



12 August 2009

The Manager  
GST Property and Government Unit  
Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Our ref: 003 Exposure draft submission

By email: [incapacitatedentities@treasury.gov.au](mailto:incapacitatedentities@treasury.gov.au)

Dear Sir/Madam

#### **Exposure Draft – GST and Representatives of Incapacitated Entities**

The Insolvency Practitioners Association of Australia (IPA) welcomes the opportunity to provide submissions to the Treasury in respect of the Exposure Draft of legislation to reform the operation of GST in insolvency appointments. The IPA is the peak professional body representing company liquidators, trustees in bankruptcy and other insolvency professionals.

It is the IPA's opinion that the proposed Exposure Draft is a significant improvement over the current legislation. Our specific comments on the particular provisions and operation of the Exposure Draft are detailed below.

<b>Provision</b>	<b>Comment</b>
27-39	<p>The IPA is concerned about the tax period ending the day before the appointment. Many entities become incapacitated during or after a day of trading. If that tax period were to end on the day before the entity became incapacitated then the representative may become liable for GST on supplies made on the day of, but before, their appointment.</p> <p>The IPA suggests that the Commissioner's systems need to be able to cater for the concluding tax period of the incapacitated entity ending on the same day that the first tax period of the representative commences. This aligns with the intent of the Exposure Draft for the representative to be liable for the GST and to be entitled to input tax credits for transactions undertaken within the scope of the representative's responsibilities.</p>



Provision	Comment
	The current proposal for the end and start dates of periods is inconsistent with the approach under section 58-10.
48-70	<p>Under the Exposure Draft, an incapacitated entity will remain part of a GST group, unless the representative of the incapacitated entity applies to have it removed from the group.</p> <p>The IPA believes that it should instead be that the incapacitated entity is automatically removed from the GST group unless the representative of the incapacitated entity applies for it to continue.</p>
58-5(2)(c)	Does the provision adequately reflect the intent of the Explanatory Memorandum, which is that the incapacitated entity will have the adjustment? At the moment the provision does not appear to state who has the adjustment, just when the adjustment will arise.
58-5(3)	Is this provision intended to be limited to supplies, acquisitions or importations or acts or omissions that were undertaken during the period that the entity was an incapacitated entity, or is this implicit in the provision?
58-10	<p>Specific questions about application:</p> <ul style="list-style-type: none"> <li>• How will retention of title arrangements work where the representative may make a payment after his or her appointment in order to retain an asset that was supplied prior to his or her appointment? At the moment, the representative should arrange for a new tax invoice and make payment on that, with an increasing adjustment to the incapacitated entity if a input tax credit has already been claimed.</li> <li>• What is the position where the entity accounts for GST on a cash basis, makes a supply prior to the appointment of a representative, but it is the representative that collects the payment after the appointment?</li> <li>• What is the position if the representative makes payments for periodic supplies, but the original transaction was entered into by the company prior to the appointment of the representative? Division 156 does not appear to assist as it does not treat each period payment as a separate acquisition, but merely attributes it as if it were a separate acquisition. The IPA suggests that this situation, which is a very common scenario, be specifically provided for in 58-10.</li> <li>• There should be a specific provision that the representative is required to lodge GST returns for the transactions under the representative's authority during the period that the representative is appointed to the incapacitated entity – and not the incapacitated entity.</li> <li>• How does 58-40 interact with 58-10?</li> </ul>



Provision	Comment
58-10(2)(d) and 58-10(3)(b)	How can the GST be attributable to a tax period applying to the representative if the representative has ceased to act?
58-40(2)	<p>This is quite a difficult provision to understand and the Explanatory Memorandum provides limited assistance. If the intention is that the liability for the GST would be imposed on the incapacitated entity, then the IPA questions whether this is achieved.</p> <p>In layman's terms, the provision states:</p> <p>If the company accounted on an accruals basis and the insolvency practitioner is liable for the GST or entitled to the credit, then if the company is liable for GST or entitled to a credit, it is taken that the company accounted on a cash basis.</p> <p>It appears that (2)(b) is inconsistent with (2)(c) and (2)(d) because how can the GST be payable both by the representative and by the incapacitated entity?</p>
58-50	There should be a recognition of the difficult circumstances that insolvency practitioners operate in, with often incomplete books and records available to them. In respect of returns relating to periods prior to the representative's appointment, the requirement should be made subject to the proviso that it "is to the best of the representative's knowledge", or a concession similar to this.
58-50(1)(b)	Any direction by the Commissioner to provide a GST return should be a reviewable decision.
58-50(2)(b)	<p>The provision provides that a representative of an incapacitated entity can be requested to provide a GST return for a tax period prior to, or after the appointment of the representative.</p> <p>For returns after the appointment of the representative, this obligation needs to be limited to the representative's own returns in their capacity as the representative of the incapacitated entity. It is unreasonable to expect a representative to lodge returns for the entity when he/she may not be in control of the balance of the entity's affairs (for example, a receivership appointment to only part of the company's assets).</p> <p>Following on from this, an incapacitated entity should not be required to lodge a GST return in its own right for the period where a representative is in control of the whole of the company's affairs (eg where the company is in liquidation, voluntary administration or a receiver has been appointed to all of the company's assets and undertakings). Should such an appointment be made to a company, the company will not be undertaking any business that is not under the control of the representative, and thus no GST returns should be required, other than those of the representative.</p>



Provision	Comment
58-55	<ul style="list-style-type: none"><li>• It is the IPA's opinion that the notification proposed under 58-55 is much improved over the current system under section 147-20. However, the exposure draft does not indicate the consequences of non-notification. Will the failure be a statutory offence under the Taxation Administration Act with a statutory penalty imposed?</li><li>• 58-55 currently only applies to liquidations. It is the IPA's opinion that this provision should apply to any insolvency administration type that may result in the payment of a dividend. As such, Deeds of Company Arrangement should also be included.</li><li>• It appears that GSTB 2003/1 will continue to be required in order to determine the amount of the adjustment where a dividend of less than 100 cents in the dollar is to be paid. These calculations are very complicated.</li></ul> <p>The IPA questions whether it is in the community's best interests to continue to treat the creditor's writing off a bad debt as triggering an increasing adjustment in the hands of the incapacitated entity. It is understood that in practice, the increasing adjustment does not yield significant revenue to the ATO. It has the effect of reducing the pool of funds available to other unsecured creditors. Even more insidiously, it may also have the effect of reducing the dividend payable to the ATO.</p> <p>Many members have reported to the IPA the considerable compliance burden placed on them by the increasing adjustment calculations. One only has to read and attempt to understand the bulletin GSTB 2003/1 to be fully aware of the complexity. The representative's fee for services will of course incorporate the time taken to attempt to understand the GST principles, compile the necessary data, undertake the calculations and communicate the result to the ATO. Given the fact that it involves complicated calculations and reporting to the ATO, the process is double checked and heavily supervised and external advice is often sought. The real and substantial cost of complying with the increasing adjustment process has the effect of reducing the pool of funds available both to the ATO and to the other unsecured creditors. While the process may ensure that the eventual total revenue collected by the ATO is technically correct, the IPA questions whether the overall cost to the community may offset the revenue collected. It is noteworthy that New Zealand is content to ignore any technical GST shortfall in these circumstances. Both in legislation and administration, New Zealand does not attempt to recover GST via increasing adjustment or other means where a creditor writes off the debt owing by an incapacitated entity where a final dividend is paid which is less than 100 cents in the dollar.</p>



Provision	Comment
58-55(1)(b)	<p>The requirement to provide information about outstanding GST or an increasing adjustment is stated to only apply to tax periods in which a GST return has not been given. This would mean that if a return has been lodged, the representative would not be required to advise if there was an understatement of GST or an increasing adjustment. The IPA does not believe that this is the intention.</p>
58-55(2)(b)	<p>There should be a recognition of the difficult circumstances that insolvency practitioners operate in, with often incomplete books and records available to them. This requirement should be required subject to the proviso that it "is to the best of the representative's knowledge", or a concession similar to this.</p>
58-55(2)(c)	<p>The IPA is concerned about the timing of the notice required under 58-55. 58-55(2)(c) states that the notice must be given as soon as is practicable after the end of the tax period. The end of a tax period is irrelevant to this provision which is interested in ensuring that notification is provided prior to the declaration of a dividend, which is provided for in 58-55(1). As such 58-55(2)(c) is irrelevant and should be deleted.</p> <p>Furthermore, this provision, if it remains, may cause unnecessary delays in the payment of a dividend. Consider an example where a representative is appointed to an incapacitated entity with quarterly tax periods. Part way through a quarterly tax period (say 10 February) the representative is ready to declare a final dividend and calculates the amount of the adjustment in accordance with GSTB 2001/1. That adjustment is attributable to the tax period ending 31 March. Is the representative required to wait until after 31 March to make the notification before it can declare the dividend?</p>
58-60	<p>The IPA questions whether the indemnity under 56-60 is sufficient. There is concern that a liability may arise under 58-10 where there are insufficient funds available under section 58-60. It is suggested that the liability under 58-10 also be limited to the monies that the representative receives in his or her capacity as the representative of the incapacitated entity.</p>
Item 40	<p>This is an issue around transitional provisions for Members' Voluntary Liquidations. Distributions by a liquidator to an associate of the company currently fall outside of the GST regime – after Royal Assent, these types of transactions will fall within the GST regime.</p> <p>Currently, tax practitioners and liquidators will be advising clients on the basis that in-specie distributions are not subject to GST. Many Members' Voluntary Liquidations will have been commenced on this basis. It would be inequitable to change this position part way through a Members' Voluntary Liquidation.</p>



Provision	Comment
	<p>Under the exposure draft, the changes will particularly affect Members' Voluntary Liquidations that commenced prior to Royal Assent but where a distribution has not yet been made</p> <p>Transitional arrangements should be made for any companies in liquidation prior to Royal Assent (or some other specified time) not only that the distribution must be made before this time.</p> <p>Another option to be considered is a rollover arrangement. It is not unusual in an asset rich but cash poor company that the representative may have a GST liability on the transfer, yet no assets are left in the entity with which to pay the GST or seek indemnity. A better result would be to include a rollover provision such as that in s 139-5(3) of the existing legislation where assets relating to an enterprise that a deceased estate carried on are transferred to a beneficiary who intends to use the assets in an enterprise. As such, if the member is intending to use the asset in an enterprise, those assets will be able to be transferred with no immediate GST consequence.</p>

\* \* \* \* \*

The IPA is available to work with Treasury if further consultation is required. In the meantime, should you have any queries in relation to above comments, please do not hesitate to contact Kim Arnold on (02) 4283 2402.

Yours faithfully  
Insolvency Practitioners Association

Mark Robinson  
President