Genesis Accounting Pty Ltd
Chartered Accountant

30 May 2012

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

Attention: Joanne Croft

By email: gstpolicyconsultations@treasury.gov.au

Dear Sir,

A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No.)

By way of background our firm provides GST consulting services to local government. We have been engaged by the NSW Local Government and Shires Associations (LGSA) to prepare a Class Ruling in relation to the taxation of taxes, fees and charges derived by all local councils in NSW. The Class Ruling application has been submitted to the Australian Taxation Office. We have also been engaged by numerous councils in Queensland to prepare private binding rulings, also in relation to the taxation of taxes, fees and charges derived by those particular local councils in Queensland. None of those private binding ruling applications have been lodged as yet.

We refer to the draft Regulation announced on 2 May 2012 and offer the following comments. Our comments are purely those of this firm and do not necessarily reflect the views of the LGSA or any other local government clients. Time has not permitted a proper opportunity for those entities to make any comment on the submissions contained herein.

References to the Act are references to the A New Tax System (Goods and Services Tax) Act 1999

Overall comment – "regulatory"

It seems to us that the thrust of the proposed regulations is to change the basis of exemption such that regulatory fees and charges are exempt and non regulatory fees and charges are taxable.

This new basis makes some sense and could have been the basis of the current regulations. However we are concerned about:

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1. the lack of a definition of “regulatory” in the proposed regulations; and
2. confusion that may be caused by the following paragraph in the Explanatory Statement that accompanied the proposed regulations:

> The term 'regulatory' is intended to capture those fees and charges imposed by a government agency, where that agency is legislatively empowered or required to make the relevant supply and the supply is to satisfy a regulatory requirement.

The word ‘empowered’ implies that a council has the power or ability to charge a fee but does not necessarily have to make a charge. The words ‘required to’ imply a statutory obligation to make a charge in relevant circumstances.

However the operation of these words seems to be qualified by the words ‘and the supply is to satisfy a regulatory requirement’. These words imply that a regulatory charge can only be one that is required to be made.

For example – a council imposes a ban on the consumption of alcohol in the city mall. A wine company applies to council for an exemption from that requirement for 2 hours on a Saturday afternoon for a wine tasting. The application is to be accompanied by an application fee of $10. There is no regulatory requirement that we are aware of that requires a council to impose a fee in those circumstances. However it seems to us that the imposition of that fee is regulatory in nature. The imposition of a $10 fee in those circumstances would not be commercial in nature. This $10 fee should not be subject to tax however it might be taxed on a reading of the abovementioned paragraph as it is not necessary for a council to impose a fee in the circumstances of this example.

Our recommendations in relation to ‘regulatory’:

- As a minimum, the words ‘and the supply is to satisfy a regulatory requirement’ be removed from the final version of the Explanatory Statement.
- A definition of the term ‘regulatory’ be included in the legislation.

Relationship of Div 81 legislation to the Div 81 Regulations

Clarification of the way sub sections 81-10 (2) and (4) work together is required.

Under the current regulations if a council fee or charge was exempt from tax the most common reason would be because the fee or charge related to permissions or information. The questions that arise in our minds are:

- If a fee or charge is clearly for a permission does a council also have to consider whether it is non regulatory in nature.
- If a fee or charge is clearly non regulatory in nature does it also have to be for a permission (or an exemption, authority or licence).

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- If a fee is for the provision of information does it also then have to pass a double barrel test to be exempt – the provision of the information is of a non regulatory nature and also the supply is of a non regulatory nature.

Clarification of the way section 81-15 works is required.

If a fee or charge does not fall for exemption under sub sections 81-10(4) or 81-10(5) will it nevertheless be exempt under proposed regulation 81-15.01(1)(f) if it is clearly regulatory in nature.

If the view is that the 'regulatory in nature' fee is exempt is that because section 81-15 is headed "Other fees…" and the word Other means other than under 81-10(4) or 81-10(5). If this is correct please confirm that section 81-15 is providing for regulations to be enacted that exempt certain fees or charges even though they are not related to a permission, exemption, authority, licence or information.

Clarification of the words 'related to' and the proposed regulations.

Section 81-10(4) uses the words 'relates to' or 'relates to an application for'. Please confirm that in the absence of the proposed regulations these words mean that if a fee is exempt then another fee that relates to the exempt fee is also exempt.

For example assume council is permitted by relevant Local Government Regulations to charge a fee of $50 for the issue of a certificate relating to outstanding rates or a fee of $10 for a busker licence. We submit that under the current and proposed regulations these fees would be exempt. Council also allows applicants to receive their certificates and licences in a shorter time frame if they pay a $20 urgent application fee (also commonly known as a priority fee).

Clarification is required regarding the taxation of the urgent application fee.

We submit that under the current regulations no regulation impacts on the answer to the question. We submit that the urgent application fee is exempt because it 'relates to' the fee for the certificate, which is an exempt fee. Is this correct?

Assuming our submission above is correct and the urgent application fee is presently exempt and not affected by the current regulations what is the impact, if any, of the proposed regulations. Does the urgent application fee have to pass the 'regulatory in nature' test in order for it to continue to be exempt. Is an urgent application fee regarded as being regulatory in nature. Please confirm the way the proposed regulations would work in this example.

The principles considered in the above example extend to potentially hundreds of fees that fall under the administration fee or processing fee headings.

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Proposed Regulation 81-10.01 (f)

The proposed substitute paragraph (f) seeks to change the basis of exempting fees for the provision of information. We do not believe this regulation needs to be changed and will lead to confusion for councils. The proposed regulation taxes the provision of information if the provision of the information is of a non regulatory nature. The corollary is that if the provision of the information is regulatory then presumably it is exempt as it would not be caught by the taxing provision, provided it meets the other requirements of s81-10(5).

The current regulation only seeks to tax the provision of information if it is not required to be provided. The corollary is that if the information is required to be provided then presumably it is exempt as it would not be caught by the taxing provision, provided it meets the other requirements of s81-10(5).

The current regulation works well with the requirements of The Government Information (Public Access) Act 2009 (GIPA Act) which replaced the Freedom of Information Act 1989 (NSW) on 1 July 2010. The GIPA Act sets out what information is required to be provided to applicants. The GIPA Act requires a large volume of information to be given to applicants. Section 9 of the GIPA Act provides:

9 Access applications

(1) A person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 (Access applications) unless there is an overriding public interest against disclosure of the information.

Part 4 (Access applications) provides, in part:

41 How to make an access application

(1) An application or other request for government information is not a valid access application unless it complies with the following requirements (the ***formal requirements***) for access applications:

(a) it must be in writing sent to or lodged at an office of the agency concerned,
(b) it must clearly indicate that it is an access application made under this Act,
(c) it must be accompanied by a fee of $30,

Queensland has similar legislation that in a broad sense requires councils to hand up almost all of the records it holds.

The proposed regulation would tax the fee for the provision of information if the 'provision' of the information is non regulatory in nature. The word provision is confusing.

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Our recommendations, in order of preference:

- Don't change the current regulation
- Substitute the following words in the proposed regulation "if the provision of the information is of a non-regulatory nature" with these words "if the requirement to provide the information is of a non-regulatory nature". We believe the requirement to provide the information is regulatory in nature as, in the NSW case, a statute (GIPA Act) requires the information to be provided.

Proposed Regulation 81-10.01 (g)

See Overall comments above.

Proposed Regulation 81-10.01 (h)

Paragraph (h) seeks to tax a fee or charge for a supply by an Australian government agency where the supply may also be made by a supplier who is not an Australian government agency. We understand this proposed regulation was drafted to specifically tax fees charged by councils for building certification work, in accordance with National Competition Policy guidelines.

Whilst we agree this is a correct outcome the wording of the proposed regulation is too wide. As worded it means that for every fee or charge imposed by a council it must look into the community to see if anyone else is charging a fee for a similar service or function.

Our recommendations:

- Limit the proposed regulation to the taxation of building certification fees, however described in relevant state legislation.

Proposed Regulation 81-15.01 (1):

Paragraph (a)
We believe this is a well drafted proposed regulation and will solve the problems we had considered would arise in the area of domestic waste management.

Paragraph (b)
No comment

Paragraph (c)
No comment

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Paragraph (d)
Councils have many fees that could be regarded as recoupment of a council officer's time or recoupment of costs paid to outside suppliers.

For example in considering a development application a council may require the opinion of an expert on a building foundation issue. That expert submits a tax invoice to council for his services and council on charges the applicant. The proposed regulation is likely to exempt from tax the oncharging of the expert's fee.

A further example may be council charging a fee in connection with enforcement activities that are essentially a recoupment of costs associated with sending an enforcement officer out to visit a business owner breaking laws relating to food safety.

The proposed exemption is in connection with "regulatory activities". How well this proposed regulation works will depend on how well "regulatory" is defined or interpreted.

Paragraph (e)
Councils sometimes pass on fees imposed by a court, tribunal etc. Please clarify that the passing on of a fee imposed by a court, tribunal etc is also exempt.

Paragraph (f)
See Overall comments above.

Paragraph (g)
We believe the grandfathering of the previous Division 81 Determination for another year will be welcomed by councils in NSW and Queensland.

Proposed Regulation 81-15.02 (1):

We see practical difficulties with these so called 'tie breaker' rules. The proposed regulation makes the decision whether to invoke the tie breaker rules a black and white decision by adopting the words "to which both regulations 81-10.01 and 81-15.01 apply".

In practice we don't believe it will be a black and white decision. Council staff will be faced with the question – is a particular fee more likely to be taxable or more likely to be exempt. We believe it will be a rare case that a fee is clearly both taxable and also exempt under a regulation.

The proposed tie breaker rules do not attempt to resolve conflict between the fees or charges exempt under 81-10(4) or (5) and the regulations. Maybe the view is that no conflict arises because the regulations always override those subsections.

Our recommendation is that the proposed regulation be scrapped, it is not necessary.

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Under self assessing principles councils will be forced to determine the correct status of a fee based on their reading of the law. It may well be that the decision is a juggle between potentially taxable or potentially exempt.
If the proposed regulation is not scrapped then our recommendation is that it be made clear that the tie breaker rule only applies where a fee clearly falls under both a taxable regulation and also an exempting regulation. Where the taxability is clearly uncertain and could go either way then it would be manifestly unfair for the legislature to adopt a “if in doubt tax it” pro revenue stance.

Should you require any further information please contact the writer. We appreciate your time in considering this submission.

Yours sincerely

Pat McCarthy
Director

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