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

By email: GSTadministration@treasury.gov.au

Dear Sir or Madam

SUBMISSION ON EXPLANATORY DRAFT LEGISLATION – COMMISSIONER’S ABILITY TO RETAIN REFUNDS PENDING VERIFICATION CHECKS

CPA Australia represents the diverse interests of more than 139,000 members in 114 countries throughout the world. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders.

Against this background we now provide this submission concerning the Exposure Draft Legislation and accompanying materials on the Commissioner’s ability to retain refunds pending verification checks issued on 15 February 2012. This submission is made not only on behalf of our members but also for the accounting profession and in the broader public interest.

CPA Australia believes that any finalised legislation on refund verification checks must be designed to carefully strike the correct balance between the requirement that risks to the revenue are appropriately minimised and ensuring that the cash flow and financial viability of compliant business taxpayers are not adversely impacted. This latter consideration is of crucial importance given the current limited borrowing capacity of many small to medium sized businesses still grappling with the impact of the global financial crisis.

We are concerned that this balance is not achieved if the legislation is enacted as drafted as the ATO will have the power to withhold refunds for up to 90 days from the date a Business Activity Statement (BAS) is lodged, and that this 90 day period can be extended at the discretion of the Commissioner of Taxation taking into account factors based on a subjective assessment by the Commissioner.

In our view such an outcome exceeds the refund verification practices previously applied by the Commissioner prior to the decision of the Full Court of the Federal Court in *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCAFC 142.

Whilst we recognise that some refund verification reviews by the Australian Taxation Office (ATO) will in certain circumstances take a considerable period of time, we are nonetheless concerned that the current exposure draft legislation potentially imposes a regime where some refunds will be unreasonably delayed to the detriment of both taxpayers and their advisers.

We also note that the proposed legislative amendments are not limited to refunds of Goods and Services Tax (GST) upon lodgement of a BAS but will extend to all other refunds payable to the Commissioner. Whilst this submission is principally concerned with the impact of the exposure

draft legislation on BAS refund verification checks we hold similar generic concerns in relation to the application of the proposed legislation on the verification of other tax refunds.

We make the following specific comments in respect of the exposure draft legislation and accompanying materials:

- In our view the Commissioner should be obliged to provide notice that he or she intends to withhold an amount within 14 days of receiving the information or the RBA surplus arising. This is a reasonable period for the ATO to ascertain whether they need to verify any information presented by the taxpayer. The current proposal for the Commissioner to retain funds for up to 30 days (in certain situations) without notifying the taxpayer represents a significant departure from the existing requirement to provide a refund within a 'reasonable time'. Further, a 30 day period will often extend into an additional GST period (for monthly reporting entities), and consequently would have a significant impact on a taxpayer's cash flow;
- The Commissioner has a right to retain a BAS refund under proposed section 8AAZLGA (1) of the Taxation Administration Act (1953) (the TAA (1953)) if the Commissioner is satisfied that it would be reasonable to require verification of the information in the BAS. However, there are no guidelines on matters which should be taken into account by the Commissioner to determine whether it is reasonable to require verification under this provision. Moreover, the verification is not limited to input tax credit claims but can relate to any part of the information in the BAS.

In our view the Commissioner's initial decision to retain a BAS refund under proposed section 8AAZLGA (1) of the TAA (1953) must be subject to a reasonableness test having regard to the list of factors under proposed section 8AAZLGA(8) that apply before an extension of the refund verification period can take place under proposed section 8AAZLGA(5).

Taxpayers should also be able to object to this initial decision in an identical manner to a later decision to retain the funds. In other words, proposed section 8AAZLGA(9) should be amended so that a taxpayer can object to a decision under both proposed sections 8AAZLGA(1) and 8AAZLGA(5). Without this amendment a taxpayer will only be able to challenge an initial decision of the Commissioner through existing judicial review procedures, such as a writ of mandamus. This would require resort to the Federal Court, and consequently be expensive and time consuming in most circumstances. In our view, subjecting both decisions to the objection process will enhance the transparency of the Commissioner's decision making and consequently increase taxpayer confidence in tax administration; and

- If the Commissioner decides to retain the BAS refund, the taxpayer must be advised of that decision before the day that interest would otherwise become payable. The exposure draft legislation should be amended to specify the date on which the Commissioner must commence his enquiries to verify the information in the BAS in order to avoid unreasonable delays in the issue of refunds. Moreover, proposed subsection 8AAZLGA(3) should be amended to expressly require the Commissioner to issue the refund once verification to the entitlement to the refund has been determined as the current wording in the provision that the issue of the refund be deferred until it is "no longer reasonable to require verification" may be interpreted as referring only to the original decision to verify rather than successful verification.

Should you have any questions regarding this submission, please do not hesitate to contact me on (03) 9606 9860 or via email at mark.morris@cpaaustralia.com.au.

Yours sincerely

A handwritten signature in black ink that reads "Mark Morris". The signature is written in a cursive, slightly slanted style.

Mark Morris FCPA
Senior Tax Counsel