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10 November 2023

Ms Jo Drum
International, Support and Programs
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By email: jo.drum@ato.gov.au

Dear Ms Drum,

Draft GSTD 2023/D1 Goods and Services Tax: supplies of combination food

The Corporate Tax Association (**CTA**) welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to draft GSTD 2023/D1 Goods and Services Tax: supplies of combination food (**Draft Determination**).

The CTA is the key representative body representing over 150 major companies in Australia on tax issues impacting the large corporate sector. A list of CTA members is attached as Appendix 1. Further information about the CTA can be found on our website at www.corptax.com.au.

General

The Draft Determination provides the Commissioner's view on how the finding in *Chobani Pty Ltd v FC of T* [2023] AATA 1664 (**Chobani**), a test case, impacts the interpretation of paragraph 38-3(1)(c) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**).

Paragraph 38-3(1)(c) provides that "(c) food of a kind specified in the third column of the table in clause 1 of Schedule 1 or food that is a combination of one or more foods at least one of which is food of such a kind" will not be GST-free.

Where a food listed in clause 1 of Schedule 1 (which are taxable food items) is combined with other food that may be a non-taxable item, the combined products become a taxable supply.

The difficulty is the word 'combination' is not defined in the GST Act. In *Chobani*, both parties accepted the word 'combination' takes its ordinary meaning, where "'combination' includes the product or outcome of joining two or more things together in some way" (para 32).

Senior Member Olding concludes:

> 74. In my view, the exclusion in s 38-3(1)(c) applies at least when a product meets the description: **food that is a combination of foods that includes separately identifiable food or foods excluded by the table in clause 1 of Schedule [1][1] or foods of that kind. There may be cases where excluded items remain separately identifiable but nevertheless are so integrated into the overall product, or so insignificant, that they would not affect the characterisation.** That is clearly not so in respect of the Product in this case. As discussed below, the dry inclusions are not integrated into the yoghurt and are significant as indicated by their physical separation in the product as sold; relative weight and cost; the marketing of the Product and consumer experience; and indeed, even its naming as a "flip" product.
>
> 75. **I appreciate this construction would leave room for undesirable uncertainty in cases at the margin**. But not more so, I believe, than Chobani's construction for the reasons already indicated. That is the inevitable consequence of the policy decision to exempt some but not all foods, as evidenced by the unfortunate history of sales tax, customs duty and GST litigation here and elsewhere. [Emphasis added]

Deputy Commissioner Hector Thompson noted in a recent speech[2] that the Draft Determination "aims to explain the Commissioner's view clearly and simply across the range of scenarios where the issue of combination food arises to support businesses to get their classifications right." In line with this, we consider that the guidance in the Draft Determination should be kept simple and be clear on:

a) where there are 'separately identifiable foods' listed in the table in clause 1 of Schedule 2 of the GST Act involved which will impact the GST treatment of the combined supply; and

b) the cases where those 'separately identifiable foods' are 'so integrated' or 'so insignificant' that they do not impact the GST treatment of the combined supply.

That is, clear guidance should be given for, and be confined to, the straightforward application of the interpretation of paragraph 38-3(1)(c) in *Chobani* to common or mainstream combined food products that the *Chobani* test case was directed at, as is consistent with the short-form nature and scope of a Determination guidance product[3].

Commissioner's view

We consider that the Commissioner's view about the meaning of 'combination food' set out in draft paragraph 8 extends beyond the parameters in paragraph 74 of *Chobani* noted above and introduces additional factors to those set out in *Chobani.* For example, the introduction of the concept of defining a food as 'separately identifiable' "when it can be individually

[1] The reference to 'Schedule 2 in the AAT decision is a typographical error. It should be a reference to 'Schedule 1'.
[2] See 'The future of GST compliance – Tax Institute's National GST Conference' speech by Deputy Commissioner Hector Thompson (26 October 2023).
[3] https://www.ato.gov.au/General/ato-advice-and-guidance/ato-advice-products-(rulings)/public-rulings/

perceived by ordinary visual inspection" (second bullet point) introduces an unnecessarily complex subjective test that may lead to a variety of unintended interpretations (i.e. the test relies on the interpretation/view of the person doing the perceiving, which cannot be a uniform basis upon which to apply rules with respect to the classification of a food product).

We suggest for your consideration terminology more commonly used such as 'separate and distinct from' which may be more suitable. i.e. food is 'separately identifiable' when it is actually "physically separated", as was the case in *Chobani*, as this interpretation should remove the subjective element and hence reduce the likelihood of a difference in opinion and the resultant classification disputes.

Also, care should be taken in how the decision in *Chobani* is described. We note for example the comment in draft paragraph 6 that "[t]he AAT accepted that classification of a food product involves questions of fact and degree, objectively taking all factors into account[8] (including personal experience), to arrive at an answer by way of 'overall impression'." However, what is actually relevant in the character of the product at the point of supply, per paragraph 82 of *Chobani* regarding the fact the judge sampled the food product in *Lansell House*[4]:

> 82. The Court also relied upon his Honour's own experience of the uses to which a cracker may be put. This suggests it is not inappropriate to take into account how the consumer will use the Product in this case. **But that does not detract from the conclusion indicated earlier that it is the character of the Product at the point of supply that is to be determined, not its character after the final consumer has interacted with it,** for example by flipping the dry inclusions and mixing them into the flavoured yoghurt.

Senior Member Olding noted later at paragraph 84, that following the lead of the Court in *Lansell House,* he too sampled the Chobani product concluding that he "did not find flipping and eating the Product particularly useful for the characterisation question which I would have answered the same way without the benefit of consuming the sample." Therefore, 'personal experience' is not necessarily a factor the AAT accepted is involved in classifying the food product for GST purposes.

In regard to the examples given in the Draft Determination, a number of examples are directed at what is not a combination food. It would be useful if contrasting examples were given regarding what is a combination food. Comments on specific examples are below.

Comments on the Principles and Specific Examples

1. **Principle 1 and Example 1**

We would like to understand the reason for including the percentage of roasted hazelnuts (20%) in Example 1. Is this intended to suggest a bright line test regarding the amount of a taxable food included before it is regarded as a combination food?

[4] *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA, 329; 2011 FCAFC 6

It raises questions about the treatment of 'crunchy' varieties of nut spreads which are confirmed later in paragraph 22 under Principle 3 to not impact the overall characterisation of the product. Without reading paragraph 22, Example 1 could be construed as misleading. It suggests by implication a spread with 20% roasted nuts where the nuts are not blended in could be a 'combination product' and thus taxable.

2. Principle 2

Paragraph 14 under Principle 2 confirms that a hamper containing "a range of individual commercially packaged food products that remain distinct" is not a combination food. We query then why it is noted in paragraph 47 that *Issue 8 Hampers* on the Food Industry Partnership list[5] needs to be removed.

In our view, *Chobani* does not have any impact on hampers and as these products are mixed supplies and not food combinations, so there is no need to change/remove this advice.
Please confirm the GST treatment of hampers is not changed.

The *Issue 8 Hampers* contains useful guidance information. If this information is removed from the Food Industry Partnership list, please advise if this detailed information will be located elsewhere.

3. Principle 3 and Examples 4, 5, 6 and 7

Example 4

This example introduces the concept of insignificance to rating a product for GST purposes. In this example, the roasted seeds are so insignificant within the overall bread product that they don't impact the essential character of the product. As this currently stands, this insignificance 'test' will just create more work and complexity in trying to rate a product for GST purposes.

Please include an example of when the insignificance threshold is reached, and the seeds would impact on the essential character of the products. Is it 5% or 10% or 50%?

Example 5

Example 5 explores how the marketing test and the concept of 'sufficiently joined together' packaging for the tuna and biscuits applies in the ATO's view to give rise to a combination food.

The tuna and biscuits are both separately packaged within a broader packaging display made available to retail customers. The tuna is separately packaged in a can (or other container) for food standards reasons. When the packaging for the product is broken open, the customer

[5] https://www.ato.gov.au/law/view/document?LocID=%22GIR%2Ffood-industry-CH8%22&PiT=99991231235958#H8

has a container of tuna and a separately packaged biscuit offering. This is a mixed supply. If the customer wanted to discard the biscuits, they could.

Contrast this to the product at the heart of the *Chobani* case, the Yoghurt Flip product. The packaging is a container that keeps the yoghurt and dry ingredients to be 'flipped' into the yoghurt still together once opened, in separate compartments under the same lid. This allows the 'flip' to occur when the customer is ready to consume the product. The packaging of the yoghurt food combination is always maintained and not broken apart - this does not occur for a mixed supply of tuna and biscuits which are separately packaged and can be separated from each other.

The ATO view in this example changes the GST treatment of a simple mixed supply calculation for tuna and biscuits into a taxable food combination by simply relying on how the product is packaged and marketed. Application of a marketing test cannot change the fact the product in this example is a mixed supply (as it has been treated since the inception of GST) and is distinct from the *Chobani* example. The outcome in *Chobani* does not support a change in the GST treatment of this type of product.

Example 6 – layered foods

As a general comment, applying the concept of combination foods to "layered foods" appears to be taking the concept a step too far.

Example 6 is an example of where the 'test' for separately identifiable foods of "when it can be individually perceived by ordinary visual inspection" does not give rise to a sensible outcome. While the nut layer may be identifiable from the custard layer on visual inspection, the nut layer would not be able to be readily physically separated from the custard layer without some of the custard coming with the nuts if they were to be 'scraped' off the top of the custard.

This demonstrates the issue that will arise with a "visual inspection" test. Again, we highlight that the more appropriate test of whether food items are 'separately identifiable' would be when the items are actually "physically separated".

The example also relies on the 10% 'threshold' that was used to describe the proportion of white chocolate and biscuit mix to the flavoured yoghurt in *Chobani* (see paras 101 and 132). One of the differences between the layered product in this case and the product in *Chobani* is that the white chocolate and biscuit mix is in a separate part of the container to the yoghurt whereas the nut layer sits atop the custard in Example 6.

This suggests the Commissioner is suggesting a bright line test of 10% of a food product being a taxable food product will make the whole food product a 'combination food' regardless of whether the different foodstuffs are separated in their packaging to some extent or combined in the same package (even though they are not mixed together). This is not a sensible outcome and seems to be out of step with the outcome in *Chobani*.

When compared to Example 3 (integrated foods) and Example 4 (insignificant food), is Example 6 another category of food entirely? This suggests that Example 6 is not an integrated food (we disagree and think it is).

It also suggests Example 6 does confirm that a 10% threshold is used to determine what is a 'significant' food. If that is the case, this should be expressly set out in the Draft Determination. The legislative basis for this interpretation is not clear as in other food-related matters, a "consisting principally" (i.e. 50%) test is required. So, it is not clear why a 10% test for a taxable food component would be sufficient to make a layered product taxable (noting that we do not agree with the position in any regard).

The application of this concept in practice could prove to be unworkable as at a retail level the supplier will not necessarily have sufficient information (other than the ingredients of the product) to make a decision as to the percentage of the product that the supposed taxable component may represent. The ATO position would appear to increase the risk of potential misclassification of food products rather than assist in clearly and simply determining what is a combination food.

Also, we note the comment in paragraph 38 that states "[t]he roasted nuts have an impact on what the product really is." An important ingredient in chocolate hazelnut spread (Example 1) is hazelnuts, but it is just that - an ingredient. The inclusion of the hazelnuts in a chocolate hazelnut spread (or peanuts in peanut butter) makes the product "what it is" but it still remains GST-free as a spread.

The wording in paragraph 38 is inconsistent with the position in Example 1 and the comments in paragraph 22 which confirms that separately identifiable nuts in a crunchy nut spread "are so integrated into the overall product that they do not have an impact on what it really is".

Example 7

It is unclear why Example 7 has been included in the Draft Determination. The tax treatment of trail mixes[6] containing processed/treated nuts, crystallised/glace fruit or confectionery pieces has previously been settled (as taxable) and is contained in the Detailed Food List. We do not see a need for this example to be included. It creates unnecessary confusion.

Application of the Draft Determination

If the Draft Determination is finalised in its current forms, it will impact many foods for which the GST treatment is currently settled, for example mixed supplies like John West Tuna and Biscuits and supermarket own brand versions of the same product where the tuna and the biscuits are separately contained from each other. The packaging of these products is not sufficiently connected to be a food combination and they fit into a mixed supply category, like they have since the commencement of GST in July 2000.

[6] We note trail mixes containing only raw nuts and/or seeds and/or dried fruits are GST-free.

In this regard, the Draft Determination should apply prospectively only, particularly as the Draft Determintation in its current form introduces new concepts. Any changes to treat food items as taxable that are currently GST-free should only apply prospectively.

Impact on existing ATO public advice and guidance

We consider that the following ATO IDs do not need to be withdrawn:

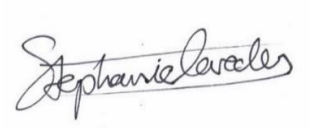
- ATO ID 2002/994 *GST and Cake Frosting decorations packaged separately and supplied as one product* - the *Chobani* decision doesn't require ATO ID 2022/994 to be removed as this is still a food mixed supply and not a food combination.

- ATO ID 2010/145 *GST and Dip with Biscuits* - this is a mixed supply and not a food combination so it is unclear why ATO ID 2010/145 needs to be withdrawn. A change in the GST treatment of these products to taxable would be inconsistent with how these products are packaged and used, noting currently, there is no applicable marketing test for these products.

- *ATO ID 2004/539 GST and blended seed and nut product* – it is not clear how or why, based on the principles outlined in the Draft Determination, the ATO proposes to withdraw ATO ID 2004/539. If the ATO is now suggesting that this product is a combination food, this seems completely at odds with the comments in the ATO ID concerning the fact that the "nuts have been processed to such a degree that they no longer retain a separate identity and have been incorporated as ingredients into the seed and nut blend". The ATO should confirm how the *Chobani* decision supports the withdrawal of this ATO ID.

Should you have any questions, please do not hesitate to contact me on 0408 0028 196.

Yours sincerely,



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