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The Treasury

GST AND REPRESENTATIVES OF INCAPACITATED ENTITIES

SUMMARY OF CONSULTATION PROCESS

The Government announced on 6 February 2009, following an adverse Federal Court decision, that it would amend the GST law with effect from 1 July 2000 to ensure the law achieves the stated policy objective that a representative of an incapacitated entity is liable for GST on transactions within the scope of its appointment.

This measure was included in Tax Laws Amendment (2009 Measures No. 5) Bill 2009, which was introduced into Parliament on 16 September 2009.

Consultation process

Consultation on draft legislative amendments was conducted between 13 July 2009 and 7 August 2009. Eight submissions were received.

Submissions can be viewed by clicking on the following [link](#).

Summary of key issues

Most submissions generally supported the proposed amendments. However, a number of technical issues were raised in relation to the various provisions and these issues were taken into account in finalising the Bill. There were also some concerns raised about the scope of the provisions in the exposure draft. These concerns are discussed below.

Key Issues

Concerns were raised that it may not always be clear whether a particular supply or acquisition is within the scope of the representative's appointment and therefore whether the representative is liable or entitled to the GST consequences. In particular, concerns were raised in relation to whether particular transactions that straddle the appointment of a representative are within the representative scope of authority. For example, supplies and acquisitions that are made on periodic or progressive basis that span the appointment of the representative, such as the supply or acquisition of premises by way of lease. Concerns were also raised with respect to lay-by sales that were initiated by the incapacitated entity prior to a representative's appointment and contracts entered into with deposits received by the incapacitated entity prior to a representative's appointment.

It was also submitted that joint and several liability of representatives of incapacitated entities under section 444-70 of the *Taxation Administration Act 1953* is not always appropriate particularly where representatives are not appointed with common responsibilities.



Australian Government

The Treasury

A number of submissions raised concerns with the retrospective application of the provisions and the potential for representatives to have GST liabilities where they no longer have access to any funds of the incapacitated entity or a right of indemnity.

A number of submissions also raised concerns about the ability of the Commissioner to direct a representative to give a GST return to the Commissioner for a tax period applying to an incapacitated entity. Concerns were also raised with the requirement for GST returns to be lodged by both an incapacitated entity and a representative during the representative's appointment.

Finally, it was submitted that in the case of member's voluntary liquidations there should be transitional protection against GST liability on distributions of assets by the liquidator to an associate of the company. It was suggested that these arrangements were commenced on the basis of the current law and in these types of arrangements there may be no liquid assets available.

Response

An amendment was made to the bill to provide that each periodic or progressive component of a supply or acquisition is to be treated as a separate supply or acquisition. For example, this amended provision will assist representatives determine the extent to which a periodic or progressive supply or acquisition, such as under a lease agreement that commenced prior to their appointment, is within the scope of their authority. Examples have also been incorporated into the Explanatory Memorandum to demonstrate how the provisions apply in relation to other types of transactions that may span the appointment of a representative.

An amendment was also made to section 444-70 of the *Taxation Administration Act 1953* to ensure that representatives are not jointly and severally liable if they are appointed to act as representatives in different capacities.

A new provision was inserted into the bill to provide protection from GST liabilities in limited circumstances. This provision will provide protection from liability under the GST Act for acts and omissions by a representative in certain circumstances up until the date of announcement to amend the law (6 February 2009). Where the relevant GST liability is within the scope of the representative's authority, protection will be available where GST obligations have been reported and paid in full by the incapacitated entity. Protection may also be available where, due to insufficient funds, the relevant GST obligations have only been paid in part by the incapacitated entity or not at all. However, in these circumstances, protection will only be available if as at 6 February 2009 the representative no longer had access to any funds of the incapacitated entity, or a right of indemnity.



Australian Government

The Treasury

The ability of the Commissioner to direct a representative to lodge a tax return for a tax period applying to the incapacitated entity is subject to the Commissioner taking into account a number of matters. These matters include the likelihood of a dividend to unsecured creditors being declared, the availability of books and records that would make it possible to prepare the GST return and the cost of the representative of preparing a GST return. While the Commissioner must take into account these matters, the Commissioner is not limited by them. However, in light of concerns raised about such a direction, amendments have been made to provide that such a direction by the Commissioner is a reviewable decision under subdivision 110-F in Schedule 1 to the *Taxation Administration Act 1953*.

There are some circumstances where more than one GST return will be required, for example, where the incapacitated entity continues to trade while a representative is appointed. However, in recognition that the requirement for an incapacitated entity to lodge a return may not always be necessary, the bill has been amended to provide that an incapacitated entity is not required to give a GST return in certain circumstances including where the incapacitated entity is not liable for GST in a tax period.

Finally, it is recognised that under the amendments a distribution of assets by a representative to an associate of an incapacitated entity will be subject to GST and that these types of transactions may not be subject to GST under the current law. As a result, the bill was amended to provide transitional protection from GST liability on distributions of assets by a liquidator to an associate of an incapacitated entity where the liquidation commenced prior to the introduction of this Bill into Parliament.

Feedback

Feedback on the consultation process for this measure can be forwarded to consultation@treasury.gov.au . Alternatively, you can contact Michael Harms on 02 6263 3308.

Thank you to all participants in the consultation process.