From: O"Rourke, Kevin (AU - Sydney)
To: GSTProperty
Cc: Donna Bagnall
Subject: GST on property transactions
Date: Friday, 17 November 2017 4:11:35 PM

Dear Prashant

Chartered Accountants Australia and New Zealand (CA ANZ) appreciates the opportunity to provide our comments on the measures contained in the GST and real property transactions Exposure Draft (ED) Bill and EM.

We provide the following general and specific comments, and our key recommendations in relation to the measures:

General comments

- Our overall sense is that this legislative response, which will apply to the whole Australian residential construction industry as well as foreign developers, is an extremely broad approach and a very complex solution in order to target the mischief of phoenix activity which is occurring in a very narrow (and criminal) sector of the industry.

- The cumulative effect of the measures, particularly in margin scheme scenarios, will have a real finance cost, an extra administrative cost and a cash-flow impact on developers, even those on a monthly BAS cycle. This is due to the valuation-impact of the GST component of the proceeds of sale not being receivable by the vendor (hence financier). Furthermore, the requirement to overpay the GST, then reclaim the excess, with potential for delay/dispute, and the further risk that double GST may need to be paid if the GST withheld is not remitted by the purchaser before the vendor's BAS is due.

- It will also potentially increase the likelihood of audits and disputes in what is already one of the most GST-litigation-prone sectors of the economy. Disputes are costly for both the ATO and taxpayers, so introducing a new mechanism that increases the risk of disputes and unnecessary interventions in the GST collection process is undesirable and should be avoided wherever possible.

- This measure itself potentially also introduces a new and broader range of risks and uncertainties into the GST collection system for residential property supplies, due to the GST compliance and remittance obligations shifting from a smaller number of well-known GST-registered developers to a significantly greater number of unknown, unregistered individuals and conveyancers who are unfamiliar with the serious onus and complexities of tax compliance obligations around residential property transactions. The risk is the disaggregating effect of the measure, in terms of exponentially expanding the Commissioner's enforcement task while simultaneously decreasing the depth of the pockets of those liable. This may materially adversely impact the Commissioner's recourse for prospects of collecting the GST in the event of non-compliance.

- The notification and payment requirements for a large number of non-taxpaying withholders seems to us to be a burdensome compliance obligation for that class and an

administrative nightmare for the ATO in matching notifications and payments to vendors and purchasers alike. No doubt Treasury has substantial data to draw upon, but if one considers the number of new residential properties developed in 2015 (refer attached document accessed via this link), and assumes that 80% of those properties are subject to GST, and multiply that by three (notification, payment, and notification of payment), the extent of the burden should become clear.

- Highlighting the GST component of residential property transactions, which are traditionally priced as GST-inclusive with the GST paid by the vendor, may also make the private individual purchasers more conscious of the GST being paid, and more inclined to take objection to the tax impost (having seen the GST amount as a discrete sum), and in turn may be less satisfied with idea of duly remitting the GST amount to the ATO. The GST becomes more personal at the individual consumer level, than the corporate supplier level. This notion of who is 'the best GST collector' for the ATO is worthwhile considering closely from a behavioural economics perspective.

- Consequently, we consider that such a broad approach, with unknown outcomes in term of success and efficiencies compared with the current GST collection mechanism, warrants the insertion of additional safeguards and flexibility into the ED. Such safeguards should, as a minimum, include the grant to the Commissioner of a power to approve particular developers who have a history of good tax compliance to account for GST on their residential property supplies in the conventional manner. We consider that building in this flexibility to revert to a conventional collection mechanism would provide the best means to overcome the potential downsides to this measure, should it prove to create unintended inefficiencies or revenue collection problems for the ATO.

- Such mechanism would have the further benefit of encouraging residential/land development entities to attain and maintain a good tax compliance status (policies, systems and processes). It would also promote the Commissioner's 'light touch' mantra that where taxpayers do the right thing, the ATO and government has less interference / impact in their business and tax affairs.

Specific comments

(i) Section 14-255 as drafted seems to be purporting to preventing the supplier from making a taxable supply (invalidating the supply), when all it needs to do is ensure that the supplier notifies the recipients of their withholding obligation in the event that a relevant taxable supply is made. Section 14-255 needs to be reworded and reversed so that it states that you must give the notice and if you don't you face a penalty.

(ii) Section 14-255 also appears to assume that the supply is, in most cases, made at settlement. Arguably a taxable supply is also made when the contract is signed (sec 9-5, GST Act). Payment terms are more relevant to attribution of the GST payable on the supply. More clarity would be helpful as regards the timing of the notification.

(iii) Section 14-255 does not cater for the scenario where exchange and settlement happen within 14 days. It is not uncommon for cashed up foreign buyers to want

quick settlements.

(iv) While the terms "supplier" and "recipient" are used in sec 14-250, the recipient becomes "another entity" in sec 14-255, the supplier becomes the "entity" in sec 16-150(2) and in sec 18-60, the supplier becomes an "entity". In sec 18-85, the supplier becomes the "recipient" and the recipient becomes the "payer". More consistent use of key terms would enhance understanding of the amendments.

(v) In sec 18-85(2), a more precise payment formula would be preferable to "…the day on which GST is payable." The description used in paragraph 1.51 of the EM is suggested as a suitable replacement.

(vi) The draft Bill does not provide for purchases by co-owners (i.e. multiple recipients who are not in partnership). This issue affects key provisions, sec 14-250 and sec 14-255.

(vii) At para 1.44 in the draft EM – how will the developer know if the purchaser has remitted the withholding tax to the ATO? The developer will inevitably claim 100% of the amount withheld and the refund for 100% of the excess GST withheld. In the absence of a massive GST matching system (akin to the Indian system), the over-claim error in the developer's BAS (where the purchaser has not remitted) will only be detectable by the ATO and only upon random audit.

(viii) Para 1.29 of the draft EM is very confusing to our mind, and we are not convinced that sec 14-255 reflects what the EM says.

(ix) Sub-section 14-255(5) – classification issues on the border of "new residential premises" are complex enough now when only the developer and the Commissioner are involved. Now we will have a third party with a tax obligation. We expect that the following new tensions will arise:

a. Even greater incentive for vendors to argue that supplies were not made in the course or furtherance of an enterprise or that the five year rule has passed (even where those stances are borderline or incorrect),
b. Transactional conflict between developers and purchasers of renovated property. A developer might argue that it is not "new residential premises" because it is not "substantially renovated". A purchaser might argue that the developer's sales agent has either expressly stated or given a very strong impression that the property was substantially renovated and is virtually new. One can see purchasers demanding to know what parts remained un-renovated. In our view, the "substantial renovations" definition is confusing and problematic. However, until now, this is an issue that has remained relatively unearthed, and if arising, can often be dealt with at a senior level within ATO. Now, we will have purchasers who may have an incentive to agitate this issue.

Key recommendations

1. The ED Bill and EM should provide a mechanism to allow flexibility in the system:

(a) by granting a power to the Commissioner to allow him to declare a requirement, or to allow developers to apply for approval (either *as a developer entity/group*, or *in respect of each development)* for the GST to be paid by the developer in the conventional manner; and
(b) by allowing those approved developers to notify the recipients that they are relieved of their withholding obligations; and
(c) by making it a separate offence for a developer/supplier to incorrectly notify any recipient in relation to their withholding obligation.

2. The ATO will need to provide the developer community with a lot more consultation about the systems that the compliance obligations on purchasers will implement in order to manage the compliance prior to/at the purchaser withholding stage, at the developer credit/refund claiming stage, and at the subsequent BAS lodgement stage. While electronic conveyancing systems will be used for many transactions, they will not be used for potentially up to 50% of transactions. This will create a substantial difference in the levels of automation v manual processes required for different transactions and parties, creating further inefficiencies and inconsistencies in the compliance steps required.

Kind regards
Kevin

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