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General Manager
Indirect, Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
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Email: gstpolicyconsultations@treasury.gov.au

Dear General Manager,

Exposure Draft of Division 36

The Australian Banker's Association (ABA) welcomes the opportunity to make a submission on the Exposure Draft (ED) of the proposed Division 36 of the A New Tax System (Goods and Services Tax) Act 1999.

The ED proposals give rise to unfair outcomes in certain situations that infringe GST neutrality principles, which are central to the design of Div 36. We therefore urge Treasury to rectify these potential shortcomings to ensure that Div 36 always results in a GST neutral outcome.

In our view, the proposals should be modified such that the new Div 36 reflects the following:

1. Refunds to be available where GST registered recipients cannot claim full input tax credits (ITCs)
2. Where GST has not been passed on, refunds to be available irrespective of whether the recipient is GST registered.
3. Removal of the condition or proviso that a tax invoice is evidence that GST has been passed on.
4. In order to assist with facilitating some of the changes that are required, we have set out a revised wording of Division 36 removing components that are not going to achieve the desired aims as set out in the Draft Explanatory Memorandum.

1. Refunds where GST registered recipients cannot claim full ITCs

We acknowledge the broad policy intent of Div 36 as explained in the Draft Explanatory Memorandum is as follows (underline added):

"A recipient who is registered, or required to be registered, would ordinarily have claimed input tax credits on the acquisition of the thing supplied (subject to the normal GST rules). This means that the passed-on amount has been recovered by the recipient and neither the supplier nor the recipient has borne the cost of the excess GST. Overall, there is a GST neutral outcome of the transaction."

However, the recipient will not always be able to claim full ITCs, which means that they will actually have borne the cost of the excess GST. As such, there will not always be a “GST neutral outcome”. For example, in situations where the recipient incurs excess GST on an acquisition used to make input taxed supplies, s11-15(2) acts to restrict ITCs available to the recipient on the GST.

It would be possible for, say, a financial institution to seek recompense from the supplier for the recovery of GST improperly charged. The supplier would be unable to recover the overpaid GST from the Commissioner leading to an outcome that is not GST neutral.

Hence amendments to the ED proposals are needed to ensure that the clear policy is not defeated, and that a basic right of the taxpayer, which is not to suffer the cost of the overpaid tax, is not infringed. Accordingly, the ABA recommends that Div 36 needs be redrafted to ensure there is always a “GST neutral outcome” with respect to overpaid GST.

This will be achieved only where Div 36 specifically provides for refunds to be allowed in situations where the GST registered recipient is not entitled to a full input tax credit.

2. Where GST has not been passed on, refunds are available irrespective of whether the recipient is GST registered

Where the overpaid GST has not been “passed on”, the economic cost of the GST is “borne” by the supplier not the recipient. Whilst there will be a GST neutral outcome from a Government revenue perspective (where the recipient can claim a full ITC), it will not be so from a supplier/recipient perspective. Unless the supplier can recover the overpaid GST, the supplier will be disadvantaged through the mistake made to overpay GST.

For example, where a contract between the supplier and recipient only allows for \$100 to be paid irrespective of GST, the supplier will receive \$100 regardless of the GST outcome. If the supplier then incorrectly overpays GST on the supply, the supplier’s net revenue after GST is \$90.91, and the recipient’s cost is \$90.91 (where the recipient can claim a full ITC). However, if the mistake had not been made, the supplier’s net revenue would be \$100 and the recipient’s cost would be \$100.

The ABA recommends that Div 36 be drafted in such a way that suppliers can recover overpaid GST where it has not been passed on. An adjustment note issued to the recipient will ensure that the ITC is repaid ensuring a revenue neutral outcome from a Government revenue perspective.

Furthermore, there are situations where parties to a transaction may wish to unwind the transaction, even if the recipient is GST registered and the GST has been “passed on”. For example, a recipient/purchaser may wish to unwind a transaction to properly reflect its stamp duty liability, as stamp duty is generally levied on the GST-inclusive consideration (e.g. where a supply has been treated as taxable when it may be eligible to be treated as a GST-free supply of a going concern).

3. As a tax invoice is not always evidence that GST has been passed on, this condition should be removed.

The assertion contained in the EM that the issuing of a tax invoice is “strong evidence” that GST has been passed on is misguided. For instance, there are situations where tax invoices may be issued in error where the GST has not in fact been “passed on” by the supplier.

For example, if a supply is miscoded during data input, sometimes a system generated tax invoice will be created, even if the price of the supply has not changed. That is, if the price of the supply was \$100 (ex GST), and an administrative data input mistake resulted in GST being paid and a tax invoice issued,

but the price remained at \$100, the GST would not be “passed on”. The supplier should in such cases be entitled to a refund of overpaid tax.

In any case the words “prima facie” in s36-5(3) are likely to lead to considerable uncertainty, which may increase the frequency of disputes between taxpayers and the ATO. Given the High Court of Australia has given guidance on the interpretation of “passing on” in *Avon Products Pty v Commission of Taxation* [2006] HCA 29 it ought to be sufficient for interpretative purposes.

4. Proposed wording of s36-5

Division 36—Excess GST

36-1 What this Division is about

Amounts of any excess GST you have will usually not be refunded if you have passed on those amounts.

36-5 Working out if your excess GST can be refunded

- (1) This section applies if, apart from subsection (2), your *assessed net amount for a tax period takes into account an amount of GST that exceeds what is payable.

Note: This section applies whether or not you have paid, or been refunded, the assessed net amount.

Example 1: Storm Co reports a negative net amount of \$4,000 made up of GST of \$10,000 less input tax credits of \$14,000. In fact, Storm Co’s GST should have been \$8,000 making its negative net amount \$6,000. Storm Co has excess GST of \$2,000.

Example 2: Snow Enterprises reports and pays a net amount of \$2,400 made up of GST of \$3,200 less input tax credits of \$800. In fact, Snow Enterprises has incorrectly included an amount of \$400 for a supply that should have been treated as GST-free, making its net amount \$2,000. Snow Enterprises has excess GST of \$400.

- (2) For the purposes of this Act, the excess GST is taken to have always been payable except for:
- (a) so much of the excess GST as you have not passed on to any other entity; and
 - (b) if:
 - (i) you have passed on some or all of the excess GST to another entity; and
 - ;
 so much of that passed-on amount for which that entity has been reimbursed.

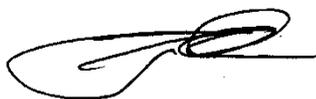
Note 1: Only excess GST covered by paragraph (a) or (b) can be considered for working out a refund under section 155-75 in Schedule 1 to the *Taxation Administration Act 1953*.

Note 2: If the excess GST has been passed on to a registered entity (or an entity required to be registered), that entity can treat the excess GST as being payable for working out the amount of its input tax credits under section 11-25.

- (3) For the purposes of subsection (2):
- (a) some or all of the excess GST may pass on to another entity even if:
 - (i) a *tax invoice is not issued to or by that other entity; or
 - (ii) a tax invoice issued to or by that other entity relates to that excess GST, but does not contain enough information to enable that excess GST to be clearly ascertained.

The ABA would welcome the opportunity to discuss this submission in more detail with you, please feel free to contact me in order to arrange a suitable time for such a meeting

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Tony Burke', with a horizontal line extending to the right from the end of the signature.

Tony Burke