



Mr Rob Dalla Costa
General Manager
Indirect, Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

26 March 2013

Email: gstpolicyconsultations@treasury.gov.au

Dear Rob

Submission: Exposure Draft Legislation: Refunding Excess GST

The purpose of this submission is to provide our comments in relation to the Revised Exposure Draft Legislation released on 26 February 2013 titled *Tax Laws Amendment (2013 Measures No.2) Bill 2013: Refunding Excess GST (the ED)* and the supporting draft Explanatory Memorandum (**Draft EM**).

As you are aware, the Property Council made several submissions and had numerous conference calls with Treasury and the ATO in relation to the previous exposure draft of this legislation released 17 August 2012.

We are pleased to see that those consultations have resulted in most of our issues being addressed in this revised ED. In fact, we only raise four drafting issues in this submission. However, unless amended, the proposed legislation will deny legitimate credits for GST already paid, become unworkable in some circumstances or create uncertainty that will cause disputes.

Importantly, the issues are easily fixed:

ED Issues	Solution
1. Unwarranted credit denial on deemed taxable supplies	Delete 142-10(2)
2. Replication of passing on test in Commissioner's discretion	Delete 142-10(3)(a)
3. Symmetry required for the input tax credits on cancelled supplies	Reciprocal reduction in increasing adjustment
EM Issue	Solution
4. Example 1.15 inconclusive	Reinstate last paragraph from consultation example

Each of these issues and proposed solutions is expanded upon below.

1 Treatment of extra GST as being for a “taxable supply” does not extend to the “creditable purpose” provisions

Treasury has adopted the Property Council’s recommendation that the ED expressly confirms any excess GST that is not refunded is taken to have always been payable is for a taxable supply – see 142-10(1)(b). This confirms the input tax credit entitlement, if applicable, for the recipient entity.

However, 142-10(2) provides that this deeming does not apply for the purposes of how s11-15(2) (about creditable purpose) applies to the supplier.

As drafted, this could lead to a supplier being denied credits on inputs to a supply on which GST has been paid and is deemed to have always been payable. This would mean irrecoverable GST is included in the inputs to a taxable supply – in direct contradiction to the policy behind these changes and the anti-cascading premise of the GST Act as set out in paragraphs 1.4 and 1.5 of the Draft EM.

The solution to this inequity is simple – remove section 142-10(2).

This would mean that the fact that the supplier has made a taxable supply due to the operation of section 142-10(1) ensures that input tax credits arise for acquisitions relating to that supply.

If this section is not removed, it will undermine the “*inherent genius of the GST system in avoiding cascading tax*” (to quote the late Justice Hill in *HP Mercantile*). Equally, it will directly conflict with the “guidance” on passing on included in the Draft EM.

2 Commissioner discretion unworkable with a two limb test

Treasury has adopted the Property Council’s recommendation to include a Commissioner’s discretion that will allow refunds in appropriate circumstances – see section 142-10(3).

This resolves two of the more difficult issues/examples set out in our submission on the first exposure draft – the wrong entity remitting the GST (our example 7, now covered by example 1.12 in the Draft EM) and changing margin scheme cost base allocations without impacting the total GST on the whole development (our example 1 and now covered by Example 1.16 in the Draft EM – but see point 4 below).

However, the discretion only applies where the Commissioner is satisfied that a refund of the extra GST would both:

- a) flow to the entity that has effectively borne the cost of the extra GST; and
- b) not give an entity a windfall gain.

The requirement in (a) unnecessarily replicates the “no passing on” test of 142-10(1). That is, if a refund of excess GST paid by a supplier is flowing to the entity that has borne the cost, then there was no passing on of the GST and, section 142-10(1) does not restrict the refund. In such circumstances the Commissioner’s discretion is not necessary.

Further, the inclusion of the requirement in paragraph (a) could make the Commissioner’s discretion unworkable. This is illustrated by the uncertainty as to how this requirement operates even using the two examples in the Draft EM (Examples 1.12 and 1.16).

Finally, the requirement in paragraph (a) isn’t necessary for the proper operation of the discretion. The discretion will only operate if the Commissioner is satisfied there is no windfall gain. This single requirement is consistent with the original and current policy intent behind the provisions (refer Draft EM pars 1.17 and 1.19). This single test is also easily applied, as illustrated by the Draft EM examples 1.12 and 1.16.

Again, the solution is simple – delete 142-10(3)(a).

3 Ensure symmetry for recipients of a cancelled supply

Treasury has introduced a new section dealing with refunding excess GST relating to cancelled supplies – section 142-20. This section reduces any decreasing adjustment that arises from a cancellation to the extent the supplier has passed on the GST and not reimbursed it.

We have no issue with this concept, but there needs to be symmetry for a recipient of a cancelled supply (i.e. ensure no “increasing adjustment” if they have not been reimbursed the GST they paid).

The solution would be to mirror subsection 142-20(1) in a new subsection to ensure no increasing adjustment for recipients of a cancelled supply that have not been reimbursed.

4 EM example 1.16 inconclusive

In contrast to the example we discussed with Treasury in consultation – attached to the email sent by your Michael Harms to me on 12 October 2013 – and even in contrast to Example 1.12 in the current Draft EM, the Draft EM example 1.16 is inconclusive and this uncertainty will cause disputes.

This example deals with the issue that, as you will be aware, has concerned our members since the first ED was released – the unfairness of a taxpayer being assessed on underpayments but not being refunded overpayments if a margin scheme cost base was re-apportioned.

The solution is simple – rather than this example being inconclusive it should have a final paragraph similar to Example 1.12 which states “In these circumstances it is appropriate for the Commissioner to exercise the discretion under subsection 142-10(3)”.

Alternatively, you could use the longer final paragraph in the example given by Treasury in our consultations – which is to the same effect:

“Having regard to the facts and circumstances of Developer AB’s situation... the Commissioner considers that it would be fair and reasonable to exercise his discretion to pay refunds of GST...”

* * * * *

We look forward to discussing this further with you. Please do not hesitate to contact Belinda Ngo on 02 9033 1929 or me on 0406 45 45 49 if you have any queries or to set up a time to meet.

Yours sincerely



Andrew Mihno
Executive Director International & Capital Markets
Property Council of Australia
0406 45 45 49