The Institute of Chartered Accountants in Australia

31 May 2012

Ms Brenda Berkeley
The General Manager
Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: GSTadministration@treasury.gov.au

Attention: Ms Joanne Croft

Customer Service Centre
1300 137 322

NSW
33 Erskine Street
Sydney NSW 2000
GPO Box 9985
Sydney NSW 2001
Phone 61 2 9290 1344
Fax 61 2 9262 1512

ACT
L10, 60 Marcus Clarke Street
Canberra ACT 2601
GPO Box 9985
Canberra ACT 2601
Phone 61 2 6122 6100
Fax 61 2 6122 6122

Qld
L32, 345 Queen Street,
Brisbane Qld 4000
GPO Box 9985
Brisbane Qld 4001
Phone 61 7 3233 6500
Fax 61 7 3233 6555

SA / NT
L29, 91 King William Street
Adelaide SA 5000
GPO Box 9985
Adelaide SA 5001
Phone 61 8 8113 5500
Fax 61 8 8231 1982

Vic / Tas
L3, 600 Bourke Street
Melbourne Vic 3000
GPO Box 9985
Melbourne Vic 3001
Phone 61 3 9641 7400
Fax 61 3 9670 3143

WA
L11, 2 Mill Street
Perth WA 6000
GPO Box 9985
Perth WA 6848
Phone 61 8 9420 0400
Fax 61 8 9321 5141

Dear Brenda

Consultation Draft Regulations – GST treatment of Australian taxes, fees and charges

The Institute of Chartered Accountants in Australia (the Institute) welcomes the opportunity to make a submission on the Consultation Draft of *A New Tax System (Goods and Services Tax) Regulations 1999* (Draft Regulations) and associated Explanatory Statement (ES) released on 2 May 2012.

The Draft Regulations will amend Regulation 81-10.01 and insert new Regulations 81-15.01 and 81-15.02, and are proposed to commence on 1 July 2012.

The Institute is the professional body for Chartered Accountants in Australia and members operating throughout the world. Representing more than 70,000 professionals and business leaders, the Institute has a pivotal role in upholding financial integrity in society. Members strive to uphold the profession's commitment to ethics and quality in everything they do, alongside an unwavering dedication to act in the public interest.

Chartered Accountants hold diverse positions across the business community, as well as in professional services, government, not-for-profit, education and academia. The leadership and business acumen of members underpin the Institute's deep knowledge base in a broad range of policy areas impacting the Australian economy and domestic and international capital markets.

Background

This submission follows our earlier submission to Treasury dated 15 February 2011 (2011 submission) in response to the Exposure Draft (ED) legislation on exempting taxes, fees and charges from the GST. In that submission, the Institute expressed the view that the administrative costs of obtaining appropriate certainty under the new Division 81 provisions would outweigh the anticipated benefits of moving away from the legislative determination which exhaustively listed specific taxes, fees or charges that are to be treated as exempt. We continue to hold this view.

Since 1 July 2011, the policy implemented by new Division 81 of the GST Act 1999[1] is that:

[1] All references to the GST Act 1999 are to the *A New Tax System (Goods and Services Tax) Act 1999*

- all taxes are acknowledged as not taxable; and
- fees and charges will be taxable if the fees and charges are consideration for a supply under section 9-5, but certain categories of fees and charges will be treated as non-taxable,

unless the taxes, fees or charges are specified as taxable by the Regulations.

However, a grandfathering provision was introduced at the same time as new Division 81 to defer its application until 1 July 2012 in respect of Australian taxes, fees and charges specified in a Division 81 determination as exempt from GST. This maintained the status quo for the GST treatment of such payments for a transitional 12-month period.

Further to our 2011 submission on the ED legislation, this submission sets out our high-level comments, both general and specific, on the Draft Regulations and ES.

General comments

- ***Need to achieve certainty and the policy intent***

We reiterate our headline concerns expressed in the Institute's 2011 submission on the ED legislation, namely that we do not believe the replacement of the former legislative mechanism with the current "principles based" approach is an improvement in terms of certainty and administrative costs. To the contrary, we consider that the new approach is less certain and significantly greater in terms of risk, compliance and administrative costs for Australian government agencies.

Under the new Division 81, Australian government agencies will now need to review the GST treatment of each and every fee and charge they receive and, to achieve certainty on the GST treatment would be advised to seek a private ruling from the Australian Taxation Office (ATO) for a binding view on whether the fee or charge is consideration for any form of supply made by the agency. That is, unless the position can be determined with certainty by virtue of the fee or charge being clearly prescribed as consideration (taxable) or not consideration (non-taxable) under the Regulations, which is unlikely because of the general nature of the drafting in the Regulations.

The new GST treatment will need to be confirmed within the grandfathering period for the legislative determination which has now been extended to 30 June 2013. We expect that the volume of ATO rulings and guidance requested by taxpayers, both during and after this time will likely lead to extensive use of the Regulation making powers to ease the administrative burden and to provide certainty on intended exemptions. Equally, we believe that the Regulatory making power is will need to be invoked simply to ensure that GST outcomes reflect the policy intent.

In this regard, we note that both the Commissioner and the courts (for example, in *TT-Line Company Pty Ltd v Commissioner of Taxation* [2009] FCAFC 178) have taken a view of the words of the law that has been said to be inconsistent with the policy intent. Consequently, it is necessary to observe that the "principled" terminology used in the proposed Regulations is unlikely to be administered or interpreted in accordance with Parliament's apparent intent.[2]

Accordingly, we believe that an alternate model for government agencies to that in place under the new Division 81 is required, as discussed further below. This need is only highlighted further by the

[2] We refer to ATO IDs 2012/21 and ATO ID 2012/22 as evidence of the challenges faced by the Commissioner in applying the current law, as it is expressed, in accordance with the policy intent that non-commercial activities of government are to be excluded from the application of GST. It is apparent that, while the clear intent is that: (i) non-business activities of government are not to be regarded as being carried on "in the form of a business"; (ii) fees charged in relation to activities that do not fall within paragraphs 9-20(1)(a) – (c) are **not** to be regarded as consideration for supplies made; and (iii) statutory exactions of government (even if on a "user pays" principle), are **not** to be regarded as consideration for any supply, these ATO IDs do not enunciate or conclude in line with any of these principles.

novel and untested 'appropriations' rules that are soon to be enacted as new subsection 9-17 (3) of the GST Act 1999, when we seek to interpret and apply them alongside Division 81. In our view, these two provisions are a minefield of uncertainty and it is inconceivable to us, as a matter of good tax policy, why the government would wish to introduce this level of complexity to the GST system in the domain of government outlays and revenue neither of which, in general, form part of the Australian GST base.

- ***An alternate model for 'government to government' expenditure***

Consistent with the recommendations of the *Future Tax System* report to improve the efficiency and reduce the compliance costs of government agencies, we reiterate our recommendation that the government consider reviewing the decision to keep government in the GST system, specifically in respect of the payments they receive. In the Institute's 2011/12 Budget submission of 3 February 2011, we noted the inefficiencies of GST and government dealings, particularly in the context of government subsidy payments, and recommended that the GST law be amended to ensure that:

- government-to-government payments are either out of scope or GST-free; and
- government expenditure does not include non-recoverable GST costs, i.e. input tax credits should be allowed.

We believe that this could be achieved for example by amending the definition of "enterprise" for the purposes determining whether payments received by an Australian government agency are received in the course or furtherance of an enterprise. In this respect, for the purposes of applying section 9-5 to Australian government agencies, the applicable definition of "enterprise" could be limited to activities falling within paragraphs (a) to (c) of section 9-20 of the GST Act 1999. However, for the purposes of determining whether a "creditable acquisition" is made under section 11-5, the definition of "enterprise" could remain as the existing broad definition in paragraphs (a) to (h).

We would be pleased to discuss and explore with you further the prospect for such an alternate model.

Specific comments

In addition to the general comments and concerns expressed above, we would like to highlight a number of specific issues in relation to the Draft Regulations and ES:

1. Extension to transitional 'saving' of determination

As indicated in the Assistant Treasurer's Press Release (2 May 2012, no.021), the Draft Regulations seek to provide a longer transitional period to the new exemption mechanism by extending the grandfathering of the previous Division 81 determination for a further 12 months until 30 June 2013.

We support this extension, as provided for in proposed subregulation 81-15.02 (2). However, we note that the original legislative provisions which conferred the grandfathering - Clause 16 (2) and (3) of the amending legislation - only operate to give continued effect to the determination and provide exemption under the determination up until *1 July 2012*.

As such, from 1 July 2012, the exemption of fees and charges prescribed in the legislative determination is achieved solely via the operation of the proposed paragraph 81-15.01 (1)(g), which merely references the legislative determination.

Contrary to this, however, the ES inaccurately states on page 2 that "the Regulation also extends the operation of the determination until 30 June 2013." This is not technically correct, since it seems that as a matter of law, the determination is no longer operative from 1 July 2012.

For the determination to continue to be legally operative as an instrument in its own right, an amendment to Clause 16 (3) would be required to give continued effect to the determination up until *1 July 2013*, in addition to the extended grandfathering provided for under Regulations 81-15.01 and

81-15.02 (2). That is, the legislative provision would need to be amended to confirm that the existing "legislative instruments continue to have effect after the commencement…and before **1 July 2013**, as if the repeal had not happened."

In this respect, we also note that the Clause 16 exemption that applies up to 1 July 2012 covers "legislative determinations" (plural), whereas the exemption that will be achieved under paragraph 81-15.01 (1)(g) covers only the 2011 (No. 1) determination (singular). Was this intended and what is the effect of this change in terms of what will continue to be grandfathered?

2. Tie-breaker provision

As recommended in our 2011 submission, we applaud the insertion of proposed Regulation 81-15.02 as a 'tie-breaker' provision, i.e. to provide express clarification that:

- fees and charges currently listed in the determination will remain not subject to GST for the extended transitional period (until 1 July 2013), under Regulation 81-15.01, even if they also fall within Regulation 81-10.01; and

- fees and charges falling within both Regulation 81-10.01 (taxable) and Regulation 81-15.01 (non-taxable) will be subject to GST.

We believe that this provides some greater certainty around the priority with which the Regulations are intended to operate in the event of overlap.

3. Use of the word "imposed"

Proposed subregulation 81-15.01 (1) prescribes that the following, amongst other things, does not constitute consideration:

> (g) "any other fee or charge *imposed* before 1 July 2013 and specified in [the Division 81 determination 2011 (No.1)]…".

Similarly, as discussed above, proposed subregulation 81-15.02 (2) provides a tie-breaker test, such that if the fee or charge is specified in the Division 81 determination 2011 (No.1), and the fee or charge was *imposed* before 2013, it will not be taxable, regardless of whether it would otherwise also fall within Regulation 81-10.01 specifying that it is to be taxable.

We understand that the word "imposed" in this context is being used to convey the meaning "becomes due and payable". In a taxation context, however, "imposts" are "imposed" under enactments or regulations. For example, the *A New Tax System (Goods and Services Tax Imposition - General) Act 1999* is an enactment that implements the GST system by "imposing the tax payable under the GST law". As such, it potentially has dual meanings - "imposed" could be given its technical meaning in the sense of the imposition legislation, or alternatively, it may be given the meaning of "imposed" in the sense of when the fee or charge becomes payable to the government agency.

While we appreciate that the term "imposed" was used in the original version of Division 81, in that context it limited the operation of the Division to taxes, fees and charges "imposed under an *Australian law".[3] The use of the same terminology to give effect to the "date of effect" of the changes to the law is, in our view, a misuse of the term that is likely to produce results that are at odds with the policy intent. We recommend that Treasury review the use of the word "imposed" in the new Division 81 and the proposed Regulations to determine whether it is intended to have the same meaning as the original provision. For example, if its (original) technical meaning were given, on our reading, all fees and charges specified in the Division 81 determination 2011 (No.1) would arguably continue to be exempt after 1 July 2013 as they have all been "imposed" prior to that date.

[3] See section 195-1 of the GST Act 1999

*4. Use of the expression "***to which [both Regulations]** *apply"*

In proposed Regulation 81-15.02, the expression "to which both Regulations 81-10.01 and 81-15.01 *apply*" is used. We believe that these words are ambiguous, since all provisions technically apply after their date of "application". As such, we believe that it would be preferable to use clearer words for example words such as "which satisfies both Regulations 81-10.01 and 81-15.01", or "which falls within both Regulations 81-10.01 and 81-15.01", or "which is covered by both Regulations 81-10.01 and 81-15.01". The words "covered by" were most recently adopted in the drafting of the *A New Tax System (Goods and Services Tax) Amendment Regulation 2012 (No.1)* - see new Item 32 in subregulation 70-5.02 (2), inserted by Clause 7.

5. Scope of exemptions

As we have previously commented, the kinds of Australian fees or charges that are covered by the exemptions under subsections 81-10 (4) and (5) appear extremely limited and are likely to exclude fees or charges that are currently covered by the Division 81 determination. Some of the terminology used, for example "licence" and "permission" may also prove problematic to interpret, as we understand that many government licences and permits are not licences and permits at common law.

In proposed Regulation 81-15.01, we now have a further seven (7) broad types of fee or charge prescribed as exempt in the Regulations, plus the catch-all category in paragraph (g) being all fees or charges specified in the Division 81 determination and imposed before 1 July 2013.

In our view, these cumulative exemptions remain unlikely to cover all fees and charges that are currently treated as out of scope of the GST as a matter of policy for government agencies. Consequently, post 30 June 2013 when the Division 81 exemptions no longer have effect, this will leave a vast range of fees and charges open to uncertainty and the burden of self-assessment under the basic GST rules.

An example of this difficulty lies in the use of the term "regulatory" or "non-regulatory" nature. Does proposed paragraph 81-10.01 (f) apply to fees charged under the Freedom of Information (FOI) laws for access to information? Clearly the provision of the information is of a "regulatory nature".

Similar difficulties are likely to arise from the wording of proposed paragraph 81-15.01 (1)(f) which requires that there be a "supply of a regulatory nature". There is a considerable doubt whether payments of the types listed in the draft ES would be "for supplies" made by the agency. We assume that the intent is to exempt "fees or charges of a regulatory nature" but, in our view, the scope of the term "regulatory nature" is very unclear.

As foreshadowed in our 2011 submission, the extent of uncertainty and GST risk for government agencies after 30 June 2013 will be likely to lead to extensive guidance and rulings being sought from the ATO. Over time, and probably sooner rather than later, we anticipate that this will create a need to revert to extensive use of the Regulation making powers to provide certainty on intended exemptions.

6. Explanatory Statement examples and principles - 'the new Legislative Determination'?

Our main observation on the Explanatory Statement (ES) to the Draft Regulations at this point in time is that it is already looking extremely lengthy and detailed (even though it covers only three taxable items and seven non-taxable items). This is because the ES contains specific examples of the types of fees and charges that fall within the various paragraphs of the Regulations.

The Institute is concerned about the extent of detail that forms part of these extraneous, explanatory materials, and would prefer to see all statements of principle and examples of fees and charges inserted into schedules to the Regulations, in a similar manner to the Financial Services regulations and schedules of examples.

In this way, the examples and principles are at least contained within the subordinate legislation itself, which will also make them more readily accessible to taxpayers (such as government agencies) who have to interpret and comply with the law.

One further issue that we note in the ES is some typo-graphical errors in the references within the Attachment, under the heading "Fees and charges of Australian government agencies subject to GST". Firstly, the reference to "*Paragraph 81-**15**.01 (1)(g) A fee or charge for a supply of a non-regulatory nature*" should state "*Paragraph 81-**10**.01 (g)*..". Secondly, in each of those references to the new paragraphs (f), (g) and (h) for Regulation 81-10.01, the "(1)" reference should be removed because it is not applicable in Regulation 81-10.01.

We would be pleased to discuss any aspect of this submission with you further. If you have any queries, please contact Donna Bagnall on 02 9290 5761 in the first instance.

Yours sincerely

Yasser El-Ansary
General Manager – Leadership & Quality
The Institute of Chartered Accountants in Australia