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The General Manager  
Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
Email: [gstpolicyconsultations@treasury.gov.au](mailto:gstpolicyconsultations@treasury.gov.au)

Dear Sir or Madam,

## **SUBMISSION: GST TREATMENT OF PROPERTY IN POSSESSION OF A MORTGAGEE**

I make this brief submission in response to your Consultation Paper of 7 June 2011, in which it is proposed that section 195-1 of *A New Tax System (Goods and Services Tax) Act 2000* (the GST Act) be amended to expressly provide that Division 105 operate to the exclusion of Division 58 where a mortgagee in possession or control sells the property of a corporation. You have also asked a much broader question, which is *“Is there an alternative way to better achieve the Government’s policy objective of a representative of an incapacitated entity being liable for GST for supplies of property in their possession or control belonging to a corporation?”*

### **Summary**

In my opinion:

- Division 105 of the GST Act should **not** be amended as is proposed.
- Where a mortgagee takes possession of most of the assets of a corporation, the GST outcome should be the same regardless of mechanism the mortgagee employs to exercise its rights of repossession and sale.

### **ATO was just resolving a conflict**

The proposal in the Consultation Paper seems to be guided and influenced by ATO Interpretive Decision 2010/224. However, that decision by the ATO does not seem to give much consideration to the tax and equity issues involved. Rather, it just seems to resolve the conflict by applying “the accepted principle of statutory interpretation (which) is that a general provision would give way to the more specific provision where there is conflict between the provisions”.

### **Not just a tax issue**

There is a good reason why the term ‘controller’ in the Corporations Act 2001 includes a mortgagee who takes possession or control of a corporation’s property in the event

of a default by the mortgagor. Its arises out of abuses of corporate insolvency accountability principles that used to occur prior to 1993. Back then, to deprive the ATO of its right to priority payment of outstanding group tax, and to avoid the reporting and compliance duties imposed under company law, banks and other mortgagees decided to use the “agent for the mortgagee in possession” option. Amendments arising out of the ALRC’s 1988 General Insolvency Inquiry took the attractive advantages out of this option.

Even though the “agent for mortgagee in possession” and “mortgagee in possession” mechanisms are now caught by the Corporations Act, I believe we ought to carefully consider what influence the proposed change to Division 105 of the GST Act may have on the choices that mortgagees make when taking possession of a company’s assets. (I refer here to those who have charges over most of a company’s assets.) No doubt, if there are tax advantages or cost advantages in them, these alternative mechanisms will become popular again. In which case we ought to consider whether this development might be to the detriment of accountability to employees, other creditors and the public.

### **Division 58**

It appears to me that Division 58 was drafted as it was because there would have seemed to be no logical or perceptible reason why the GST outcome of a mortgagee taking possession of a company’s assets should be determined by whether they appointed someone called a “receiver” or someone called an “agent for the mortgage”. Personally, although I have read lots of relevant material I still cannot see why the GST outcomes should be different. However, I can see a case for applying a provision such as Division 105 where a financier takes possession of an asset or two under right given in chattel mortgages or the like.

### **Division 105**

If Section 105.5 of the GST Act was intended to apply in a situation where a mortgagee takes possession of most of the assets of a company, I find this hard to see in its narrow wording. It seems to apply to a very specific situation. In my view Treasury should focus in this review on uncovering the meaning of Division 105 of the GST Act and defining what situation – other than those addressed by Division 58 of the GST Act – that Division 105 is trying to address, or should address.

Yours faithfully,

Peter J Keenan