THE TAX INSTITUTE

THE MARK OF EXPERTISE

29 October 2015

Mr Tom Reid
General Manager
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The Treasury
Langton Crescent
PARKES ACT 2600

By email: taxlawdesign@treasury.gov.au

Dear Mr Reid,

GST Treatment of Cross-Border Transactions

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Tax Laws Amendment (GST Treatment of Cross-border Transactions) Bill 2015 Exposure Draft* (**Exposure Draft**) and associated documents.

Our submission below addresses our main concerns in relation to the Exposure Draft that we have been able to draw out in the limited timeframe we have had to consider it.

Discussion

We consider each of the schedules contained in the Exposure Draft separately below.

1. Schedule 1

Firstly, we wish to acknowledge the work Treasury has put into this second iteration of the exposure draft in relation to the tax integrity measure to extend GST to digital products and other services imported by consumers. We appreciate that Treasury has invested considerable time to take into account many of the comments that were provided in the initial round of consultation despite having very little time to prepare and finalise a second iteration of the exposure draft for this measure and prior to progressing this measure to Bill stage.

a) Specific comments on the draft provisions and Explanatory Memorandum

i) Subsection 84-100(3)

Draft subsection 84-100(3) as currently written may cause confusion. As such, we make the following suggestions to Treasury that may assist to clarify this provision:

- Write the requirement in the 'positive': both subsections 84-100(3)(b)(i) and (ii) are required for a taxpayer's 'belief' to be reasonable; or
- There only be one requirement in subsection (3)(b) – that there has been a declaration by the recipient of their registration with their ABN (or other prescribed information).

ii) Supplies made through an electronic distribution platform

The rules are clear in relation to the obligation for an electronic distribution platform to register for GST where the GST turnover for the supplies made through them on behalf of the non-resident supplier exceeds the $75,000 threshold. This is set out in Example 1.6.

However, it is unclear whether the electronic distribution platform must register for GST where the GST turnover amount from separate non-resident suppliers when aggregated exceeds the turnover threshold, but not when each non-resident supplier is considered individually.

It seems to be intended that the electronic distribution platform is required to register for GST when the aggregated GST turnover of the supplies made through it exceeds the relevant threshold. It would be useful if an example could be included in the Explanatory Memorandum confirming this.

This interpretation has the effect of extending the application of GST to supplies made by non-residents who do not individually exceed the GST turnover threshold (and therefore would not be required to register for GST). If this is intended, a provision should be inserted into the Exposure Draft to reflect that it is only the operator's threshold that is relevant.

Extending this explanation, it should also be made clear that the non-resident supplier may not be required to be registered for GST when their GST turnover for supplies made directly into Australia (i.e. not through an electronic distribution platform) does not exceed the threshold, even though the supplies they make through the electronic distribution platform are subject to GST because the platform operator is liable.

b) Other

i) Overseas charities

Situations may arise where an overseas charity is unable to register with the Australian Charities and Not-for-Profits Commission and therefore supplies it makes in Australia become subject to GST even though if the charity were located in Australia, supplies it makes would not be subject to GST.

We suggest that Treasury consider empowering the Treasurer to be able to determine by legislative instrument that supplies by overseas charities are GST-free supplies (consistent with sections 38-250 and 38-270 of the *A New Tax System (Goods and Services Tax) Act 199* (Cth) (**GST Act**) similar in terms to the power he is given in relation to financial supplies[1].

ii) Enforceability of the rules

In our previous submission to Treasury[2] dated 7 July 2015 in relation to the first iteration of these rules, we raised concerns around the administrative difficulty that may be experienced in trying to enforce these rules. As the rules are largely voluntary, in our view, they should be easy to comply with. However, the rules in the Exposure Draft have been drafted broadly and it is not easy for non-residents to register for GST. In this context, and subject to the impact of the proposed Schedule 2 changes, we would expect that most non-residents that seek to comply with the proposed rules will likely register for GST to enable them to claim input tax credits, rather than use the proposed limited registration mechanism (which does not entitle the registrant to claim input tax credits). We are still concerned that the latest iteration of rules will still impose a significant cost burden on non-resident suppliers and will be difficult for the ATO to enforce.

Our previous submission also suggested the inclusion of a mechanism for the Commissioner to treat supplies as not being connected with Australia where he considers that the collection of GST on a supply is not administratively feasible (similar to Division 85). We reiterate such a suggestion and note that the proposed Subdivisions 38-T and 40-G could be expanded to provide such a mechanism.

2. Schedule 2

The Tax Institute welcomes the amendments proposed by Schedule 2 as they are likely to limit the circumstances where non-residents are required to be in the Australian GST net for no net revenue gain. One concern with the proposed rules is that the cross-border provisions will become more complex as a result of the amendments, since the proposed amendments generally operate by way of exceptions

[1] Refer to draft sections 38-310 and 40-180

[2] http://www.taxinstitute.com.au/tisubmission/tax-integrity-extending-gst-to-digital-products-and-other-services-imported-by-consumers

to the existing rules. We note the GST cross-border rules are already complex: since the GST commenced, the ATO has issued some 10 GST rulings comprising almost 1,000 pages of commentary on these rules alone.

The Tax Institute would welcome the opportunity to explore ways in which the cross-border rules could be simplified and still achieve the same policy outcome.

a) Specific comments on the draft provisions

i) 'Indirect tax zone'

We strongly recommend Treasury consider reverting back to referring to Australia in place of the newer terminology 'indirect tax zone'. Often the term 'indirect tax zone' is followed with an explanation that it refers to Australia. It would be more efficient, and clearer, if the word Australia was used instead.

ii) 'Made or provided to' in the definition of potentially chargeable

We note the concept of 'provided to' is referred to in draft section 9-26. This concept is not used in the table in draft section 9-26(1), which only refers to supplies made to a potentially chargeable entity. The concept appears again in draft section 38-190(3A). It would be useful if Treasury could explain why the term is used in the definition of 'potentially chargeable'. Is it intended this also refer to supplies captured in draft section 38-190 (3A)(b)? If so, then we note the phrase 'potentially chargeable entity' in draft section 38-190(3A) does not appear to correctly apply the definition in draft section 9-26(2). Draft section 38-190(3A)(b) refers to an individual who is an employee or officer of a potentially chargeable entity.

However, pursuant to draft section 9-26(2), the definition of 'potentially chargeable' specifically contemplates that the supply will be made or provided to the potentially chargeable entity, not to a third party, such as an employee or officer. In the context of draft section 38-190(3A)(b), no supply may ever be made or provided to the potentially chargeable entity.

Given the importance of these provisions, the inclusion of an example in the Explanatory Memorandum illustrating the operation of these provisions would be useful.

iii) Item 3 – draft section 9-26

Section 9-25(3)(b) has the capacity to effectively impose double GST where the recipient of the relevant supply is an input taxed business or is unregistered (since GST applies to the importation and the supplier would normally charge GST on the sale of the goods). Item 3 effectively deals with the double taxation issue where the supplier is a non-resident and the recipient is potentially chargeable.

While Item 3 is welcome, we note that double tax can still arise in either of the following situations:

- where there is an Australian supplier (i.e. the recipient imports the goods into Australia) and the supplier installs or assembles the goods in Australia; or
- the recipient is unregistered regardless of whether the supplier is a non-resident or an Australian supplier.

A possible solution to this issue is to remove section 9-25(3)(b) entirely and always treat the installation / assembly as a separate supply (similar to draft section 9-26(3)). The remaining amendments would ensure this supply is taxed appropriately. This is because the deemed supply of installation / assembly services would not be connected with the indirect tax zone under Item 1 of draft section 9-26(1) where the supply was made to a potentially chargeable entity and would be connected with the indirect tax zone under section 9-25(5)(d) where the supply was made to an Australian consumer.

iv) Draft section 38-190(3A)

Draft section 38-190(3A) expands Item 2 of section 38-190(1) of the GST Act by providing carve-outs to the 'provided to' exception in section 38-190(3). While this is a positive improvement to this item, a practical issue may arise in relation to the level of 'sufficient documentary evidence[3]' required to be obtained by the Australian supplier to be sure it is making a GST-free supply. We query whether, for example, a warranty in the supply contract could be sufficient for these purposes and whether the ABN of the person to whom the supply is provided will need to be quoted to the Australian supplier. It would be useful if additional clarification of this matter could be included in the Explanatory Memorandum.

b) Specific comments on the Explanatory Memorandum

i) 183 day test

It would be useful if Treasury could include an example in the Explanatory Memorandum demonstrating the implications for a non-resident taxpayer who intends only to be present in Australia for less than 183 days but unintentionally exceeds that time period, say by one week.

The other scenarios (being where there is a clear intention to be present in Australia for longer than 183 days and where there was an intention to be present in Australia for longer than 183 days, but the 183 day time limit is not exceeded) are set out in Examples 2.1 and 2.2 in the Explanatory Memorandum respectively.

[3] Refer to paragraph 2.133 in the Explanatory Memorandum

c) Application date

In our view, taxpayers should have enough lead time to consider the implications of these provisions and prepare for their application. We suggest a start date of 1 July 2016 will give enough time for this purpose.

d) Ongoing role for Division 83

We wish to raise with Treasury for consideration the ongoing role of the reverse charge mechanism in Division 83 in relation to non-residents making supplies connected with Australia. Should the amendments contained in Schedule 2 pass into the GST Act as they currently stand, the application of Division 83 to supplies of anything other than goods or real property will be substantially reduced.

We understand Division 83 will continue to apply in relation to the supply of goods in certain circumstances. However, it would be useful if Treasury could include in the Explanatory Memorandum some information explaining the ongoing need for the Division 83 reverse charge mechanism and how it will operate alongside the amendments contained in Schedule 2 (perhaps at around paragraph 2.114).

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely

Stephen Healey
President