions. As with any area of taxation law, identifying issues is often just as difficult as solving them. While the authors do not always provide definitive answers to contentious issues, they at least proffer alternative arguments and conclusions as to how GST might potentially apply to the various arrangements considered. This is a meaningful and helpful contribution, especially given the early evolutionary stage of our GST system.

A feature of the book is the way in which the authors outline the steps involved in the relevant financial arrangements. A good example of this is found in the way they tackle securitisation in Chapter 6. They commence by explaining the fundamental structural elements of this kind of financing technique. They then proceed to apply the GST provisions to the key participants involved in each step of the transaction. To assist readers further, the authors provide a user-friendly table outlining their analysis and conclusions. The authors adopt similar strategies in dealing with other common transactions such as broking services in Chapter 7 and superannuation in Chapter 8.

The final chapter in the book (Chapter 12) concentrates on GST planning. It examines the general anti-avoidance provision in the GST legislation and suggests some planning considerations relating to financial supplies. In particular, the authors focus on cashflow and timing considerations, cross-border transactions, structured financing techniques and sales of going concerns.

The appendices at the rear of the book are useful and complement the analysis in the chapters. Appendix 1 briefly outlines the transitional rules contained in the *A New Tax System (Goods and Services Tax Transition) Act 1999*. Arguably, the discussion on the transitional provisions could also have been located at the beginning of the book. However, by placing this discussion separately at the end of the book,

the authors have not cluttered the general discussion in the body of the text. On balance, this is an appropriate delineation.

Appendix 2 contains relevant extracts from the *A New Tax System (Goods and Services Tax) Regulations 1999*. In particular, it contains Division 40 (which prescribes what does and does not constitute a financial supply) as well as Schedules 7 and 8 (which provide examples of what is and what is not a financial supply). It also contains Division 70 (which specifies what constitutes reduced credit acquisitions). Placing these materials in the appendices allows for easy cross-referencing and is a particular user-friendly feature of the book. It allows the reader to go to source materials directly, without having to open another text.

It is evident that *GST and the Financial Markets* has been written by practitioners who understand the underlying financial transactions to which GST must be applied. GST is a transactional tax. It must be approached from this perspective and this is how the authors tackle their topic. A book that merely describes the GST provisions will not go far to solve the issues that arise in the real world. *GST and the Financial Markets* does not suffer this weakness. The authors have been prepared to tackle difficult and real issues head on. For this reason, the book will prove to be an invaluable resource for not only lawyers and accountants advising on GST but also those directly involved in the finance and related industries such as bankers, stockbrokers, fund trustees and insurers. It should also find a home in many university libraries around the country and will, no doubt, be referred to in many postgraduate tax course reading guides.