CORPORATE TAX ASSOCIATION
of Australia Incorporated

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General Manager – GST Unit
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The Treasury
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By email: gstpolicyconsultations@treasury.gov.au

Refunding Excess GST – Exposure Draft Legislation

The Corporate Tax Association (**CTA**) welcomes this opportunity to comment on the Exposure Draft legislation on refunding excess GST (**ED**). We also thank you for allowing a short extension of time.

Firstly we would like to acknowledge the positive changes made in the ED as a result of consultation on the first ED (as released on 17 August 2012), in particular:

- the alignment of the proposed amendments with recommendation 45 of the Board of Taxation GST Review, that being to clarify that the Commissioner has a discretion to refund the GST where appropriate;
- the application of the proposed Division 142 to both business to consumer and business to business transactions;
- allowing taxpayers to object to relevant assessments; and
- the relevant amendments which allow most adjustment provisions to operate as intended.

There are, however, a number of issues of concern that have not been addressed in the current ED. These issues were canvassed in our submission dated 21 September 2012 and can be summarised as follows:

- We are still of the view that the Federal Court decision in *International All Sports v Commissioner of Taxation* [2011] FCA 824, although arguably giving rise to a need to amend section 105-65 to deal with miscalculations, does not warrant the complete overhaul of section 105-65 and the consequential introduction of concepts such as 'passing on' that are fraught with difficulty. To this end, we note that the decision in *International All Sports* recognises and supports the operation of section 105-65 to deny refunds in circumstances where it would result in a windfall gain.

- The proposed amendments, if enacted, will be retrospective in their application from 17 August 2012. We understand that this can sometimes be necessary, for example where the proposed measures are aimed at protecting the integrity of the tax system. However, we do not accept that the proposed Division 142 fits within this category.

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Given we are now looking at a 10 month gap between the date of announcement and any potential date of Royal Assent, we ask that further consideration be given to aligning the start date with the latter.

- The proposed Division 142 holds the line that registered suppliers who have overpaid an amount of GST and have 'passed on' that amount on to the recipient will not be able to claim a refund. In this circumstance, unless the supplier can recover the overpaid GST, the supplier will bear the cost of the excess GST. This will occur where, for example, a contract between a supplier and a recipient allows for a specified amount to be paid, irrespective of the GST payable.

  An example of this is in the real property and margin scheme context where the price of the land sold does not change depending on what the vendor's GST liability is (i.e. the purchaser simply pays a price for the land) and the purchaser does not know (or care) how much GST the vendor is paying under the margin scheme. A Tax Invoice is not issued by the vendor to the purchaser disclosing the amount of GST payable by the vendor. In these circumstances, where the vendor/supplier incorrectly overpays GST on the supply, the proposed Division 142 will prevent that vendor/supplier from recovering that overpaid amount. The CTA strongly objects to such an inequitable outcome. The redrafting of the Explanatory Memorandum (**EM**) to include further examples around this point does not assist taxpayers who find themselves in this space.

  There are also other circumstances in which the operation of 'passing on' is unclear. One example is the area of promotions. The Commissioner's discretion under subsection142-10 (3) talks about the Commissioner being satisfied that a refund of GST would flow to an entity that effectively has borne the cost of the extra GST. For a retailer, if a refund can be made via a promotion to its customer base that purchased a particular product and electronically this customer information is available, does the concept of a promotion allow a flow to the customer? We note that the example in the previous EM in relation to promotions has been removed and not replaced in the current EM.

- Following on from the last point, the ED and the EM still place significant reliance on the concept of 'passing on' and look to the issuing of a tax invoice as evidence that the GST has been passed on to the recipient. This assumption does not take into account common scenarios that typically lead to an overstatement of GST, such as:

  - Incorrect GST coding being applied internally but the price to the end consumer does not change.
  - Transposition errors and other errors related to BAS preparation that lead to higher amounts of GST being reported on the BAS than was priced to the customer.
  - Miscalculations of the GST mix of a mixed supply scenario where the end price to the consumer does not change.

We recognise that the reworking of the ED to reinstate the Commissioner's discretion and to allow taxpayers to self-assess via decreasing adjustments is aimed at addressing this concern. In obvious circumstances such as those outlined above, these changes may well achieve that aim. It is in the more 'line ball' cases, such as those outlined under the previous dot point, that the value of these changes will be challenged. This is because their effectiveness will be completely dependent on the approach the ATO takes to self-assessed adjustments and how flexible (or inflexible) the ATO is in allowing refunds that, in the taxpayers' view, satisfy the 'passing on' requirement.

On this point, there is a real concern that there may be significant misalignment between the circumstances in which Treasury might accept taxpayers self-assessing refunds (on the basis that a taxpayer has not 'passed on' GST) and the ATO's approach to determining whether taxpayers have satisfied the proposed section 142-10. Although we recognise that this perception may be unwarranted, given there have been no consultation meetings on these proposed changes, we are not in a position to assure our members that their concerns are unfounded or that the ATO and Treasury positions are indeed aligned. To this end, we refer to the recent protocol between the ATO and Treasury on tripartite law design and draft Practice Statement 3473. When read together, the practical application of these documents should result in externals, Treasury and the ATO having a shared understanding of how proposed law will work in practice. In our view, this is not the case in the context of the proposed Div 142. Further discussion of the proposed changes between Treasury and ATO officials with relevant externals in attendance would go some way to addressing this concern.

Please do not hesitate to contact me should you wish to discuss any aspect of this submission further.

Yours sincerely,

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