

From: Noel Beharis
Sent: Wednesday, 15 February 2012 6:52 PM
To: GST Administration
Subject: Submission regarding the Commissioner's ability to hold refunds of tax payable.

Dear Treasury

We wish to make the following submissions concerning the exposure draft legislation regarding the Commissioner's ability to hold refunds of tax payable

The draft concerning the Commissioner's ability to withhold GST refunds effectively allows the Commissioner an open ended discretion as to whether a taxpayer will ever receive a refund at all. The draft allows the Commissioner to take 60 days and then, on giving 14 days notice at the end of that 60 day period, hold the amount of the refund indefinitely. The Taxpayer's right of appeal only comes at the end of the 74th day since the commencement of the review. Even so, then if the Taxpayer issues proceedings (which in many cases will not be economically viable to do), the refund could be delayed until the matter is brought before the AAT or Federal Court.

What if the refund is a "relatively" small amount of \$10,000? None of the above process is worth pursuing. The Amount of GST would have to be a significantly large amount to warrant such action. As such the Commissioner could effectively withhold refunds of small GST amounts indefinitely as taxpayers would not be able to afford to challenge the ATO.

As such, we submit that there be a monetary floor on the refund before Commissioner can delay the refund beyond 14 days and for the commencement of the 60 day period delay period applies. In our view the floor should be set at \$100,000 (indexed annually) before the Commissioner can delay the refund beyond the 14 day period unless the Commissioner suspects fraud or evasion. The qualification for fraud or evasion would address the prospect of trying to group refund claims under the \$100,000 limit in multiple BAS statements. If the Commissioner did suspect fraud or evasion, then he could withhold the refund for the 60 day period provided he gave the taxpayer notice of that decision. We do not consider the monetary floor to constitute a materially adverse threat to the revenue.

GST was founded on the premise that taxpayers could reliably budget their cash flow based on the expectation that GST would be refunded to them. A delay in refunding GST can place taxpayers at risk of trading insolvent as there is no reasonable expectation that GST will be refunded to them at any point in time.

There is no recourse by the taxpayer to have the refund paid to them at any time past 74 days and even so, the delay of the judicial process can mean that the refund can be withheld for significantly longer.

The legislation will encourage Taxpayers will seek to delay the claim of any refund pending the payment of GST of an equal or greater amount so that there is no refund claim at all.

A delay in the payment of a refund also raises the prospect of whether the matter then becomes an issue of civil claim against the Commonwealth Government if the Commissioner unreasonably withholds a GST refund for such a period of time that would cause a company to become insolvent and suffer damages.

We submit that if the Commissioner does withhold a refund beyond the 14 day time period, the Commissioner should be required (as is currently the case with Receivers and Managers) to provide an undertaking as to damages to be caused to taxpayers by the delay if the delay in paying the refund is found to be unjustified.

We highlight that we consider that it is a shortcoming in the legislation that there is no independent review permitted in the period prior to 74 days that would allow taxpayers to seek an early payment of the refund. The matter goes to the heart of business entity cash flow and could potentially jeopardise the ability of businesses to trade.

Arm's length trade creditors of a trading business do not allow their debts to take 75 days before repayment. There is no reason why the Commissioner should not be treated in the same way as any other trade creditor and be required to pay trade debts within ordinary trading terms which is typically 14 days.

There are no safeguards placed in the amendments for taxpayers. Specifically:

- § the section would apply to all taxpayers, regardless of whether the relevant behaviour is associated with fraud or evasion (as was alleged to be the case in the Multiflex decision or merely a consequence of the taxpayer taking a different view of the law to the Commissioner;
- § the "incorrect information" may be insignificant ie identifying a small error in the calculation of the entire amount involved would empower the Commissioner to withhold the entire refund;
- § the phrase "reason to believe" is broad and could be easily established by the Commissioner, even without any probative evidence; and
- § as the Commissioner's decision to withhold cannot be challenged on any grounds for at least 60 days, during that time, he may withhold a refund from any taxpayer without having to establish that he meets the requirements of the section

Prior to the amendment, and post Multiflex's decision, the Commissioner has done, in at least one instance that we have direct knowledge of, paid the GST refund, issued an amended assessment seeking to recover the refund and Garnisheed the bank account the refund was paid into to recover the GST that was paid so that the taxpayer could not access the refund. Those three steps occurred simultaneously, in the space of one day. This has been a matter of complaint made to the ATO and the matter is still unresolved. The documents and correspondence in substantiation of the circumstances of this matter can be provided to Treasury on request.

We stress that the review officers of the ATO in response to our complaint have acted in a professional manner. The point that we wish to make is that, the risk of this "technique" of

protecting the revenue occurring again is still relevant and is not addressed in the legislation.

Given the armoury of the Commissioner's remedies, we dispute that the Revenue is ever at risk even under the current regime which we highlight is a matter of fact and has been done by the ATO. Further, the Commissioner can by-pass the process of challenge by taking the same course of action under this legislation once the 60 day period has expired.

Income Tax issues.

We submit that if the Commissioner refuses to refund GST, under the Income Tax Assessment Act 1997, a taxpayer should be permitted to claim the disputed refund as a bad debt or an increase in the cost base of a capital asset that is purchased. We submit that consequential amendments should be made to give effect to that position.

Without such amendments, taxpayers have no guidance as to how to treat the non payment of the refund in their income tax return if the dispute spans tax years to resolve.

We are happy to discuss the matter with Treasury at any point in time. If there are any queries in relation to the submission, then please contact the writer on 03 9605 9450.

Kind Regards
Noel Beharis

Noel Beharis | Director Tax Technical Services
Dominion Private Clients
Level 33, 360 Collins Street, Melbourne VIC 3000
GPO Box 2183, Melbourne Vic 3001
t +61 3 9605 9450 **f** +61 3 9605 9599
e noelb@dominionpc.com.au **w** www.dominionpc.com.au