



# ICCA NEWS

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## ATO REFUSES TO ISSUE A GST REFUND—MULTIFLEX DECISION—AN ATO SAGA

The obstinate defiance of the Commissioner of Taxation not respecting the decision of the Judiciary cannot be more stark than its behaviour in the decision of (*Multiflex Pty Ltd v FCT* [2011] FCA 789, Federal Court, Dodds-Streeton J, 13 July 2011.)

On July 13<sup>th</sup> 2011 In the Federal Court the taxpayer, a buyer and seller of information and communication technology products, (i.e. mobile phones, iPad, etc) held certain sales were GST free but the purchases were creditable acquisitions and was therefore entitled to a GST refund of input tax credits. The commissioner refused to pay on the basis that it was withholding the GST refunds due to the investigation of a possible large scale fraud involving many different suppliers of mobile telephones and other electronic products.

The ATO had been auditing Multiflex for some time and had withheld the GST refunds of \$835,000 until the audits were completed. Multiflex in Court alleged that the decision to withhold the refund was 'an improper exercise of power, without a proper basis and was seeking review under the *Administrative Decisions (Judicial Re-*

*view) Act 1977*'. The Court in its decision said it was "satisfied that the expedition of the hearing was justified in circumstances where the subject matter of the litigation was the taxpayer's entitlement to a refund, the prompt payment of which was vital to its continued business operations and solvency". That was July 13<sup>th</sup> 2011.

On Sept 30<sup>th</sup> 2011, the ATO argued that input tax credits claimed by the taxpayer were unsubstantiated and refused to pay the refunds until an audit had concluded. The Federal Court disagreed with the ATO and ordered that a writ of mandamus issue directing the Commissioner to comply with s 35-5 of the GST Act and s 8AAZLF of the TAA and pay Multiflex the net amount notified in its GST return for each of the tax periods January, February, March, April and May 2011. (*Multiflex Pty Ltd v FCT* [2011] FCA 1112, Federal Court, Jessup J, 30 September 2011.)

On November 17<sup>th</sup> 2011 The ATO applied to the Federal Court for special leave that the mandamus order to be stayed. In the Federal Court Justice Edmonds J granted the stay on the following grounds:

"Subject to any further order of the Court or a judge, the operation of the orders of the Full Court made 11 November 2011 be stayed - (a) until 5:00 p.m. on 23 November 2011; and (b) if the applicant [the Commissioner] pays the sum of \$465,000 to the respondent [taxpayer] before that time, thereafter until 5:00 p.m. on 13 December 2011."



**Conclusion** – The ATO's behaviour breaches its own Taxpayer's Charter and more so the principles of a Model litigant. "*The State and all agencies must conduct themselves as model litigants in the conduct of all litigation by adhering to the following principles of fairness .... The State must behave as a model litigant in the conduct of all litigation, including significant litigation, by adhering to the following principles of firmness.*" Whether Multiflex survives long enough for Justice to be served remains to be seen.

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