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General Manager
Indirect, Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: gstpolicyconsultations@treasury.gov.au

Dear Sir/Madam,

REFUNDING EXCESS GST

The Association of Superannuation Funds of Australia ("ASFA") welcomes the opportunity to comment on the Exposure Draft released on 26 February 2013 that proposes to amend the provisions of *A New Tax System (Goods and Services Tax) Act 1999* ("GST Act") and the *Taxation Administration Act 1953* ("TAA") relating to GST refunds.

In this submission we focus our comments on the practical application of the Exposure Draft in areas that have the potential to affect ASFA members.

ASFA notes the improvement on the previous draft in the following areas:

- Taxpayers are better able to self-assess whether they are entitled to a refund;
- Taxpayers will be able to claim a refund where the recipient of the supply is entitled to reclaim the overpaid GST on the basis of contractual, statutory or restitutionary rights;
- The Commissioner will retain a discretion to allow a refund even where the statutory criteria have not been met.

However, we are concerned that a number of undesirable consequences may flow from the current Exposure Draft and request that consideration be given to addressing these matters prior to the amendments being finalised. In particular ASFA is concerned that the Exposure Draft in its current form continues to prevent taxpayers from seeking refunds of GST in legitimate circumstances, impacts on the ITC entitlement of recipients and produces unfair and unintended consequences. These concerns are set out more fully below.

ABOUT ASFA

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds (SMSFs) and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

GENERAL COMMENTS

Whilst agreeing that the Exposure Draft is an improvement on the draft released on 17 August 2012, we consider that the current Exposure Draft still has a number of undesirable consequences that require further consideration prior to the amendments being finalised.

In particular, we request that further consideration be given to the following matters:

- There is no explicit statement that the extra GST is not only deemed to be always payable on a taxable supply, but deemed to also be consideration for an acquisition by the recipient.
- The Exposure Draft does not take account of the situation where the recipient is registered for GST but is not entitled to full ITCs on its acquisitions.
- Treating overpayments as always being payable until the other entity is reimbursed will increase the duty that may be payable under State and Territories duties legislation.
- The narrowness of the operation of the Commissioner's discretion to refund where the statutory requirements are not met.
- Treating a tax invoice as 'prima facie' evidence that GST has been passed on does not adequately take into account the way that supplies are priced as it assumes the price always includes a GST component.
- The lack of clarity of the provisions with respect to the adjustments that arise when extra GST is reimbursed to the recipient.
- Removing clause 142-10(2) as it will have the effect that an entity making input taxed supplies will continue to be liable for GST on overpaid amounts even though these are not treated as taxable supplies for the purposes of determining input tax credits such as when using an apportionment formula.

Our concerns on the above matters are set out more fully below.

Amendments relating to GST refunds

ASFA understands that this further exposure draft has been provided to address a number of concerns raised by industry and advisers during the first round of consultation. We note that the new Exposure Draft includes new Division 142 that forms part of the 'special rules'. The previous proposal was to include a new Division 36 as part of the 'basic rules'.

Whilst we consider the current approach an improvement, we are concerned that this version of the Exposure Draft may still prevent taxpayers from seeking refunds of GST in legitimate circumstances, impacts on the ITC entitlement of recipients and may produce outcomes that could be considered to be unfair and unintended.

Recipient's entitlement to input tax credits

Whilst the Exposure Draft deems Extra GST to always have been payable on a taxable supply, it does not explicitly state that the recipient will have a deemed acquisition for the purposes of claiming input tax credits. Although implied in the EM, it is not explicit that the recipient may be entitled to claim an input tax credit for the amount of the overpaid GST. Clause 142-10 states that the Extra GST is always taken to have been consideration on a taxable supply. However, it will not always be clear that the recipient will have made a corresponding acquisition of something. In particular, it is not apparent how the recipient would calculate the amount of the input tax credit under section 11-25, which states that the ITC is equal to the GST payable "on the supply of the thing acquired".

Where the recipient is not reimbursed for the extra GST, the recipient will bear the full GST cost, particularly where they are not entitled to full ITCs on their acquisitions. ASFA is concerned that this embedded GST will cascade along the supply chain and become an additional cost to the end consumer.

In business to business transactions which are fully creditable, there is no economic incentive for the supplier to reimburse the recipient and claim back the extra GST. The intention seems to be that these amounts will simply flow down the supply chain. The proposed Division 146 does not attempt to ensure that the end consumer is refunded any extra GST. This has the potential to simply move the windfall gain from the supplier to the recipient in business to business transactions. Although the Commissioner's discretion in clause 142-10(2) might apply in these circumstances, the discretion seems to have a limited scope and requires an entity in the chain to actually apply for a refund. As the supplier has no economic incentive to apply for a refund, the discretion is likely to have limited utility.

Recommendation

ASFA recommends that the provisions make it clear that a creditable acquisitions is deemed to be made by the recipient where the Extra GST is deemed to have always been payable on a taxable supply.

GST neutrality

ASFA is concerned that the Exposure Draft will not result in GST neutrality in business to business transactions where a recipient is registered for GST but is not entitled to full ITCs on the acquisition. This will result in the overcharged GST being passed on in the cost of supplies and cascading down the supply chain.

Duty Implications

Under State and Territories legislation the 'dutiable value' of property is not discounted for any GST payable on the supply of property. For the purposes of the Duties Legislation, GST has the same meaning as in the GST Act.

The Exposure Draft proposes to treat overpayments of GST, or extra GST, as always being payable until the amount is reimbursed to the entity that the GST has been passed on to.

The effect of this is that, where a purchaser has overpaid the supplier an amount of GST, the dutiable value of property will include the amount of the overpayment of GST. If the amount is not reimbursed on the basis that the recipient has claimed a full input tax credit and would not benefit, from a GST perspective, from a reimbursement, the amount will still be included as part of the 'dutiable value' of property. Even if the overpaid GST is subsequently refunded, this will not necessarily reduce the assessed duty. In practical terms, even where the extra GST is subsequently refunded, duty will be assessed and payable on the inflated amount of consideration paid for the dutiable property.

Recommendation

ASFA recommends that the provisions make it clear that, for the purposes of determining the dutiable value of property under duties legislation, 'extra GST' that has not been refunded does not form part of the 'consideration' paid for the property.

Pricing supplies

Proposed section 142-15 provides that if a tax invoice is issued and it contains enough information to enable some or all of the extra GST to be ascertained, the tax invoice is prima facie evidence that GST has been passed on. The section also provides that extra GST may pass on to the other entity even if a tax

invoice is not issued. The effect of this is that the amount on a tax invoice will be taken to include a GST component. This is the case even where, although the supply has incorrectly been treated as taxable, the supply is priced as being GST exclusive on the invoice.

We consider that in treating tax invoices as prima facie evidence that GST has been passed on, suppliers who mischaracterise supplies may be at a competitive disadvantage where their supplies are priced in such a way that the loss is felt at their margins. This is on the basis that the supplier will receive less consideration for a supply incorrectly treated as taxable where the amount on the invoice is taken to include a GST component, but the supply has been priced on a GST exclusive basis.

We consider that it would be appropriate in these circumstances that the supplier receives a refund of GST as this would place the supplier in the same position as if the supply had been treated correctly. Whilst the current Exposure Draft provides for the Commissioner to have a discretion to refund extra GST, the limited discretion provided for in the Exposure Draft would not cover this situation unless it is determined that the supplier is the entity that has borne the cost of the extra GST.

Recommendation

ASFA recommends that section 142-15 and the EM be redrafted to remove the assumptions that GST is always passed on unless the taxpayer establishes the contrary.

Mechanics of adjustment provisions

ASFA is concerned with the reliance on notes in the operative sections of the Exposure Draft rather than the inclusion of specific 'mechanic' provisions, particularly with respect to the operation of the adjustments.

Specifically, Note.1 to 142-10(1) provides the detail as to the adjustments that are required when amounts of GST are reimbursed. However, there are no provisions that deal with attribution and adjustments under the broader range of likely situations.

On the basis that the Exposure Draft operates through the use of adjustments to the net amount, ASFA considers that it is important that the mechanics of the provisions are included in operative sections and not merely through the use of notes or examples in the Explanatory Memorandum.

Recommendation

ASFA recommends that provisions are included to provide that if a self-assessment is made the taxpayer can either request an amendment of a prior period BAS or treat the overpayment as a decreasing adjustment.

Commissioner's discretion

ASFA welcomes the inclusion of a Commissioner discretion to allow GST refunds. However, as it is premised on the same principles as the provisions for self-assessment, we consider that the discretion is unduly restrictive and is unlikely to operate except in limited circumstances.

Both the statutory provisions for self-assessment and the Commissioner's discretion require that the passed-on GST is refunded to the entity that has borne the cost of the passed on GST. We consider that having the discretion operating in a manner similar to the self-assessment provisions does not meet the stated objective that the discretion is intended to operate where a refund is considered appropriate in the circumstances despite the statutory criteria not having been met.

ASFA considers that the current limit on the discretion is unnecessary and may prevent suppliers from receiving refunds in circumstances where there is no corresponding windfall gain.

Recommendation

ASFA recommends that the rules surrounding the operation of the Commissioners discretion be revisited such that they operate where a refund is considered appropriate in the circumstances.

Ability to claim input tax credits by recipient

ASFA is concerned that the application of subsection 142-10(2) will result in an entity remaining liable for GST on overpaid amounts whilst at the same time being denied input tax credits on related costs. This would mean that, should the ATO decide in the course of an audit that something that has been treated as taxable should have been treated as input taxed, then the GST would remain payable but, at the same time, the supplier would be denied input tax credits and would incur GIC and be subject to penalties.

Recommendation

ASFA recommends that subsection 142-10(2) be removed.

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If you have any queries or comments regarding the contents of our submission, please contact Robert Hodge on (02) 8079 0806 or via e-mail rhodge@superannuation.asn.au.

Yours sincerely
Fiona Galbraith

Director Policy