

14th September, 2012



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Dear Sir/Madam,

Re: ANRA submission - Exposure draft on GST refunds

The Australian National Retailers Association ("ANRA") 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.

In the following submission, ANRA has limited its comments to the practical application of the Exposure Draft that have the potential to affect its members, and the broader business community.

About ANRA

ANRA represents the interests of Australia's leading national retailers, across the full spectrum of retail products and services. Members of ANRA include household names in supermarkets, department stores and specialty retailers. Combined ANRA members account for more than \$100 billion of retail turnover and directly employ nearly half a million Australians.

Executive Summary

In particular, we consider that there are a number unintended consequences of the Exposure Draft ("ED") as currently drafted that require further consideration, including the following:

- the ED does not take into account issues that arise where a registered recipient is entitled to a reimbursement of overcharged GST from the supplier, but the supplier is not entitled to a corresponding refund of excess GST payable;
- the ED would apply equally to deny a refund to a taxpayer that has miscalculated GST under the reverse charge provisions in Division 83 or Division 84;
- 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 into account different ways 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. In these cases, the supplier will suffer a loss of margin as they would effectively remit GST to the ATO out of their margin. A GST refund in these circumstances would not result in a windfall gain to the supplier, but they would still be denied a refund under the Exposure Draft as currently drafted. In these circumstances, the supplier will suffer a competitive disadvantage and a loss of margin;
- Where an invoice for a mixed supply includes an amount of overcharged GST, the approach to determine the GST applicable to each portion of a mixed supply as outlined in the draft ruling GSTR 2012/D3 could not be applied. This is on the basis that the recipient would not be able to determine the extent to which a mixed supply and other supplies in a transaction

are taxable where GST is treated as always being payable and there is no adjustment note issued by the supplier; and

- *Note 2* under section 36-5 of the ED attempts to preserve ITC entitlement for recipients for overpaid GST where the GST has been 'passed on' by treating the excess GST as being payable for the purposes of the section 11-25 of the GST Act. However, as the excess GST may not be 'consideration' for a taxable supply, there would not be a creditable acquisition for the purpose of Div 11 and therefore no corresponding ITC.

We recommend that the above issues be considered and that the Commissioner retain his discretion to pay refunds where appropriate, for example, where a taxpayer does not satisfy the requirements of the proposed Division 36, but there is no windfall gain to the taxpayer.

For clarity, ANRA does not support amendments that would permit the retailer obtaining windfall gains – but we feel the following should be considered in avoiding adverse consequences from the proposed legislation.

Amendments relating to GST refunds

We understand that the ED was released to address the uncertainty that has arisen surrounding the Commissioner's discretion to issue refunds of overpayments of GST, particularly since the introduction of the self assessment system under section 105-65 of the TAA.

We also understand that the amendments were an attempt to implement recommendation 45 of the Board of Taxation's *Review of the Legal Framework for the Administration of the GST*, announced by the Government in the 2009-10 Budget.

Whilst we agree that the operation of the Commissioner's discretion required clarification and the provisions relating to GST refunds since the self assessment system was introduced, our view is that the ED prevents taxpayers from seeking refunds of GST in legitimate circumstances, impacts on the ITC entitlement of recipients and produces unfair outcomes. Indeed, the proposed amendments appear at-odds with the Board of Taxation's recommendation in this regard.

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

Competitive neutrality

As currently drafted, the ED prevents a supplier being entitled to a GST refund 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'.

Where the recipient is not entitled to full ITCs, the transaction will not be 'GST neutral' as the recipient will include the overpaid GST into its price of supplies. The overcharged GST therefore "cascades" through the supply chain effectively creating a tax on a tax.

In addition there may be circumstances where the recipient has a right to a reimbursement of overcharged GST meaning the supplier will then bear the cost of the GST. The recipient may have a contractual right to a refund of the overpayment or the contract may only allow for a gross up of GST payable in relation to "taxable supplies". The ED only makes the overpayment an amount of GST payable: it does not make it consideration for a taxable supply. Typical GST gross up clauses in commercial contracts only allow a gross up for the "value" of taxable supplies. Therefore the supplier, although unable to recover the overpayment, may have no right to a reimbursement from the recipient, or may have to refund the recipient any overcharged amount.

In addition, a registered recipient may have a right to recover any overpayment under consumer protection laws (such as the Competition and Consumer Law) or equitable laws of restitution (such as where there is a separate amount of GST payable and the consideration fails).

We consider that this places 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.

Pricing supplies

Where GST has been 'passed on' to an unregistered recipient, the supplier will not be entitled a GST refund unless they reimburse the recipient. The Explanatory Memorandum describes the phrase 'passed on' as it is not defined within the Exposure Draft itself and states that:

1.4.6 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.

The effect of this, combined with proposed section 36-5(3) is that a tax invoice will be 'prima facie' evidence that GST has been passed on, regardless of whether the price charged to a customer includes a GST component or not. Where the price is effectively a 'GST exclusive' price, having not been grossed up to include a GST component, the supplier would effectively be funding the payment of GST out of their margins where they would not be entitled to a GST refund.

To illustrate, consider the situation where a retailer buys Panadol for \$1.50 and then sells it for \$2.00 with no GST. The margin is 50c. Then as part of a marketing campaign the price of Panadol is reduced to \$1.90. However, due to a mistake, the retailer included GST in respect of this product. Therefore, in circumstances where the retailer expected to make 40c of margin ie. \$1.90 - \$1.50, the retailer actually only made 23c margin ie. \$1.90 - \$1.50 - GST of 17c. Although GST was included on the tax invoice, the customer was not charged any additional amount. The retailer lost margin merely by incorrectly marking the product as taxable and would therefore not make a windfall gain if it was to receive a refund in these circumstances. This is consistent with current practice of providing refunds in these circumstances.

We consider that this places suppliers who mischaracterise supplies 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 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.

We consider that it would be 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 made to a recipient who could claim full ITCs.

For clarity, ANRA does not support legislation that would afford the retailer to be unjustly enriched.

Mixed supplies

Example 2 of GSTR 2012/D3 *Tax Invoices* indicates that a tax invoice will be treated as valid if the GST payable and the extent to which each supply listed is a taxable supply can be ascertained from information contained in the invoice and the items that are taxable supplies are clearly labelled.

Where there has been a change in the characterisation of one or more of the supplies listed on an invoice, for instance, where a supply (or a portion of) a supply was incorrectly treated as taxable, this approach cannot be applied. This is because the recipient would not be able to determine the extent to which a mixed supply or other supplies in a transaction are taxable.

As excess GST is treated as always being payable for the purposes of section 17-5, where the GST has been passed on and the recipient is registered or required to be registered, there will be no 'adjustment event' for the purposes of Division 19 where for instance there is a change in the extent to which a supply is a taxable supply and subsequently no adjustment to the net amount under section 17-10.

Without an adjustment event occurring, there is no requirement that an adjustment note be issued under section 29-75 of the GST Act. Therefore, without an adjustment event, a recipient would be unable to determine the GST applicable to mixed supplies where the GST component of each individual supply is not provided and a total amount is included instead.

Corresponding entitlement to ITCs

The ED attempts to preserve ITC entitlements for recipients who are overcharged GST through the inclusion of *Note 2* under section 36-5. This states that where the excess GST has been 'passed on' to an entity that is registered or required to be registered for GST, the entity may treat the excess GST as being payable for working out the amount of its ITCs under section 11-25.

Section 11-25 of the GST Act states that the amount of the ITC for a *creditable acquisition is an amount equal to the GST payable on the supply of the thing acquired. In order for an acquisition to be a creditable acquisition, the supply to the recipient must be a taxable supply and the recipient must have provided consideration for the supply.

It is our view that treating excess GST as being GST payable for the purposes of section 11-25 does not entitle the recipient to ITCs with respect to this overpaid GST amount where the supply is not a taxable supply. Nothing in the ED creates a taxable supply where there otherwise is not. Additionally, the overpaid GST amount may not be 'consideration' for a supply to the extent that the supply is correctly treated as being non-taxable. That is, even if the additional amount is recoverable from a registered recipient, that does not make it consideration for any particular supply.

Given this, a recipient who overpays GST on an acquisition will not be making a creditable acquisition to the extent that the overpaid GST relates to a non-taxable supply. Therefore, there is no entitlement to an ITC under section 11-25, even though the ED attempts to treat overpaid GST as GST payable for the purposes of this section. Without a creditable acquisition at the outset, section 11-25 cannot apply.

We consider that if a registered recipient is unable to claim an ITC for overcharged GST, then the ED cannot be seen as 'GST-neutral' where the GST is 'passed on' and the recipient is registered or required to be registered for GST.

Removal of the Commissioner's discretion

We understand that there is a need to clarify for the operation of the Commissioner's discretion to issue GST refunds under section 105-65 of the TAA. However, we consider that it is unnecessary and highly restrictive that the discretion is removed effectively in its entirety.

This leads to a situation where a taxpayer is only entitled to a refund where specific conditions are satisfied and taxpayers would not be entitled to a refund even where there would be no windfall gain. In this respect, we consider that removing the Commissioner's discretion goes beyond clarifying the law and aligning provisions relating to GST refunds with the self assessment system.

We therefore consider that it is important the Commissioner retain his discretion to allow refunds of excess GST in appropriate cases, such cases being where legitimate refunds are denied and there is no windfall gain accruing to the taxpayer.

Thank you for considering our views in this matter. Should you have any questions about ANRA's position please contact Mr Russell Goss on (02) 8249 4520 or rgoss@anra.com.au

Sincerely,

A handwritten signature in black ink, appearing to be 'MO', written in a cursive style.

Margy Osmond
Chief Executive