



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

24 February 2012

E-Mail: FinancialSupplies@treasury.gov.au

Attention: Rob Dalla Costa

Dear Rob,

Exposure Draft Regulations – GST Financial Supply Provisions

Thank you for the opportunity to comment on the exposure draft regulations on GST Financial Supply Provisions.

The Property Council is the peak body for owners and investors in Australia's \$600 billion property investment sector. The Property Council represents members across all four quadrants of property investment -debt, equity, public and private.

The industry welcomes the Treasury expanding input tax credits on financial supplies to include legal services.

Much of Australia's significant commercial property is held by managed funds. Managed funds (sometimes known as REITs) fall within the definition of "recognised trust scheme" in the draft regulations.

The industry is concerned that certain aspects of the draft regulations are unclear, which may reduce certainty and result in unnecessary compliance costs.

There are four key recommendations that will reduce compliance costs and provide clarity.

1) Exclude acquisitions that are outside the provisions' scope

Item 32 aims to stop "inappropriate bundling" of acquisitions into trustee and responsible entity fees to increase input tax credits.

We agree that it is logical that where bundling cannot provide a benefit, those acquisitions should be excluded. The draft regulations seek to exclude these acquisitions.

The following recommendations ensure that the exclusion is clear and complete.

Recommendation 1: The words "to the extent" should be inserted into item 32(b) such that it reads "(b) to the extent the services acquired are not:"

Recommendation 2: Replace existing item 32(b)(i) with "a service of the kind mentioned in item 9 or 21".

2) Remove confusion around trustee capacity

One aim of the measure is to remove practical difficulties arising from uncertainty as to the GST capacity in which trustees and REs contract. The Property Council commends the approach taken to this issue in item 32. However, we do not think that the current drafting clearly achieves this objective.

Adopting our recommendation will ensure that all trustee services are clearly dealt with by the regulations.

Recommendation 3: Insert a new subregulation 70-5.02(5):

The services acquired in item 32 of the table in subregulation (2) can be acquired either as a taxable supply from the entity referred to in item 32(a) or as a taxable supply from another entity.

3) Management services example

The regulations are part of complex GST provisions relating to financial services.

Examples are necessary to help the industry understand how complex areas of this regulation apply in practise and aid certainty.

Recommendation 4: The EM should include an example that illustrates how RITCs will continue to be claimed at the 75% rate on management fees.

The attached submission outlines our recommendations for appropriately dealing with these issues. We are keen to discuss them with you further at your convenience.

Please do not hesitate to contact Elaine Abery on (02) 9033 1929 or myself if you have any queries.

Yours sincerely



Andrew Mihno

Executive Director International & Capital Markets

Property Council of Australia

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GST Financial Supply Provisions

*Property Council of Australia
February 2012*



1. General comments and clarification

Most significant commercial property in Australia is held by managed funds, more commonly referred to as real estate investment trusts or REITs, which will normally fall within the definition of “recognised trust scheme”. The proposal to reduce the rate of reduced input tax credits (RITCs) claimable by REITs from 75% to 55% on the acquisition of non-excluded services from trustees or responsible entities (RE) is therefore an issue of concern to the Property Council. This proposal to increase the tax burden on REITs will result in a corresponding decrease in returns to investors.

We understand from the Explanatory Memorandum (EM) which accompanies the Draft Regulations that proposed item 32 of the table to Subregulation 70-5.02 and consequent amendments is an anti-avoidance measure. That is, the purpose of the amendment is to address alleged inappropriate “bundling” of acquisitions into trustee and RE fees. The Property Council is unaware of any such activity.

Nonetheless, if this is indeed the object of the measure then if no benefit is to be secured from bundling an acquisition into a trustee or RE fee then it follows that the acquisition should be excluded from the item 32 RITC rate reduction. This situation will occur where the fund could otherwise claim a RITC at the 75% rate on the acquisition under a different item of the table to Subregulation 70-5.02. This is most commonly the case in relation to investment management fees, asset management fees and custodian fees.

The Property Council therefore commends the inclusion of proposed item 32(b) which on its faces appears to exclude these acquisitions from the item 32 RITC rate reduction. However, the Property Council considers that the exclusion of these acquired services could be more clearly expressed in proposed item 32(b).

Recommendation 1

The words “to the extent” should be inserted into item 32(b) such that it reads “(b) to the extent the services acquired are not:”

Proposed item 32(b)(i) as currently drafted excludes the acquisition of “brokerage services covered by item 9 or 21” from the RITC rate reduction. The work “brokerage” does not presently appear in item 9 or 21. Accordingly, the scope of the exclusion is uncertain.

The Property Council therefore considers this uncertainty could be avoided by amending the wording of item 32(b)(i) to exclude the acquisition of any service where a RITC can otherwise be claimed under item 9 or 21.

Recommendation 2

The existing item 32(b)(i) be deleted and replaced by “a service of the kind mentioned in item 9 or 21”.

2. Remove the confusion concerning capacity

There is no statutory, common law or industry definition of “trustee services”. It is a term invented by the ATO. At law a trust is “a relationship”, but under the A New Tax System (Goods and Services Tax) Act 1999 (GST Act) a trust is

“an entity”. Accordingly, at law all fees, costs and other expenses in relation to the trust property are paid by the trustee, or RE, since the trust doesn’t exist as a separate entity. Further, the trustee, or RE, pays these expenses either directly or indirectly out of the trust, or managed investment scheme (MIS) (which is a trust), assets.

The ATO created and used the term trustee services to try and distinguish the trustee/RE remunerative services component of payments out of trust assets from other payments. This in turn inherently involves trying to distinguish the capacity in which the trustee or RE is acting when it incurs an expense on behalf of the trust or MIS. This approach (of trying to distinguish capacities) is both conceptually fraught and practically unfeasible.

The Property Council therefore commends the deft approach taken in proposed item 32(b). The draft amendments to subregulation 70-5.02 do not attempt to insert a definition of trustee services and hence avoids all the difficulties in attempting to distinguish the capacity in which the trustee or RE is acting.

Rather the Property Council understands that item 32 operates where a trustee or RE of a “recognised trust scheme” carries on a GST registered enterprise and makes taxable supplies to the recognised trust scheme. Where that threshold requirement is met, services excluded under paragraph (b) are carved out and RITCs on “the rump” of services acquired by the fund can be claimed by the fund at the 55% rate. Thus, there is no requirement, or need, to label or define these remaining services, nor to try and identify the capacity in which they were acquired. They are simply services acquired by the fund which are not excluded services.

The EM states that one of the objectives of the proposed regulation is to remove the “considerable uncertainty surrounding the capacity in which some acquisitions by the trustee were being made”.

The Property Council, however, does not consider that the present drafting of proposed item 32 clearly achieves that purpose. The Property Council recommends that a new sub-regulation be added to 70-5.02 to make this explicitly clear and to forestall any future confusion.

Recommendation 3

Insert a new subregulation 70-5.02(5), and renumber existing proposed subregulation 70-5.02(5) as 70-5.02(6), to the effect:

(5) The services acquired in item 32 of the table in subregulation (2) can be acquired either as a taxable supply from the entity referred to in item 32(a) or as a taxable supply from another entity.

3. Example of management services

Finally, the Property Council considers that the EM would benefit from a further example which illustrates the exclusion of management fees for investment portfolio services (in respect of which RITCs are claimable under item 23(b)) from item 32 under proposed item 32(b). The Property Council recommends this as such management fees are common, particularly for REITs, and considers this would provide additional clarity to taxpayers and the ATO alike.

Recommendation 4

Insert a new Example 5 into the EM which illustrates how RITCs will continue to be claimed at the 75% rate on management fees.