



Australian Government

The Treasury

GST SUPPLIES BY REPRESENTATIVES WHO ARE CREDITORS

SUMMARY OF CONSULTATION PROCESS

In the 2011-12 Budget, the Government announced that it will amend the goods and services tax (GST) law to clarify that Division 105 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) operates to the exclusion of Division 58 of the GST Act where a mortgagee in possession or control sells the property of a corporation.

The measure was included in Tax Laws Amendment (2012 Measures No. 4) Bill, which was introduced into Parliament on 27 June 2012.

Consultation process

- Public consultation on a discussion paper for the proposed measure was conducted between 7 June 2011 and 6 July 2011. Four submissions were received. All were public submissions.
- Public consultation on the draft legislation was conducted between 14 February 2012 and 13 March 2012. Four submissions were received. All were public submissions.

Summary of key issues

Discussion paper

Issues raised

Stakeholders were generally supportive of the proposed amendments to prefer the application of Division 105 over Division 58 in this specific circumstance. Submissions noted that the operative provision should be inserted into Division 58 or Division 105, rather than amending the definition of 'representative' in section 195-1 of the GST Act. Submissions agreed that this would effectively exclude the operation of Division 58 where Division 105 applies.

However, some stakeholders were concerned that the tiebreaker provision would not sufficiently address the potential overlap between Divisions 58 and 105 by not covering the field and by providing incentives to structure the appointment of representatives in such a way that allows the avoidance of GST liability, due to the broad definition of 'controller' in the GST Act. Submissions further suggested that additional guidance on the operation of the provisions would be useful to taxpayers in interpreting the law.

Response



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The Government made minor changes to the measure to insert a tie breaker provision into Division 58 of the GST Act. The effect of this is that Division 105 operates to the exclusion of Division 58 in all circumstances where a representative of an incapacitated entity is a creditor of that entity, and the representative makes a supply in satisfaction of a debt that the incapacitated entity owes to them.

The choices made by mortgagees and agents in structuring their GST liabilities are considered to be outside the scope of this measure. The avoidance situations described in submissions would occur in very limited circumstances. In most of these cases, Division 105 will not apply, thus there would be no overlap between the two Divisions.

The amendments are designed to address the overlap between Division 58 and Division 105, which only arises in the context of a corporation in the GST Act, as a 'controller' can only be appointed for a company. The situation where a mortgagee is selling the property of an entity other than a corporation is not at issue here.

It is the role of the Australian Taxation Office to provide guidance material for taxpayers on the correct interpretation of the law.

Draft legislation

Issues raised

Stakeholders were generally supportive of the insertion of a tiebreaker provision into Division 58, with the effect that Division 105 will apply over Division 58 in the event of an inconsistency.

Stakeholders were concerned that taxpayers might restructure their representative arrangements to avoid the effect of the amendment, so that only Division 58 applies. In addition, there was some concern that the tiebreaker would not address the overlap between Division 58 and Division 105, but could be better addressed by amendments to section 195-1 to remove 'controller' from the definition of 'representative.'

It was also noted that the terms used in the draft explanatory memorandum, 'charge' and 'chargee', were inconsistent with recent amendments to the Corporations Act 2001 and the recently amended Personal Properties Securities Act 2009.

Response

The Government considers that the term 'controller' should remain in section 195-1. Removal of this definition would create a gap in the GST law in cases where property is sold by a controller that was appointed by a mortgagee. A tiebreaker provision will ensure the effective operation of the law in cases where a mortgagee takes possession of, and exercises, their power of sale with respect to a corporation's property.



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It is considered that there are very limited situations in which taxpayers could adopt arrangements to avoid GST liability imposed by the amendments. The choice of taxpayers to make such arrangements is outside the scope of this measure.

The Government amended the explanatory material and title of the measure to ensure consistency between the amendments to the GST Act, the Personal Properties Securities Act 2009 and the Corporations Act 2001.