

28th March, 2013

General Manager
Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam,



Australian National
Retailers Association
ABN 78 118 494 643

8/16 Bougainville Street
Manuka ACT 2603

Tel +61 2 6260 7710
Fax: 61 2 6260 7705

3 Spring Street
Sydney NSW 2000

Tel +61 2 8249 4520
Fax: 61 2 8249 4914

admin@anra.com.au

Re: ANRA submission - Exposure draft on refunding excess GST

The Australian National Retailers' Association (ANRA) 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.

ANRA has limited its comments to the practical application of the Exposure Draft that have the potential to affect its members.

Executive Summary

ANRA considers the current Exposure Draft is an 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.

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 consider that the following matters need to be taken into consideration:

- As currently drafted the Exposure Draft implies that the recipient is entitled to an input tax credit for any overpaid GST. However, the recipient's entitlement to input tax credits ("ITCs") needs to be more explicit such that 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 fails to take account of the situation where the recipient is registered for GST, but is not entitled to full ITCs on its acquisitions. The effect being that the Exposure Draft will not be GST neutral where the recipient is not entitled to full input tax credits as the overpaid GST will cascade through the supply chain and ultimately add to the costs for the ultimate consumers.

- 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 as the 'dutable value' of property under the Duties Legislation will also include 'extra GST' that is deemed to always be payable.
- The Commissioner's discretion to refund where the statutory requirements are not met is unduly restrictive and does not meet the objectives outlined in the Explanatory Memorandum that it is intended to operate when the Commissioner is satisfied that a refund is appropriate.
- Treating a tax invoice as 'prima facie' evidence that GST has been passed on fails to take account of the way that retail supplies are priced and assumes the price includes a GST component. Where a supply is incorrectly treated as taxable, but the value of the supply has not been priced to include a GST amount, the supplier will receive less consideration for the supply that they would have if the supply had been treated correctly.
- The provisions should be clearer with respect to the adjustments that arise when extra GST is reimbursed to the recipient and such mechanics should be included in the operative provisions rather than as a Note to 142-10(1). Further, example 1.8 in the Explanatory Memorandum should state that the amount of the increasing adjustment for F Pty Ltd is equal to 75% of the amount reimbursed, being F Pty Ltd's entitlement to ITCs on its acquisitions.

About ANRA

ANRA represents Australia's largest retailers across the full spectrum of retail goods and services. ANRA's membership includes leading household names in supermarkets, department stores and specialty retailers. ANRA members account for more than \$100 billion of the more than \$255 billion in retail spending across Australia annually.

Amendments relating to GST refunds

We understand that the further exposure draft was rewritten to address a number of concerns raised by industry and advisers during the first round of consultation. The new Exposure Draft includes a new Division 142 that forms part of the 'special rules' rather than the previously proposed Division 36 which was to be included in the 'basic rules'.

Whilst we agree that the former Exposure Draft required clarification and further consideration, our view is 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.

We have discussed the specific issues that should be taken into consideration below.

Recipient's entitlement to input tax credits

Whilst the Exposure Draft deems Excess 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 they will bear the full GST cost, particularly where they are not entitled to full ITCs on their acquisitions. 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 somebody 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.

GST neutrality

The Exposure Draft will not deliver 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 it has 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 full ITCs 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 subsequently refunded, this will not necessarily reduce the duty which has been assessed. In practical terms, even where the extra GST is subsequently refunded, duty will be assessed/payable on an inflated amount of consideration paid for dutiable property.

Commissioner’s discretion

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

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. This largely limits the discretion to circumstances that would fall within proposed clause 142-10(1) anyhow; that is, circumstances where the Commissioner's discretion is not required at all. The requirement in proposed clause 142-10(3)(a) is considered superfluous and should be deleted. As drafted that clause does not meet the objectives that the discretion is intended to operate where there is no windfall gain by any party..

We discuss the application of the Commissioner's discretion in relation to pricing supplies in more detail below.

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 even where, although the supply has incorrectly been treated as taxable the supply is priced as being GST exclusive..

The proposed section 142-15 and EM fail to take into account the complex means by which retail products are priced. This was recognised in the Avon Downs decision, but this is glossed over in the EM. Any number of external factors may impact on retail prices, not the least of which is the prices of competitive products. Pricing points may be dictated by direct competitors from within Australia as well as offshore suppliers. In some circumstances, prices may be dictated by other products that are capable of substitution. Those products may be subject to GST or may be GST-free (e.g. hot food compared to other food).

In particular, many retailers now face global competition with imported goods that can be sold directly without GST being incurred. To begin with an assumption that Australian supplied goods are priced to recover the cost of GST is a false assumption. This is only true in a non-competitive market or a market with no competition that from suppliers that do not incur GST.

In addition, we consider that in treating tax invoices as prima facie evidence that GST has been passed on, suppliers who misprice or mischaracterise supplies may be at a competitive disadvantage where their supplies are priced in such a way that the loss is incurred at their margins. We provide the following example:

Jimmy's Supermarket

Jimmy's Supermarkets sells food and groceries and makes taxable and GST-free supplies. A plain milk product is currently \$2.50 and is classified as GST-free. The price of similar milk products has recently been reduced to \$2 at all competitor supermarkets in the area. Jimmy's Supermarket adjusts its price for the milk product to \$2 to match the market competition.

In the process of adjusting the price, the systems manager at Jimmy's Supermarkets inadvertently changes the GST system classification from GST-free to taxable. As a result of this inadvertent error, the milk product is sold for \$2. Customers are issued with a tax invoice marking the sale as "GST-inclusive". GST of 18 cents is recorded and paid by Jimmy's Supermarkets.

After 3 months, a product manager identifies that Jimmy's Supermarket is making a loss on the sale of the milk product, below the expected return when the price was set at \$2. The product manager identifies that \$45,000 of GST has been accounted for on the sale of the milk product and paid by Jimmy's Supermarket in previous assessments since the system change was made.

In considering whether Jimmy's Supermarket is entitled to a refund, notwithstanding a tax invoice was issued alerting the recipient that the sale price of \$2 included GST, it is necessary to consider whether Jimmy's Supermarket passed on GST. As Jimmy's Supermarket pricing strategy was to reduce the price to \$2 to match a comparative price charged by other retailers selling similar GST-free milk products, Jimmy's Supermarket has demonstrated that it has not passed on the extra GST. Jimmy's Supermarket can apply to the Commissioner to amend its assessment for the period in which it paid the extra GST.

We consider that it appropriate in these circumstances that the supplier receive 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.

Mechanics of adjustment provisions

We are concerned with the lack of mechanics in the operative sections of the Exposure Draft and the reliance on notes, particularly with respect to the operation of the adjustments.

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 a range of likely situations.

On the basis that the Exposure Draft operates through the use of adjustments to the net amount, we consider 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.

Thank you for considering ANRA's position on this matter. Should you have any questions regarding ANRA's position please contact Mr Russell Goss, Deputy Chief, at our Sydney office on (02) 8249 4520 or via email on rgoss@anra.com.au

Sincerely,



Margy Osmond
Chief Executive