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Dear Sir or Madam

CONSULTATION ON GST AND DIGITAL PRODUCTS EXPOSURE DRAFT

Australia Post is a Commonwealth government owned Government Business Enterprise employing over 36,000 employees and operating through over 4,400 post offices nationwide and a comprehensive online retail offering.

Australia Post's retail network offers a broad range of products and services that could potentially be impacted by the *Tax Laws Amendment (Tax Integrity: GST and Digital Products) Bill 2015 (ED)* and is continually expanding its offering as new products become available. We welcome the opportunity to provide comments on the ED. All legislative references are to the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* except where indicated otherwise.

1. Executive Summary

Australia Post requests the following:

- Transitional rules are introduced into the ED.
- The ED is amended to introduce clear provisions which determine which entity is liable for GST in the circumstances where section 85-55 could apply to more than one entity to avoid double taxation and to remove uncertainty.
- The ED is amended to make it clear that a retailer of digital content cards is not liable for GST in relation to inbound intangible supplies. If it is not practical to amend the ED, we request that comments are made in the explanatory memorandum to make it clear that a retailer is not liable.
- The explanatory memorandum to the ED contain as much practical guidance as possible in relation to determining whether a supply is made to an Australian Consumer. Australia Post also requests that proposed section 84-100(a) is amended to remove the reference to "all."

2. Transitional Rules

The ED sets out that the amendments apply to supplies *made on or after* 1 July 2017.

We submit that transitional rules need to be incorporated into the ED to provide certainty to potential taxpayers in relation to when GST applies.

Under the *A New Tax System (Goods and Services Tax Transition) Act 1999 (the Transition Act)*, a number of provisions dealt with the issue of when a supply is made. We submit that similar provisions would be helpful in the ED. For example, is the supply of digital content made when the download

occurs? Further, where a supply such as a subscription is made, is the supply made at the commencement of the subscription or throughout the period?

As discussed below, Australia Post is a retailer of digital content cards. If it is determined that Australia Post is required to account for GST (under section 84-55 of the ED discussed below), is the supply made (ie taxing point) when the digital content card is sold? Or is it the time when the user uploads their credit or accesses the digital content (neither of which Australia Post will know)?

Further detail/confirmation should be provided in the ED in relation to situations where the supply of the digital content cards are made prior to 1 July 2017.

If Australia Post is liable to GST due to the operation of proposed section 84-55 (discussed in more detail below), it is likely that it will be required to renegotiate legal and commercial arrangements with the underlying supplier (or a number of parties in the supply chain). Australia Post is concerned that there could be circumstances where it is unable to appropriately renegotiate these arrangements to take GST into account. The absence of transitional rules for grandfathering contracts (like those that were included in the Transition Act) or a statutory provision permitting the application of the provisions of the ED to pre-existing contractual arrangements, may mean that intermediaries such as Australia Post are not able to adequately address the GST cost. We note that Division 2 of the Transition Act was introduced to shift the onus of remitting GST to the recipient of a supply where appropriate changes to the legal arrangements between the parties were not able to be renegotiated. In the context of the proposed changes, the introduction of a transitional measure such as statutory ability to pass on any GST cost or alternatively transitional protection for intermediaries to prevent section 84-55 applying until such time as the contractual arrangements can be amended to take into account any GST (ie the supplier/content provider has the liability), would assist in ensuring intermediaries such as Australia Post are not bearing the GST cost.

Australia Post requests that transitional rules are introduced into the ED.

3. Intermediary provisions

On the basis that Australia Post carries on an enterprise in Australia, we consider that the main implications arising from the introduction of the proposed ED for Australia Post is the intermediary provisions contained in proposed section 84-55 of the ED. That is, in some circumstances the liability that arises will be shifted to the operator of an electronic distribution service.

Australia Post is one of Australia's biggest retailers. Australia Post serves both the business and consumer market.

While it is difficult to predict the exact nature of products and services that Australia Post will supply into the future, on the basis of existing products, we consider that section 84-55 of the ED could potentially apply to Australia Post in relation to the sale of digital content cards.

Australia Post sells digital content cards through its retail outlets (and to a limited extent on its online store). These cards are largely considered to be Division 100 vouchers (and therefore GST is not payable when the card is sold but rather, when it is redeemed). There are some cards that are not considered to be Division 100 vouchers because they are considered to be more in the nature of subscription cards (and GST is payable when the card is sold). In some circumstances Australia Post is a distributor of the card and in other limited circumstances the arrangement involves a buy/sell meaning that Australia Post is the principal in the arrangement.

The cards are usually distributed through an Australian entity and it is this entity that has the relationship with the ultimate content provider or store. We refer to this entity as the Card Distributor. Appendix A sets out the structure.

Some of the content providers have Australian operations and some do not ie some would be “inbound intangible supplies” (as defined in proposed section 84-60) but others are made through an enterprise that is carried on in Australia.

In relation to cards that are not Division 100 vouchers, we consider that there is a risk that section 84-55 of the ED applies to require Australia Post to account for GST on the sale of the cards instead of the supplier (ie the content provider). This is because:

- Australia Post could be seen as the operator of an electronic distribution service by virtue of it selling and activating the digital content cards (although the distributor does take a role in activation); and
- it is unlikely that section 84-50 would operate to relieve the intermediary of the GST liability.

Therefore, where Australia Post sells a digital content card for an inbound intangible consumer supply, there is a potential that Australia Post has a GST liability. We do not think this was the intention of the ED and this outcome could be an unintended consequence which we consider needs to be clarified.

It is also possible that the Card Distributor of the card is also an operator (for the same reason outlined above) and also liable under section 84-55. This would result in double taxation which is clearly not the intention of the proposed legislation.

It is Australia Post’s view that as a retailer of digital content cards, it should not be liable for GST on the subsequent use of those cards. ***Australia Post requests that the EM is amended to introduce clear provisions which determine which entity is liable for GST in the circumstances where section 85-55 could apply to more than one entity to avoid double taxation and to remove uncertainty.***

Australia Post takes its tax obligations seriously and if it is determined that Australia Post is required to account for GST in relation to the supply of digital content cards provided by offshore suppliers it will comply. However, Australia Post does not think it was intended as a retailer of digital content cards to be required to account for the GST in relation to the supply of the underlying content.

We do not consider Australia Post should be liable in these circumstances for the following reasons:

- The content provider is better placed to determine the residency status of the recipient eg is the recipient an Australian consumer? The consumer will be required to enter various details as part of any content provider’s onboarding process and this will provide more comprehensive information to assist in determining whether the customer is an Australian consumer.
- Australia Post is not practically able to obtain information in a retail environment which will enable it to determine whether the customer is an Australian consumer.
- The content provider will be privy to far more information about the consumer’s physical location when they access digital content (wifi location, IP address etc).
- The content provider is the entity that is capable of determining where the supply is done (which could be relevant in relation to the application of the GST-free provisions).
- The potential inconsistencies between the supply of an inbound intangible product and similar products distributed for Australian suppliers (ie where Australia Post does not have the GST liability). There will be difficulties for Australia Post in distinguishing between the local content providers and the offshore content providers.

The ED explanatory memorandum states the following:

“1.9 Shifting responsibility for GST liability to operators minimises compliance costs as operators are generally better placed to comply.”

We do not consider that Australia Post in relation to the sale of digital content cards is better placed to comply.

We understand the reasons for including intermediary provisions into the ED in relation to collection and administration. This is especially the case in situations where there are a high volume of transactions with a vast number of suppliers (see para 1.35 & 1.36 of the EM). The use of an intermediary in these situations appears appropriate ie the operator/intermediary has better knowledge and is in a better position to comply. However, in application to Australia Post and the digital content cards, there is no need to require Australia Post to account for the GST. In this regard, we do not consider the provisions in 85-55 should apply in circumstances where Australia Post sells non-Division 100 digital content cards

Australia Post requests that the ED is amended to make it clear that a retailer of digital content cards is not liable for GST in relation to inbound intangible supplies. If it is not practical to amend the ED, we request that comments are made in the explanatory memorandum to make it clear that a retailer is not liable.

4. Division 100

Division 100 deals with a range of products but most typically vouchers/cards that are used in a retail context. There are a growing number of cards which are not used for purchasing goods, rather are used to access digital content whether it is through an online music store, app store, gaming environment or television. It is difficult to know the types of products that will be offered into the future, but it is likely that the digital content cards will grow in prominence.

As outlined above, the ED could capture the sale of digital content cards and intermediaries such as retailers could be required to account for GST on the sale. For example, the sale of a non-Division 100 voucher (eg a card that is considered to be a subscription card rather than a face value voucher) by an intermediary may be subject to GST at the point of sale if it is regarded as an “inbound intangible supply”.

This outcome would mean a different treatment for Division 100 vouchers versus non-Division 100 vouchers which represents a compliance risk. For example, the sale of Division 100 vouchers would be subject to GST only at the time of redemption by the underlying content provider.

Australia Post considers that there should be consistency and all products should be treated the same way. For example, digital content cards should either all be taxed upfront or all on redemption. Difficulties will arise where there is inconsistency which may bring uncertainty (taxpayers may have different views regarding the timing of the GST payable). It is Australia Post’s view that Division 100 should be expanded to include all digital content cards. This approach is also appropriate given the different arrangements in place for the sale of these cards eg buy/sell versus distribution.

As prepaid digital content cards are likely to grow in prominence, it is important to address this issue prior to the implementation of the new digital rules in 2017. Having a fundamental difference in the GST treatment of Division 100 vs non-Division 100 cards will cause complexities for digital content providers post 1 July 2017, as they will not know whether GST has already been remitted on particular payment mechanisms used to purchase Australian digital content.

Australia Post requests that the Government undertakes a comprehensive review of Division 100 prior to the introduction of the ED and make amendments to broaden the scope of Division 100 to ensure that it applies to the sale of all digital content cards.

5. Australian Consumer

As noted above, we consider that the supplier of the digital content is best placed to determine whether the recipient of the supply is an “Australian consumer”.

If proposed section 84-55 of the ED applies to retailers like Australia Post, Australia Post will need to determine a supply is made to an “Australian consumer” (proposed section 9-25(5)(d) of the ED).

In a retail context we consider that it will not be possible to determine in real time whether the recipient of the supply is an Australia consumer. In this regard Australia Post considers that it will most likely be necessary to make a number of assumptions regarding the types of products sold eg they would only be sold to consumers and on the basis that the sale of the digital content card is made in Australia, the recipient of the supply is an Australian resident.

If these assumptions are not made, it will be necessary to obtain information on the income tax residency status of the customer, whether the customer is to be the eventual user of the digital content card and also whether the customer or the eventual user is registered for GST. It will practically be impossible to obtain this information in real time.

For example, “Australian resident” is defined in the GST Law as follows: “a person who is a resident of Australia for the purposes of the ITAA 1936.” In relation to an individual, the test involves effectively four tests, (residence according to ordinary concepts, the domicile and permanent place of abode test, the 183 day test or the Commonwealth superannuation fund test.)

In a retail environment, it is practically very difficult to obtain information from customers and in any event, given the complexity of the test, Australia Post has no way of verifying the information obtained from customers. We consider that it is not practical to ask every customer buying a digital content card whether the customer is an Australian resident. We are concerned that under section 84-100 of the proposed ED, there is an expectation that retailers will ask for this information in order to show that they have taken “all” reasonable steps. We submit that this is not practical and particularly onerous. In any event, even if we did ask customers whether they are Australian residents, we have no way of verifying the information. As noted above, there is also the question of whether the purchaser of the digital content card is the eventual user.

In relation to the GST registration element of the definition of “Australian consumer”, while at the moment the majority of the digital content cards would probably be for consumers and therefore it may be possible to make assumptions about the products sold, we cannot predict going forward the types of products that will be sold through Australia Post. In this regard, it may not be appropriate to make assumptions regarding the types of products being sold and therefore it will be necessary to determine if the recipient is an “Australian consumer” each time a sale is made. It is possible that products could be sold to small businesses. In these cases, it will be necessary to determine if the recipient is registered for GST. There will be many instances where a recipient holds an Australian Business Number (ABN) but is not registered for GST. It will be very difficult to differentiate between GST registered and non-registered businesses in real time (ie at the point of sale). It might be the case that customers will give incorrect information in relation to GST registration if it means that GST will not be added to the price (although it is not usual for GST to be added to the price in a retail environment, it may be possible). In any event, customers may not intentionally give incorrect information but as part of the point of sale process, it might be difficult to accurately capture the GST registration status of the customer. It seems unreasonable to require taxpayers to check the GST registration status of recipients.

Section 84-100 of the ED requires the taxpayer to take “all” reasonable steps to determine that the customer is not an Australian consumer. All reasonable steps may mean that there is an expectation that a check is done of the ABN provided by the customer to verify that it is registered for GST. This is not possible in a real time retail environment.

We note that para 1.23 of the EM uses the phrase “reasonable steps” while proposed section 84-100 sets out “all reasonable steps.” We consider proposed section 84-100 should refer to “reasonable steps.”

Australia Post requests that the EM to the ED contain as much practical guidance as possible in relation to determining whether a supply is made to an Australian Consumer. Australia Post also requests that proposed section 84-100 (a) is amended to remove the reference to “all.”

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Dimech', with a stylized flourish at the end.

Peter Dimech
Head of Taxation

Appendix A

Appendix A: Digital supplies paid by way of gift cards

