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Via email: GSTconsultations@treasury.gov.au

GST: proposed draft definition of Feminine Hygiene Products

This submission is being lodged by Kimberly-Clark Australia Pty Ltd (KCA) in response to the Treasury invitation for interested parties to submit comment on the proposed draft definition of '*feminine hygiene products*' for GST purposes (refer Attachment A).

KCA would like to express its appreciation for the opportunity to provide this response to your invitation for submissions as this is a critical initiative relating to women's physical health and wellbeing which is supported by KCA.

As a manufacturer and market leader of feminine hygiene products (including the U by Kotex and Poise range of products), KCA considers that it has the pre-requisite expertise in making these submissions for consideration by Treasury.

KCA would be pleased to discuss the proposed amendments detailed below with Treasury to provide any further information - please contact **Cynthia Winata** on **9963 8951**.

Background to the agreement to make Feminine Hygiene Products GST free

Per Attachment A, at the Council on Federal Financial Relation (CFFR) meeting on 3 October 2018, the Commonwealth and states and territories agreed to make feminine hygiene products GST-free from 1 January 2019 (the CFFR Agreement).

The debate that led to the CFFR Agreement was framed in the public arena as being the removal of the 'tampon tax'. Whilst the debate was framed under the headline of repealing a 'tampon tax', KCA submits that the CFFR Agreement was about ensuring women feel protected during their entire menstrual cycle and realising the associated physical health and wellbeing benefits of the agreed policy.

The CFFR Agreement was that the GST free classification relating to women's physical health and wellbeing should apply to a class of product used through the entire menstrual cycle under the broad scope of *feminine hygiene products* - rather than simply applying the GST free classification to a limited scope of product at a single phase of the cycle.

KCA considers that the proposed draft definition as currently drafted at page 3 of Attachment A, narrows the scope of feminine hygiene products to a limited part of the menstrual cycle, being the time when women require products to only absorb or collect menstrual or vaginal blood.

KCA submits that if the GST fee classification relies on segmenting the menstrual cycle for the purposes of applying a GST rating classification to relevant products, that this will cause unnecessary compliance issues and confusion. Taxpayers will need to make tax-driven decisions when trying to differentiate between product which is used exclusively in the period phase, product which is used as feminine hygiene in the non-period phase and product which may reasonably be used in all phases of the menstrual cycle.

The GST rating classification compliance issues will potentially lead to:

- unnecessary compliance costs;
- market confusion as to classification of product between consumers, retailers and distributors;
- marketing of product which may confuse consumers as to the appropriate use of a product but is marketed in such a way to ensure that the product is treated as being GST free within the parameters of the proposed draft definition.

The compliance issues above were a problematic feature of the Australian wholesale sales tax regime which was replaced with the GST regime from 1 July 2000. In the decision in *Smith & Nephew Pty Ltd v FC of T (93 ATC 5213)*, when determining whether cotton buds were *Surgical Appliances... viz... Absorbent cotton wool' within the meaning of those words in item 42(2) of the First Schedule to the Sales Tax (Exemptions and Classifications) Act*, Hill J., commented:

The present case once again shows the absurdities into which a wholesale sales tax system falls when there are large numbers of exemptions and multiple rates requiring classification and differentiation of products. The time of the Commissioner, legal and accounting advisers, not to mention that of this Court, could be better employed in ways other than resolving classification disputes with the resultant need to differentiate between arbitrary headings.

The decision of Hill J. and the latter decision of the Full Federal Court on appeal (94 ATC 4507) cited numerous other decisions on product classification litigation under the repealed wholesale sales tax regime.

The submissions in this paper are made as recommendations to deal with the compliance issues above (as reinforced by the quote from Hill J. above) and ensure that the policy espoused under the CFFR Agreement is achieved.

KCA considers that the current consultation process presents Treasury with the opportunity to ensure that the definition of '*feminine hygiene products*' within the policy espoused under the CFFR Agreement does not cause the compliance issues detailed above and which were a feature of compliance with the repealed wholesale sales tax regime. Further, KCA submits that any compliance issues can be dealt with some minor additions to the draft definition of '*feminine hygiene products*' proposed in the consultation paper and which are detailed in the section below.

KCA proposal to broaden proposed draft definition of feminine hygiene product

KCA submits that it was the policy of the CFFR Agreement to support the hygiene of women through the entirety of the menstrual cycle, to support the health and wellbeing of women. As such, the GST free classification

should be applied to products which specifically support feminine hygiene through the entire menstrual cycle and not simply be limited to product specific to one inexact phase of the cycle (every woman's cycle is different).

For purposes of paragraph (b) of the proposed definition, by attempting to frame a definition limited to products used at one phase of the menstrual cycle (when blood is discharged), this will cause confusion, particularly in relation to products which may be used across other phases of the cycle (when mucous is discharged). It may cause product to be marketed in a way for which the product was not intended, so that the product falls within the definition of *feminine hygiene products* which are GST free. It could also lead to consumers substituting product not appropriate for one phase of the menstrual cycle on the basis that such product is cheaper due to a GST free classification. KCA submits that these factors would be unintended definitional outcomes which could be dealt with by some minor additions to the proposed draft definition.

For reasons detailed, KCA submits that the proposed draft definition of feminine hygiene products on page 3 of Attachment A be amended by the addition of the words added in red below:

'Feminine hygiene products' refers to:

*(a) products that are specifically designed to absorb or collect menstrual or vaginal blood, such as tampons, pads, **pants** and menstrual cups; and*

*(b) panty liners, maternity pads and **maternity pants** specifically designed to absorb or collect menstrual or vaginal **discharge**.*

Intent of the KCA proposed amendments

When reviewing the proposed draft definition of feminine hygiene product and the associated table that provides a description of *Items that could meet the draft definition*, in relation to panty liners it is stated:

Panty Liner (scented and unscented, thin, thin and long, with aloe vera/vitamin E etc., double)

Comments

Similar to pads, but a little lighter, thinner and not used to soak up too much blood. However, products marketed for general hygiene use or incontinence would be excluded from the definition.

Under the draft proposed description and comments above, there is an intention that panty liners used in absorbing or collecting menstrual or vaginal blood would have a different classification to panty liners which are marketed for general hygiene.

Per the comments above in relation to classification under the repealed wholesale sales tax regime, taxpayers will then need to delineate between product based on a subjective marketing test applied to the product. This is not good tax policy for the following reasons:

- taxpayers will not be able to confidently comply with tax obligations as there may be different interpretations applied to how a product is marketed – such that classification would be based on a subjective interpretation of a marketing test (i.e. how is it to be interpreted that the panty liner is marketed as either a period product or a product marketed for general hygiene).
- A marketing-based test based on a subjective interpretation could lead to disputes between some or all of consumers, retailers, distributors and the ATO.
- In attempting to comply with a subjective marketing-based test and marketing the panty liner in such a way to meet the definition of *'feminine hygiene products'*, the marketing may confuse consumers who

could then use product in an inappropriate way such that the consumers health and wellbeing outcome is compromised.

- Consumers may inappropriately substitute panty liners which are cheaper (due to being GST free) for other panty liners more appropriate to that phase of the menstrual cycle and this may compromise health and wellbeing outcomes for women.
- The differentiation between products based on a subjective marketing test does not recognise that it was the intent of the policy to provide support to females through the entire menstrual cycle and provide the associated health and wellbeing outcomes.

To take account of the concerns above, KCA recognises that paragraph (b) of the proposed draft definition of feminine hygiene products stipulates products that collect menstrual/vaginal blood. However, KCA submit that it should be extended to menstrual/vaginal discharge which includes blood and mucous.

Per examples of health research appended at Attachment B, mucous like period blood is a part of the menstrual cycle. Liners are designed to absorb light period blood and mucous – these events occur outside the 5-6 days of bleeding. For many women (every woman’s cycle is different), for the majority of the month there will be either blood or mucous being discharged from their body.

Based on the proposed draft definition and description of products in the associated table, the current definition will require taxpayers to make GST classification decisions based on an uncertain delineation. This delineation will be between the health needs of the user of the panty liner (every woman’s cycle is different) and whether, based on a subjective marketing test, the liner is used to collect or absorb menstrual or vaginal blood or menstrual or vaginal discharge (or even a combination of blood and mucous discharge).

It may also be that as products evolve and improve, there will be fewer difference between panty liners which might be marketed for use as feminine hygiene, as opposed to panty liners for use wholly to collect or absorb blood. This is further exacerbated by the fact that every woman’s cycle is different.

For the reasons above, KCA submits that the amendments proposed above to paragraph (b) of the draft definition, would deal with the delineation issues and achieve the objective of supporting women’s health and wellbeing through the menstrual cycle.

If the scope of the definition at paragraph (b) of the proposed definition covers panty liners used through the menstrual cycle (via including the words menstrual/vaginal discharge), KCA submits that there will not be a requirement to seek amendments to the definition of feminine hygiene products as products evolve and improve.

KCA are also aware of product development initiatives being undertaken in relation to pants products which will be an alternative to the current range of menstrual pads. It is expected that these new products will be available in the Australian market in a short time frame. Rather than have to amend the definition of ‘*feminine hygiene products*’ when these products are available in the Australian market, it is submitted that word *pants* be added to paragraph (a) and *maternity pants* be added to paragraph (b), per the suggested amendments above.

Per the detail above, KCA, as a market leader in the feminine hygiene product segment, would be pleased to discuss the proposed amendments detailed above with Treasury to provide any further information required or

clarify any of the detail. If Treasury considers that further discussions with KCA would assist in its consideration of the submissions made, it is requested that in the first instance, you contact the signatory of this submission.

Yours sincerely


Cynthia Winata

Finance Director – ANZ

Kimberly-Clark Australia