

From: Elaine Abery
Sent: Tuesday, 21 February 2012 7:02 PM
Subject: RE: exposure draft legislation - Commissioner's ability to retain refunds
[SEC=UNCLASSIFIED]

Dear Jenny,

Thank you for the opportunity to provide the industry's views on the proposed amendments to the Taxation Administration Act 1953 ("TAA") concerning the Commissioner's entitlement to retain refunds while information is verified ("draft law").

The Property Council is the peak body representing the interests of owners and investors in Australia's \$670 billion property investment sector. The Property Council serves the interests of companies across all four quadrants of property investment, debt, equity, public and private.

We understand that the draft law is an integrity measure.

However, the industry wants to ensure that the proposed amendments do not adversely affect legitimate refund requests.

Unfortunately, due to the very short consultation period, we have not been able to fully consider the issues that arise from the draft law. Our general comments on GST refunds are set out below. We are keen to meet you to further discuss the draft law.

1) Commissioner must inform taxpayers in writing

Proposed s 8AAZLGA(2) states that the Commissioner must "inform" the entity if the Commissioner intends to retain a refund.

It is important that any notice under s 8AAZLGA(2) be in writing. This will reduce disputes between the ATO and taxpayers, by ensuring that there is clear evidence that the Commissioner has informed the taxpayer as required by the law.

2) Timeframes must not "refresh" when a refund notice is varied

Taxpayers may lodge a refund notice and then receive new information and vary their refund notice, either upwards or downwards. To reduce uncertainty, the proposed amendments need to address this issue.

For example: Ewe Buyte Co notifies the Commissioner in a GST return that it is entitled to a refund of \$1 million. Following an enquiry by the Commissioner during the 14 day period, Ewe Buyte revises the refund amount down to \$900,000.

This revised refund amount must not be treated as a new refund notice or "refresh" the 14 day time period, as this would effectively double the Commissioner's timeframe to withhold refunds.

The draft legislation must be clarified to ensure that the timeframes set out in s8AAZLGA(2) and (3) are not "refreshed" if an entity amends a refund notice.

3) Commissioner must request information within 14 days

There is a real risk that the draft legislation will adversely affect the cash flow of taxpayers with legitimate refund requests. It is therefore vital that the Commissioner be required by the legislation to act swiftly when withholding refunds.

The draft legislation allows the Commissioner to retain a GST refund beyond 14 days (and possibly a further 60 days) if the Commissioner is satisfied that it would be "reasonable to require verification of information" relating to the refund.

However, the draft legislation does not oblige the Commissioner to actually obtain the information he needs to verify the refund.

It is only logical that the Commissioner be required to request any information he needs within 14 days of a GST return being lodged. The further 60 day period should only apply where the Commissioner has requested information and requires additional information.

4) Clarify the meaning of "verification"

Treasury has stated that the draft law only applies where the Commissioner intends to verify factual information, not where the Commissioner disagrees with the entity's entitlement to a refund on technical grounds.

It is important that either the Explanatory Memorandum or the law clarify that the Commissioner may not withhold refunds where he disagrees with the technical grounds for a taxpayer's refund.

5) Clarify what factors allow the Commissioner to retain a refund

The draft law allows the Commissioner to retain a refund in the 14 days after the refund request is lodged. The Commissioner can then withhold the refund beyond 60 days in certain circumstances (s 8AAZLGA(8) lists a number of factors to be considered).

It does not make sense that this list only applies when the refund is withheld for more than 60 days. The same factors clearly apply when the Commissioner makes his initial decision to withhold a refund.

S 8AAZLGA(8) should apply when the Commissioner decides to withhold a refund.

It is crucial that the law provides clarity and certainty to taxpayers with legitimate refund requests.

S 8AAZLGA(8)(a)-(e) is a complete list of circumstances where the Commissioner should be entitled to withhold a refund. It does not make sense to list a further miscellaneous circumstance of "any other matter the Commissioner considers relevant" (s 8AAZLGA(8)(f)).

S 8AAZLGA(8)(f) increases confusion and uncertainty and should be deleted.

6) Retain taxpayers' Part IVC objection rights

S 8AAZLGA(9) says that the entity may decide to object to the Commissioner's decision that it is reasonable to require verification of information. The Commissioner then has another 60 days to consider the objection.

It is important to retain taxpayers' rights to pay the correct amount of tax. Cash flow is vital to many businesses and the longer a refund is retained, the higher the impact on the business.

It is crucial that taxpayers can object to the Commissioner's actions that adversely affect them and their business.

We are concerned that it will be difficult, if not impossible, for an entity to object against the Commissioner's decision under s8AAZLGA(5) that "it would be reasonable to require verification of the information".

Taxpayers should have a right to object to the decision to retain a refund, not the decision that it is reasonable to require verification of the information.

7) Allow taxpayers and the Commissioner to agree to retain a refund in writing

In some cases, a taxpayer may be prepared to allow the Commissioner to withhold a refund while the correctness of a refund is determined. For example, where an entity has lodged a refund request, but the matters giving rise to the refund request are the subject of a test case that has not yet been decided by the Courts.

Allowing the Commissioner to retain the refund will reduce the taxpayers' risks of incurring GIC where it is ultimately determined that the taxpayer was not entitled to the refund.

In such circumstances, it may be appropriate for the parties to agree in writing that the Commissioner may retain the refund until either:

- the Commissioner has determined the correctness of the refund claim; or
- the taxpayer revokes the agreement and requests the refund (whichever happens first).

8) Consult on non-GST refunds

The draft law does not just apply to GST refunds.

It is not clear which types of refunds could be potentially impacted by the draft law. This makes it difficult to comment on the draft law.

It is essential that sufficient time is provided for consultation on the other taxes that the draft law addresses.

We are keen to meet with you to discuss the draft law.

Please do not hesitate to contact me with any queries.

Kind regards

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