THE TAX INSTITUTE
THE MARK OF EXPERTISE

1 December 2016

Mr Christopher Lyon
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The Treasury
Langton Crescent
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By email: lowvaluegoods@treasury.gov.au

Dear Mr Lyon,

Applying GST to Low Value Goods Imported by Consumers

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Treasury Laws Amendment (2017 Measures No. 1) Bill 2017: Low value imported goods Exposure Draft* (**Exposure Draft**), the Exposure Draft Explanatory Materials (**EM**) and the associated 'Question and Answer' document.

We also thank Treasury, the Australian Taxation Office and the Department of Immigration and Border Protection for the opportunity to have discussed this measure with you in a teleconference on 18 November 2016.

Summary

Our submission below addresses our main concerns in relation to the Exposure Draft, mainly around the administration and practical implications of the provisions, including the short timeframe in which suppliers will have to accommodate this law change into their business systems. In our view, the easier and simpler the proposed law is to enforce and comply with, the more likely that overseas suppliers will comply.

Discussion

1. General

The Tax Institute appreciates that the policy measure is to ensure low value goods imported into Australia by consumers are captured within the Australian GST net so as to level the playing field with local suppliers. However, The Tax Institute has a number of concerns with how this measure will be implemented and administered.

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a) Approach to administration

The Tax Institute has reservations regarding the ability of the relevant Australian authorities (namely the Australian Taxation Office and the Department of Immigration and Border Protection) to effectively enforce the proposed legislative changes. We are concerned that the proposed amendments are a 'one size fits all' approach and do not provide sufficient powers of enforcement of the law, nor sufficient 'encouragement' to the range of overseas suppliers (from large to small) to adhere to the proposed legislative changes, either due to a lack of awareness or by deliberate intent.

While we acknowledge the existence of the proposed limited registration option for overseas suppliers (under draft Division 146), we expect that most overseas suppliers will still want to register under the ordinary rules in case they wish to claim input tax credits. The current process for non-residents that seek to register for GST is extremely time consuming and represents a significant hurdle for non-residents that wish to comply with the proposed measures. It also remains to be seen whether and to what extent the limited registration option reduces these hurdles.

Further, the new provisions are also technically complex and difficult for overseas suppliers to understand, for example, the imposition of GST on low value imported goods is not via the general "*connected with the indirect tax zone*" rules in section 9-25 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) but rather via the special rules in Division 85.

The Tax Institute believes that in the absence of a concerted education / advertising approach to overseas suppliers, the complex rules combined with the difficulties in the ATO enforcing the proposed measures and the difficulties for non-residents registering for GST will lead to a very low compliance rate with the new measures.

We recognise that larger, better known overseas suppliers with worldwide reputations may spend the resources to become acquainted with and voluntarily comply with the new measure and would like to believe that many suppliers would like to comply with the measure in good faith.

It is important that the measure operate effectively in the majority of cases of low value imports. However, in our view, we are concerned this does not seem to be the case. It is unlikely, in the absence of education and effective enforcement and given the other factors mentioned above, that there will be high levels of voluntary compliance from other overseas suppliers.

There is a potential risk that consumers may seek to take advantage of supplies from those overseas suppliers who are non-compliant and therefore there is the potential for an increase in the import of goods that do not meet the stringent controls, in terms of safety, customer services standards, ethical sourcing and so forth which are a key element of Australian consumer protection.

It is our view that, in order to enforce the proposed legislation, it would be appropriate to put in place measures to identify and tax any supplies from the non-conforming businesses at the point of import. To not do so would significantly undermine the integrity of the proposed system.

Although we recognise that any measure to tax at the point of import would likely slow down the processing of low value parcels at the border, cause delays in delivery times and potentially be costly, we would view this approach as the only viable alternative. Alternatively, in practice, this could operate as Customs stopping and reviewing a sample of parcels, rather than every parcel imported into Australia (much as the ATO selects a sample of individual income tax returns to audit every year).

If goods are not stopped at the border, there would be a presumption that the overseas supplier has complied with the relevant GST requirements. However, it is our understanding that the information currently required to be provided on an international mail declaration would provide no indication as to whether GST had been charged and accounted for by the offshore supplier.

While goods forwarders will be required to collect additional data from the overseas supplier to be included in the relevant import declarations to be made in relation to low value goods delivered to Australia[1], it is unclear how similar information will be collected for low value goods that arrive in Australia via international surface mail. If the mail delivery entities, which just facilitate the delivery of surface mail, are not required to collect such information, a significant number of low value goods are likely to enter Australia without the same 'checks and balances' in place to ensure the relevant GST liability has been met. We consider that some kind of mechanism to check on low value goods being brought into Australia via the international mail system, or at least a 'spot check' system, could be considered to address this.

We understand from our teleconference that some advertising overseas will be done to inform overseas suppliers about the change to the Australian GST laws and how they will be affected and the intention is to get overseas suppliers that are affected by this measure into the system in the first year or two without having to utilise formal compliance action. Treasury advised that there is no intention to stop goods at the border where an overseas supplier has not complied with this measure, given that one of the principles applicable to this measure is that '[low value] goods would not be stopped at the border[2]'. It is also intended that the law be designed to not draw small businesses into the net unnecessarily and that the business would need to be of reasonable size before catching the attention of the ATO for non-compliance.

[1] Refer to p3 of the 'Question and Answer' document at the question 'I operate an international air cargo company and deliver parcels to Australia. What does this change mean for me?'
[2] Media release of former Treasurer the Hon Joe Hockey MP 'Statement: Council on Federal Financial Relations Tax Reform Workshop' (21 August 2015)

We support the intention for a post-implementation review of the measure to be carried out after two years[3] to ensure that the measure, once implemented, is both working and being administered effectively.

b) Notification requirements

We are unsure how information regarding whether GST has been charged and paid on the low value imported good will be notified. However, we understand the intention is that overseas vendors will be required to provide certain information to the transporters/goods forwarders who are then required to provide this to the customs brokers to be entered into the 'ICS' (customs system). This information will then be provided to the ATO for checking. This relies on quality of the information to be provided by the overseas supplier in the first place.

What would occur if the information is not provided? Will there be any penalty if the transporters/goods forwarders are not provided with the information? If this cannot be enforced, once suppliers become away of the lack of enforcement, will there be an incentive to not provide this information?

c) Limited implementation period

It is intended that this measure apply to tax periods starting on or after 1 July 2017. Given there is only draft legislation seven months out from the intended start date and the legislation is not expected to pass until at least February 2017 (and possibly later), we note there is a limited time for overseas suppliers, particularly the larger ones, to get systems in place in time to accommodate this law change.

It is important not to underestimate the resources required for overseas suppliers to implement the new rules. For large suppliers, the exercise is similar to when Australian businesses were required to implement GST in 2000 (for which the implementation period was approximately 18 months). We note that the issues that arise (and the systems required to deal with these issues) are significantly more complex than for suppliers seeking to comply with the recent amendments to tax digital supplies. Some examples of these issues include:

- Sales of GST-free goods (such as GST-free medical aids and appliances);
- GST treatment of delivery services (and other mixed and composite supply issues);
- returns policies (particularly for electronic distribution platform providers where the goods are generally returned direct to the supplier);
- goods that are sold under the Tourist Refund Scheme;
- compliance with the GST component pricing and other rules in the Australian Consumer Law (discussed below); and
- sales of second hand goods;

[3] Per the 2016-17 Federal Budget measure 'Applying GST to Low Value Goods Imported by Consumers' Budget Paper No. 2 p19.

We acknowledge that the States have agreed to a 1 July 2017 start date for the proposed measure. If it is not feasible to defer the start date, we therefore suggest that the legislation include transitional rules allowing the ATO to ameliorate the compliance difficulties for overseas suppliers (say by legislative determination). We would be pleased to discuss the types of transitional rules that could be included.

d) Australian Consumer law

In our discussion, we raised for Treasury's consideration the general Australian consumer law requirements that prices are to be displayed including all taxes, duties fees, levies or other charges[4] and how this could be applied to overseas suppliers who may be required to display pricing inclusive of the Australian GST component.

Treasury is aware of the issue and advised there is no intention to vary Australian consumer law to cater for this change to the GST law at this point in time. However, we understand that consideration will be given to the Australian consumer law implications for international websites (that sell goods into Australia) that display prices in Australian dollars to their Australian customers.

e) Aggregation

We also have a concern around when goods will be aggregated for the purpose of determining whether they meet the $1,000 low value threshold and when they will be disaggregated for this same purpose. It is necessary that there be clarity so that suppliers are aware whether Division 13 of the GST Act will apply or whether the provisions contained in the Exposure Draft will apply to impose GST on the importation.

2. Exposure Draft

Set out below are our queries about a number of the proposed provisions included in the Exposure Draft.

a) #30 in the Exposure Draft introducing a new table into section 84-5

The word 'wrongly' is used in Column 3 in Item 4 of the table. We suggest a word like 'incorrectly' may be more appropriate to use, as this should cater for all circumstances whether the representation by the recipient was accidental or otherwise.

b) Draft section 84-50

Draft section 84-50 does not require the overseas supplier to provide a taxable supply in the circumstances set out in the draft provision. We consider that a note should be

[4] Refer to the Australian Competition and Consumer Commission Advertising and Selling Guide (https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/pricing/component-pricing)

included in new Subdivision 85-B about when a tax invoice may not be required, referring back to section 84-50.

c) Draft section 84-52

Draft section 84-52 requires an overseas supplier to notify the recipient of the amount of GST payable on the supply within one business day if the recipient makes this request of the supplier. The Tax Institute raised concerns about the short timeframe in which to expect an overseas supplier to provide this information, though we understood the concern about holding up goods from being able to be cleared by the Department of Immigration and Border Protection for delivery until this information was sought.

In our discussion, we were advised that Treasury anticipated it would be a rare occurrence for this provision to be invoked and there is an expectation that in a lot of cases, the Australian consumer should have been advised of the GST component at the time they receive confirmation of their goods order from the overseas supplier.

What happens if the overseas supplier does not respond within one business day? Is there any penalty or recourse? We consider that the timeframe of one day is quite impractical.

d) Draft sections 85-45(2) and 85-50(2)

We are uncertain what circumstances draft sections 85-45(2) (re suppliers) and 85-50(2) (re goods forwarders) will cover and whether these provisions are intended to ensure the goods are not taxed twice – once when the goods are supplied by the overseas supplier and again when the goods are received into Australia.

We refer to Example 1.11 and suggest that draft section 85-45(2) as currently drafted does not make sense when applied to the circumstance in the example. We consider that perhaps the provision could be amended as follows (in red below):

> *Section 85-45(2)*
> However, this section does not apply to the supply if:
> (a) the goods are imported into the indirect tax zone; and
> (b) the importation is a *taxable importation (or apart from section 42-15 would be a taxable importation); ~~and~~ or
> (c) the supplier reasonably believed, at the time of the supply, that the goods would be imported into the indirect tax zone as a taxable importation.

In relation to section 85-45(2)(c), we also query the context of when the supplier was to form the reasonable belief that the goods would be a taxable importation[5]. We understand from our discussions that the supplier should form this view at the time they ship the goods to Australia and that this provision has been included to prevent suppliers from having to guess if a supply will be a taxable importation.

[5] Refer to Division 13 of the GST Act

The same should be considered in relation to section 85-50(2).

e) Non-application of section 84-100

Draft section 85-45(1)(c) is the provision that ensures that goods delivered to businesses are not connected with the indirect tax zone. It broadly mirrors part of the definition of 'Australian consumer' in section 9-25(7)(b). In respect of Australian consumers, section 84-100 allows overseas suppliers to treat recipients as not being Australian consumers where they have reasonable systems in place for identifying Australian consumers.

We note there does not appear to be a similar provision applying in respect of supplies of low value imported goods and we suggest such a provision is included for these supplies.

3. Explanatory Materials

a) General

We observe that there seems to be some inconsistency throughout the EM in relation to the circumstances when determining the $1,000 low value goods threshold, though we note the legislation is clearer on this matter.

We are particularly concerned with the examples that deal with the change in value of the imported good during the period between the time the sale is made and the time the goods arrive in Australia due to fluctuations in the relevant exchange rate during that intervening period. This is not a practical outcome. We suggest that the legislation give some guidance on a particular time, preferably earlier rather than later in the course of the transaction for the sale of goods (eg at the time the sale is made), when a determination can be made with certainty about the 'value' of the good and whether it falls for taxation under Division 13 of the GST Act or Division 84 or 85. Given overseas suppliers are only able to include GST in their prices at the time the Australian customer finalises the order for the goods, any change in the GST treatment of the goods after this time would result in an unfair outcome for overseas suppliers if they had not previously accounted for GST.

b) Example 1.5

We refer to Example 1.5 which covers the circumstance where a person who is not a resident of Australia acquires relevant goods overseas and arranges for the goods supplier to deliver the goods to an address in Australia. In this case, the supply is caught by the proposed legislative changes.

We suggest an example also be included in the EM that illustrates the consequences of the proposed legislative changes where, instead, the non-resident first acquires the goods and then arranges themselves for delivery of the goods to an address in Australia (rather than directly from the supplier). On its face, we do not believe that

GST would apply in this case. It would be useful for Treasury to confirm if our understanding is correct.

c) Example 1.9

In relation to this example, we query how Raj, the supplier, is able to form the reasonable belief that the goods will be a taxable importation. The aggregate value of the goods exceeds the $1,000 law value threshold[6]. However, the value of each individual item falls below this threshold.

In the example, the goods are arranged to be shipped separately. It does not seem consistent that Raj can reasonably form the view the goods will be a taxable importation where the items are shipped separately. It would be useful for Treasury to clarify when it is reasonable for an overseas supplier to form the view that an importation of goods will be a 'taxable importation' if, when shipped separately, they would instead be an importation of low value goods.

d) International transport

We refer to the comments in the EM about GST and international transport. In our discussion, The Tax Institute queried what the proposed amendments to the international transport provisions in Subdivision 38-K of the GST Act might be. Treasury clarified that this would be a discrete change to the law that may make international transport services which are ordinarily GST-free become subject to GST when supplied in association with taxable low value imports.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on [redacted].

Yours sincerely

Arthur Athanasiou
President

[6] Refer to draft section 85-55(1)