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Law Council
OF AUSTRALIA
Business Law Section

5 April 2013

Ms Brenda Berkeley
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Indirect, Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Attn: Mr Rob Dalla–Costa

By email: gstpolicyconsultations@treasury.gov.au

Dear Ms Berkeley

Exposure Draft – Refunding Excess GST

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (the Committee) is grateful for the opportunity to comment on the exposure draft and for the extension of time to 5 April 2013 for our comments that was agreed to by Mr Dalla-Costa.

2. The Committee considers that the current draft is a substantial improvement on draft division 36 which was released for comment on 17 August 2012. However, the Committee considers that further improvements could be made and the Committee offers the following comments. References to the GST Act are to the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

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Proposed section 142-5

3. Greater clarity would be achieved if the term, “excess GST”, as it appears in subsection (2) was defined. This might be achieved by inserting “(excess GST)” after “GST” in subsection (1) and a corresponding link to and from the dictionary provisions.

Proposed section 142–10

4. Subsection (2) appears to deny input tax credits for acquisitions related to input taxed supplies which have been incorrectly treated by the GST Act as taxable supplies which are subject to subsection (1). It is submitted that this is unfair. A taxpayer ought be entitled to input tax credits for acquisitions that relate to supplies that are taxable supplies by virtue of section 9–5 or are treated as taxable supplies in accordance with subsection 142–10(1). Once the overpaid GST is refunded to the recipient of the supply it would be appropriate for an adjustment to be required to input tax credit claims previously made by the supplier to recognise the change in status of the supply. However, until that time, a taxpayer who incorrectly treats input taxed supplies as taxable should be entitled to input tax credits. It is acknowledged that this suggestion may require a further amendment to provide for the adjustments to be made to input tax credit claims previously made.

5. The expression “effectively borne” in subsection (3) is imprecise and will lead to confusion. It appears to be an adoption of the language of explanatory memoranda and explanatory statements relating to the GST provisions[1] that, until now has not found its way into the GST Act. It may be a very useful general statement to describe GST is a tax which is “effectively borne” by consumers and this is effected by a system of input tax credits. But, as an expression used in legislation, it lacks such precision or is so impractical as a concept that it has no place there. If it is directed at determining whether the overpaying taxpayer’s customer has borne the tax better words could have been chosen. But if it is directed at somehow assessing whether anyone further down the distribution chain has somehow “borne” the overpayment then it is practically unworkable.

[1] See, for example, the Explanatory Memorandum for the A New Tax System (Goods and Services Tax) Bill 1998 and the Explanatory Statement for the A New Tax System (Goods and Services Tax) Regulations 1999 (No.245 of 1999)) and the language of rulings of the Commissioner of Taxation (see, for example, MT 2009/D1 - Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953.

6. GST has been described as a practical business tax[2], a tax on business people. It is a self assessing tax. If Parliament intends that a taxpayer be able to assess whether its customer has passed on the burden of overpaid tax, directly or indirectly, to a consumer then the provisions impose an incontrovertible barrier to refunds. A taxpayer will be unlikely to be able to assess what has happened beyond the relationship it has with its immediate customer. The overpaying taxpayer is only able to determine whether its immediate customer has borne the overpayment. This ought be the limit of the enquiry required by the provision.

7. Subsection (3) uses another expression, "windfall gain". It, too, is imprecise and may lead to confusion. Where there is a refund of tax to be paid it might be said that either the taxpayer or its customer derives a windfall gain (of course, until that time the Commissioner of Taxation derives the windfall gain). In the Administrative Appeals Tribunal, in the case of Luxottica Retail Australia Pty Ltd v Commissioner of Taxation, Deputy President Block and Senior Member Frost (as he then was) acknowledged that the recipient of a windfall gain could be the consumer.[3] Under the provisions, as drafted, if the consumer derives a "windfall gain" there would be no refund. With respect the Committee doubts that this is the intention. Example 1.7 in the draft explanatory memorandum seems to be directed at a very similar example to that considered by the Administrative Appeals Tribunal in the Luxottica case. It may be attempting to clarify the windfall point. If it is, the explanatory memorandum is no place for it. Clarification ought to be effected in the legislation. The Committee considers that the term "windfall gain" needs to be defined or another expression found.

8. Subsection (4) is an anti-avoidance provision. It has some difficulties. First, it appears to be directed at the recipient of the relevant supply but it is difficult to know how, when preparing its BAS and claiming input tax credits, the recipient of a supply (the acquirer) will know whether its supplier paid the overpaid tax to the Commissioner. Differences in timing of the lodgment of BASs, particularly in cases where taxpayers are on different tax periods, make this an unworkable provision.

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[2] See, for example, *Sterling Guardian Pty Limited v Commissioner of Taxation* [2005] FCA 1166 at [39] per Stone J

[3] [2010] AATA 22 at [60]

Secondly, division 165 would seem to adequately cover the territory. Duplication of avoidance provisions only serves to confuse.

Margin Scheme

10. The draft explanatory memorandum discusses overpaid GST on margin scheme supplies at [1.57] to [1.59]. Some examples are used to illustrate circumstances where GST will be seen as having been passed on. What is not acknowledged is the commercial reality that, in retail sales of residential property which is the largest domain for the margin scheme, GST is rarely taken into account in pricing. It is simply a cost to the business. The GST is effectively, and in every other way, borne by the supplier of the property. This is in large part due to the fact that the pricing of new residential property is impacted substantially by the prices of competing "second hand" residential property upon which there is usually no GST. This reality ought be recognised in the explanatory memorandum with the acknowledgement that, in such circumstances, the overpaid GST may not have been passed on.

11. The Committee will welcome any discussion on these comments or the draft provisions. Please contact Andrew Sommer of Clayton Utz (0293534837 or asommer@claytonutz.com) in the first instance if you have any questions.

Yours sincerely

Frank O'Loughlin