



SUBMISSION

REFUNDING EXCESS GST

14 September 2012

* * * *

About ASFA

ASFA is a non-profit, politically non-aligned 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 and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

Refunding Excess GST

The Association of Superannuation Funds of Australia ("ASFA") welcomes the opportunity to comment on the Exposure Draft 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 released on 17 August 2012.

ASFA has limited its comments to technical points related to the specific provisions and amendments in the Exposure Draft and concerns relating to the practical application of the Exposure Draft.

1. Executive Summary

Whilst agreeing that the law surrounding entitlement to GST refunds requires clarification, particularly since the introduction of the self-assessment system, ASFA considers that the Exposure Draft in its current form is overly restrictive and significantly reduces the ability of taxpayers to obtain refunds for overpaid GST when equity and sound policy demands such an outcome and there is no windfall gain accruing to the taxpayer.

We are further concerned that the new rules appear to overreach the stated policy aims and appear to be at odds with general concepts of equity and fairness and contrary to the Commissioner of Taxation's current practice in dealing with refunds and use of his discretion.

ASFA members have expressed concern at an apparent lack of consultation with taxpayers and industry on what is a fundamental and important change to policy and one which could be seen to interfere with issues of contract between transacting parties, exposing taxpayers to unnecessary contractual risks where GST is mistakenly charged.

Whilst the Explanatory Memorandum states that new Division 36 'ensures that the policy that taxpayers should not receive a windfall gain is achieved', ASFA considers that the new law significantly and unfairly overextends this policy aim in a number of respects that adversely affect superannuation funds and potentially other taxpayers. The specific matters that we consider need to be taken into consideration are as follows:

- The ED fails to take into account the issues that arise where the recipient of a supply will be entitled to a reimbursement of overcharged GST notwithstanding that the supplier will not be entitled to a refund of excess GST payable.
- As currently drafted, the ED fails to take account of the situation where the recipient is registered for GST but is not entitled to full input tax credits ("ITCs") on acquisitions.
- The proposed Division 36 would deny a refund to a taxpayer that has miscalculated GST under the reverse charge provisions in Division 83 or Division 84. This is despite the taxpayer having borne the full economic cost of the overpaid GST.
- Treating overpayments as 'GST payable' where the conditions for a refund are not satisfied 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 'excess GST' that is classified as 'GST payable'.

- Treating tax invoices as 'prima facie' evidence that GST has been 'passed on', even where the tax invoice does not specifically or separately identify the GST component, fails to take account of the way supplies may be priced. For example, where a supply is incorrectly treated as taxable but the value of the supply has not been grossed up to include an amount of GST, the supplier will receive less consideration for the supply than they would have if the supply had been treated correctly.

Recommendation:

ASFA recommends that the Commissioner be given the discretion to pay refunds where that outcome is appropriate, e.g. where a taxpayer does not satisfy the requirements of the proposed Division 36, but there is no windfall gain to the taxpayer.

2. Specific comments

Amendments relating to GST refunds

ASFA understands that the policy intent behind the amendments is to address the uncertainty surrounding the nature of the Commissioner's discretion contained in section 105-65 of the TAA to issue refunds of overpayments of GST, particularly since the introduction of the self-assessment system.

We further understand that the proposed changes are intended to address the perceived impact of the Federal Court's decision in *All Sports v Commissioner of Taxation [2011] FCA 824* to ensure that overpayments of GST in the case of both miscalculation and mischaracterisation are subject to the same restrictions and that taxpayers do not receive 'windfall gains' through the operation of the refund provisions.

We agree that the law surrounding entitlement to GST refunds requires clarification, particularly since the introduction of the self-assessment system. However we consider that the Exposure Draft in its current form is overly restrictive and significantly reduces the ability of taxpayers to obtain refunds for overpaid GST when equity and sound policy demands such an outcome and there is no windfall gain accruing to the taxpayer.

ASFA is concerned that the new rules appear to overreach the stated policy aims. They also appear to be at odds with general concepts of equity and fairness and contrary to the Commissioner of Taxation's current practice in dealing with refunds and use of his discretion.

ASFA is concerned that the ATO and Treasury appear to have not sought to consult broadly with taxpayers and industry about what is a fundamental and important change to policy. This is particularly so given that the change appears to be, in part at least, a response to recent case law on the current refund provisions and that the proposed policy could be seen to interfere with issues of contract between transacting parties and may expose taxpayers to unnecessary contractual risks where GST is mistakenly charged. The policy change has the potential to penalise more cautious taxpayers and encourage a culture of 'if in doubt, don't pay'.

ASFA suggests that there may be other, more equitable, ways than that proposed to achieve the policy aim to ensure that taxpayers should not receive a windfall gain. For example,

consideration could be given to applying the law of mistake and unjust enrichment in a GST context. It is our understanding that mistake and unjust enrichment is applied in other GST/VAT jurisdictions and also in relation to other mistaken payments of tax such as stamp duty. The principal benefits of applying the law regarding mistake and unjust enrichment are that it is based on a body of established law, it should achieve more equitable outcomes for both taxpayers and the Commissioner, and it focuses on the actual economic impact of the transaction rather than the proposed “one-size fits all, blanket approach” with no discretion for the Commissioner.

Recommendation

That, instead of the current proposal, consideration should be given to achieving the policy goal by applying the law of mistake and unjust enrichment.

Competitive neutrality

Under the provisions of the ED a supplier will not be entitled to a refund of overpaid GST where the recipient is registered or required to be registered for GST. This is regardless of whether the GST has been effectively costed into the price of supplies made to a registered recipient. In such cases, the GST will be treated as always being ‘GST payable’. The presumption seems to be that, if the recipient is registered, there will be an entitlement to a corresponding ITC and the transaction will be effectively ‘revenue neutral’.

A common situation where a transaction will not be ‘GST neutral’ is where the recipient has a right to a reimbursement of overcharged GST and exercises that right. In such a situation the supplier will then bear the cost of the GST and the recipient will have received a windfall gain. There are many circumstances where a tax invoice recipient may have a contractual right to a refund of the overpayment, or may have rights under consumer laws (such as the Competition and Consumer Law) or the laws of restitution (such as where the consideration fails) to a refund of amounts overpaid, including overpaid GST amounts.

ASFA considers that such a situation could place an undue financial hardship and loss on suppliers should they be required to reimburse recipients for overcharged GST but then be unable to obtain a corresponding GST refund. Where the supplier received a GST refund in the above circumstances they would not receive any windfall gain, but would rather be placed in the same position as if they had correctly calculated their GST liability or had made a supply to a recipient who could claim full ITCs.

Recommendation:

Where there is a contractual or other right to a refund of an overpaid GST amount, consideration should be given to achieving the desired ‘GST neutral’ position by:

- **Amending the law to grant the supplier the right to a refund and deny the recipient access to an ITC to the extent the GST paid is recovered from the supplier (e.g. under contractual or consumer laws or under the common law); or**

Overpayments of GST where denial of corresponding GST credits applies

Under the current drafting of the Exposure Draft, a supplier will not be entitled to a GST refund for overpaid GST where the recipient of a supply is registered for GST but is not entitled to full ITCs on their acquisitions. This applies even though the recipient cannot claim the corresponding ITC for a portion of the overpaid GST.

Apart from special situations, such as GST calculated using the margin scheme or global amounts calculated under Division 126, the denial of refunds where there is no corresponding entitlement to an ITC will result in GST cascading through the supply chain. As the supplier cannot claim a refund, the overcharged GST is not passed back to a registered recipient who is not entitled to claim full ITCs. The cost of the overcharged GST is either then borne by the recipient or passed on in the cost of supplies made by the recipient. This results in a cascading of GST which is contrary to one of the fundamental principles of a GST system.

In these circumstances the transaction will not be 'GST neutral' where the recipient has a right to a reimbursement of overcharged GST as the supplier will bear the cost of the GST. The recipient may have a contractual right to a refund of the overpayment, or may have rights under consumer laws (such as the Competition and Consumer Law) or the laws of restitution (such as where the consideration fails).

We consider that this may place undue financial hardship and loss on suppliers who are required to reimburse recipients for overcharged GST and who cannot obtain a corresponding GST refund. We note that if the supplier received a GST refund in these circumstances they would not receive any windfall gain, but would be placed in the same position as if they had made a supply to a recipient who could claim full ITCs.

Recommendation:

Where there is a contractual or other right to a refund of an overpaid GST amount and the recipient is not entitled to a full ITC, consideration should be given to achieving the desired 'GST neutral' position by:

- **Amending the law to grant the supplier the right to a refund and deny the recipient access to an ITC to the extent the GST paid is recovered from the supplier (e.g. under contractual or consumer laws or under the common law);**

Interaction of Divisions 36 and 84

ASFA is concerned that the new law does not appear to deal with circumstances where GST is mistakenly paid by the wrong entity. As currently drafted, the new rules may result in double taxation in certain circumstances. For example, it is unclear as to how Division 36 interacts with Division 84. If a superannuation fund is mistakenly charged GST by a foreign investment manager for services that are not connected with Australia, the GST will be taken to have always been payable by the investment manager under section 36-5(2). However, the superannuation fund will also have a liability to account for GST on the supply under section 84-10(1). Therefore, the fund will suffer double taxation and the revenue will receive a windfall gain.

Recommendation:

The apparent inconsistency between the operation of Division 36 and Division 84 be examined and resolved.

Duty implications

Under State and Territories Duties legislation, the 'dutiabale 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 'excess GST', as an amount of 'GST payable' where the supplier would not be entitled to a GST refund (i.e. the conditions for a refund are not satisfied).

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. This is even though GST being applied to the supply may have been the result of a miscalculation or error. In practical terms, this means that duty will be assessed/payable on an inflated amount of consideration paid for dutiable property.

Recommendation:

ASFA recommends that the provisions make it clear that the 'excess GST' is not GST for the purposes of determining the dutiable value of property under Duties legislation.

Pricing supplies

Under the provisions of the Exposure Draft, a supplier will not be entitled to a refund of overpaid GST, where the GST has been 'passed on' to an unregistered recipient unless the recipient has been reimbursed. In such cases, the GST will be treated as always being 'GST payable'.

The phrase 'passed on' is not defined in the Exposure Draft, however the Explanatory Memorandum to the Exposure Draft states that an:

1.46 An amount of GST is generally taken to have been passed on if it has been included in the price of a supply, even if that amount is not separately identifiable or disclosed. The issuing of a tax invoice (including a recipient created tax invoice) will be strong evidence that GST has been passed on.

1.48 GST may have been passed on even though a tax invoice has not been issued, or does not specifically or separately identify the GST component or is not a valid tax invoice for the purposes of the GST Act.

Proposed section 36-5(3) provides that the issue of a tax invoice is prima facie evidence that the GST has been passed on. 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 on the invoice.

We consider that in treating tax invoices as prima facie evidence that GST has been passed on, suppliers who are not entitled to a refund of GST may be at a competitive disadvantage. This is on the basis that a 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.

The current interpretation of 'passed on' may therefore result in an unfair outcome where a taxpayer is not entitled to a refund and has priced supplies in a certain way, and incorrectly treated those supplies as taxable.

The concept of GST being 'passed on' assumes that the GST payable by a supplier on a taxable supply is always charged to a customer and that the cost of GST incurred by an input taxed supplier on its purchases is always built into the price of its supplies. However, these assumptions do not reflect commercial reality in many circumstances. For example, the pricing of financial supplies varies significantly and can be complex. ASFA considers it inappropriate and incorrect to apply a broad assumption that input taxed financial suppliers have included the cost of GST on purchases into the prices of their supplies. This needs to be established on a case by case basis.

For example, where GST is mistakenly applied on a supply to a GST registered entity that makes input taxed financial supplies (such as a superannuation fund), no refund of GST can be obtained and reimbursed to the entity in any circumstances. This provides a windfall gain to the Commissioner at the expense of the entity that has borne the cost of the mistakenly charged GST. As well as being inequitable, this is contrary to the Commissioner's current practice in exercising his discretion. ASFA suggests that this could be rectified by amending the exception in section 36-5(2)(b) such that it is not limited to entities that are neither registered nor required to be registered.

Recommendation:

That the interpretation of 'passed on' be reconsidered.

Recommendation

That the scope of the exception in section 36-5(2)(b) be broadened.

Removal of the Commissioner's discretion

As detailed earlier, we understand the need for clarification surrounding the operation of the provisions relating to GST refunds, particularly the Commissioner's discretion under section 105-65 of the TAA.

The Exposure Draft proposes to remove the discretion entirely and removes any right to a refund, except where specific conditions are satisfied. We consider that removing the discretion entirely will significantly reduce the ability of taxpayers to obtain refunds where there would be no windfall gain and that the proposal goes far beyond the stated purpose of clarifying the law and aligning provisions relating to GST refunds with the self-assessment system.

As discussed above, the amendments are likely to result in taxpayers being denied legitimate refunds where excess GST has been paid, despite the fact that there is no windfall gain. It is therefore important that the Commissioner retain his discretion to refund excess GST to ensure that taxpayers receive refunds of overpaid GST where appropriate, for example, where the taxpayer otherwise does not satisfy the provisions but no windfall gain would result.

We therefore suggest that the Commissioner retain his discretion to allow refunds of excess GST in appropriate cases, for example, where legitimate refunds are denied and there is no windfall gain accruing to the taxpayer.

Recommendation:

That the Commissioner be given a discretion to pay a GST refund in cases where the operation of the law would not otherwise achieve a 'GST neutral' outcome.

* * * *

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

Yours sincerely

Margaret Stewart



General Manager, Policy and Industry Practice