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Dear Sir

**Submission in response to Exposure Draft on inserts for Tax Laws Amendment (2009 Measures No.5) Bill 2009: GST and representatives of incapacitated entities**

We refer to the Tax Laws Amendment (2009 Measures No. 5) Bill 2009: GST and representatives of incapacitated entities Exposure Draft (the Exposure Draft) and the corresponding explanatory memorandum (EM) in making the following submissions.

KPMG welcomes the opportunity to provide comments in relation to these proposed changes.

Broadly, our submission seeks to ensure that the proposed changes to the legislation achieve the objectives set out in the EM, whilst ensuring that it will possible and practical for the Representative of incapacitated entities (Representative) to comply with the proposed legislation.

Outlined below are the key areas that warrant further consideration/redrafting:

- Provisions of the proposed legislation that do not achieve the stated objectives:
- Requirements that operate to obviate the ability of the Representative to comply as they are impractical; and
- where the provisions are deficient or lacking in some regard.

All reference made are to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) unless otherwise stated.

**Proposed section 58-5**

This section appears to deem any supplies, acquisitions or importations that are made by the Representative as being supplies, acquisitions or importations of the incapacitated entity (IE).



Following the decision in *Deputy Commissioner of Taxation v PM Developments Pty Ltd [2008] FCA 1886* (PM Developments), this section has limited or no application as the Representative does not ordinarily make supplies, acquisitions or importations, rather such supplies are made by the IE.

At paragraph 42 of the PM Developments, his Honour Mr Justice Logan held that presently none of the provisions of Division 147 of the GST Act:

“expressly state that, after the winding up of a company has commenced, a liquidator is, for the purposes of the GST Act, taken to make a supply when an asset of the corporation is disposed of or to make an acquisition when a corporation purchases goods or services in the course of its winding up.”

It is our submission that the proposed provisions in the Exposure Draft do not achieve this either. However, what the Exposure Draft appears to achieve at subsection 58-10(1), is to make the Representative liable for GST in respect of supplies, entitled to input tax credits for acquisitions and have adjustments if the supply, importation or acquisition is within the scope of the Representative’s responsibility or authority for managing the IE’s affairs, notwithstanding that the Representative does not make the supply, importation or acquisition.

### **Proposed subsection 58-10(2)**

Section 58-10(2) as drafted does not reflect the intention as set out in Section 1.32 of the EM, that the Representative is not liable for GST or entitled to any GST related amounts to the extent that consideration for a taxable supply or creditable acquisition was received or provided before the Representative was appointed. In particular, paragraph (c) in relation to vouchers requires amendment to the present drafting, such that the exception applies to the extent that the consideration does not exceed the consideration already provided for the IE’s supply of the voucher.

For example, under paragraph (c) the Representative is not liable for GST on a supply for which a voucher is redeemed if the IE supplied the voucher and the consideration for the supply does not exceed the consideration provided for the IE’s supply of the voucher. So that if the Representative makes a supply of an equal or lesser value than the consideration for the voucher, the Representative has no GST liability.

However, if the Representative makes a supply of a greater value than the consideration for the voucher, as currently drafted, the Representative has a GST liability on the full amount of the supply, notwithstanding that it has not received consideration in full because it has accepted an existing voucher in part payment.

### **Paragraph 58-10(2)(a)**

We consider it is not clear in this proposed paragraph 58-10(2)(a), how supplies and acquisitions would be treated for these purposes in the following circumstances:

- where the supply or acquisition is made on a periodic or progressive basis and the IE has received consideration progressively or on a periodic basis and consideration continues to be received after appointment of the Representative (this would occur particularly in the case of appointment of an administrator who is seeking to trade the entity out of its incapacity). Examples include commercial leases, pay by the month insurance and magazine subscriptions;
- where a deposit has been received by the IE prior to appointment of the Representative, the supply is within the scope of the Representative's responsibility and the deposit is applied as all or part of the consideration for a supply;
- a hire purchase arrangement where the IE makes the supply upfront but consideration continues to be received by the Representative after its appointment, or where the IE enters into a hire purchase arrangement and the Representative continues to make payments;
- lay-by sales, where the IE received an amount prior to appointment of the Representative and either the lay-by sale is cancelled or completed; and
- sales of second-hand goods to which Division 66 of the GST Act applies where the goods are acquired prior to appointment of the Representative and sold after appointment.

### **Subsection 58-10(3)**

#### ***Paragraph (a)***

The GST liability on any supplies and input tax credit entitlement on acquisitions or importations made by the IE prior to appointment of the Representative, remain with the IE. It is therefore necessary for the Representative to lodge GST returns on behalf of the IE for tax periods after appointment of the Representative. That is, it is necessary to allow GST returns to be lodged for both the Representative and the IE during the period of appointment of the Representative.

For instance, where the IE provided consideration for an acquisition, but did not claim an input tax credit, because, for example it did not hold a tax invoice; the IE should be entitled to an input tax credit at the time it holds a tax invoice. To achieve this, it is necessary for the IE to claim input tax credits in its own right once the Representative has been appointed. To do so, the IE must be in a position to lodge GST returns.

In our experience, the Australian Taxation Office (ATO) systems are not currently able to accommodate the lodgement of GST returns for both the Representative and the IE; instead the GST return of the IE for the last period prior to appointment of the Rep has to be opened and closed each time to include additional GST amounts identified. This deficiency will need to be addressed with the ATO to allow Representatives to operate within the proposed legislation, prior to the amendments being tabled.

### ***Paragraph (b)***

Under this paragraph, the Representative is not entitled to an input tax credit for acquisitions that are within the scope of the Representative's responsibility or authority and for which the Representative provided payment, where the input tax credit was not attributable to a tax period that ended prior to the Representative's appointment ceasing (because, for instance the Representative did not hold a tax invoice).

The Representative should be able to claim an input tax credit where the acquisition was within the scope of its responsibility or authority and its provided consideration, even if the input tax credit is attributable to a tax period after its appointment ceases for the following reasons:

- It is contrary to the current administrative practice of the Commissioner of Taxation that allows the Representative to claim an input tax credit after its appointment has ceased, provided that it is still registered for GST in its capacity as Representative of the IE.
- It results in a different financial position if the input tax credit is attributable to a tax period that ends before the Representative's appointment ceases as demonstrated by the following. When the Representative claims an input tax credit (and the net amount for a tax period is less than zero), the Representative can obtain a refund of the GST. However, if the IE claims an input tax credit, the refund is set-off against other tax liabilities of the IE and is not refunded to the IE.

Further, in these circumstances, it is not clear that the IE will be entitled to an input tax credit for an acquisition that is within the scope of the Representative's responsibility or authority for which the Representative provided consideration. It appears that the proposed subsection 58-5(1) is seeking to address this, however to achieve this, subsection 58-5(1) should be revised to ensure that any supply, acquisition or importation within the scope of the Representative's responsibility or authority for managing the IE's affairs is taken to be a supply, acquisition or importation by the IE.

### **Subsection 58-10(5)**

This proposed subsection seeks to ensure that where the Representative is liable for GST, entitled to an input tax credit or has an adjustment, that the IE or the representative member of the GST group of which the IE is a member is not liable, entitled or has an adjustment.

On one reading, the subsection assumes that the GST group structure which was in place prior to appointment of the Representative shall be retained after appointment of the Representative. This means that the IE retains joint and several liability (as detailed in the Note to section 48-40 of the GST Act) as a member of the GST group, notwithstanding that a Representative has been appointed. For example, where a GST group comprises of entity A, B and C, where entity A is the Representative member of the GST group and entity C has appointed a Representative, the Representative is liable for GST etc. for supplies within the scope of its responsibility or authority. The IE as a member of the GST group is jointly and severally liable to pay the GST

that is payable by the Representative, the Representative is not as this is not within its responsibility or authority.

In practice it is difficult to obtain details of the members of a GST group. Obtaining such information from the ATO can require completion of a request for information under the *Freedom of Information Act 1982* and can take a minimum of 30 days.

Instead of the presumed position that the group will be retained in its current composition, we consider that the Commissioner issue a notification to each of the member of the GST group, notifying them that the membership of the GST group will be varied to exclude the IE from the date of appointment of the Representative, unless notification to the contrary is received within, we submit a defined period of 21 days.

In its assumption that the IE remains a member of the GST group, this subsection is contrary to section 48-72 which requires the representative member to make a tax period election; otherwise it is likely that the IE would no longer satisfy the requirements for being a member of a GST group.

#### **Section 70-25**

This section contains a minor amendment to the *Fuel Tax Act 2006*, but does not deal with liabilities or responsibilities under the GST Act.

Consideration should be given to whether amendment is also required to the *A New Tax System (Luxury Car Tax) Act 1999* or the *A New Tax System (Wine Equalisation Tax) Act 1999*.

#### **Section 27-39**

Under the amendments to this section it is proposed to split what would ordinarily be one tax period into two tax periods. In practice, the ATO will need to ensure that the necessary systems and processes are in place to ensure that this can happen in practice.

#### **Section 58-50**

Where the Representative is required to provide a GST return for a tax period applying to the IE, in preparing the GST return, could the Representative be liable for an administrative penalty for a false or misleading statement under section 284-75 of Schedule 1 of the *Taxation Administration Act 1953*?

It is unclear whether this is anticipated in the proposed section 58-50.

## **Section 58-55**

### ***Interim dividends***

This proposed section as it is drafted cannot be applied to an interim dividend. This is best explained by way of the following example.

The IE has an entitlement to input tax credits on acquisitions that it made for which it holds a tax invoice, notwithstanding the fact that it may ultimately be unable to pay the creditor in full. The IE claims an input tax credit. The IE will have an increasing adjustment at the end of the estate that is included within the amounts owed to the ATO for the purposes of calculating and paying the final dividend (as detailed in GST Bulletin, GSTB 2003/1).

In accordance with proposed Section 58-55, the Representative must not declare a dividend to the unsecured creditors unless it has notified the Commissioner of the increasing adjustment that is attributable to that tax period. The increasing adjustment that is attributable to that tax period is nil as the increasing adjustment is attributable at the end of the estate. Further, an increasing adjustment based on the current interim dividend would be overstated as it does not take into account future dividends.

### ***Timing of notification***

The section as currently drafted contains a timing issue because, the Representative must notify the Commissioner of an increasing adjustment prior to declaring a dividend, but the notification must set out the increasing adjustment that is attributable to the tax period and be given to the Commissioner as soon as possible after the end of the tax period. In circumstances where the Representative is seeking to pay a dividend on 4 April 2009, but the tax period does not end until 30 June, this section could require the Representative to delay 2 months in paying a dividend so that it can notify the Commissioner of an increasing adjustment in relation to the tax period. Further, it would not be reasonable for the Representative to be required to notify of any increasing adjustment in relation to a tax period, prior to the end of that tax period.

We submit that the section be amended such that the Representative is required to notify the Commissioner of an increasing adjustment which it is aware of, that has not previously been notified to the Commissioner, prior to declaring a final dividend.

## **Section 58-60**

We note for completeness that a Representative's obligations in applying and distributing monies is set out in the *Corporations Act 2001* and is not a function of the GST Act.

## **Section 138-10(1)(aa)**

This proposed section suggests that the IE has a concluding tax period that ends the day before the entity became incapacitated. As set out above under the heading Paragraph 58-10(2)(a),

above, there is a requirement to continue to lodge GST returns for the IE following appointment of the Representative. For this reason, this section is not appropriate.

### **Section 43**

Is it intended that the Commissioner have the power to recover from the Representative in the event that such a refund was obtained following the decision in PM Developments and the IE has subsequently been liquidated, such that there are no assets left from which the Representative would be able to recover the liability? Should the Commissioner have discretion in such circumstances?

### **Section 44**

This proposed section requires that the Representative pay an amount to the Commissioner before the Commissioner will refund an amount that was paid by the IE which is now the liability of the Representative. This cannot be applied in practice. This section should allow the Representative to authorise the Commissioner to apply the refund payable to the IE against a liability of the Representative in these circumstances.

We would be pleased to discuss the contents of this submission with your office or elaborate on the matters discussed above. Please do not hesitate to contact me on 02 9335 7323, [dajenkins@kpmg.com.au](mailto:dajenkins@kpmg.com.au), or Alison Marshall on 02 9335 7386, [armarshall@kpmg.com.au](mailto:armarshall@kpmg.com.au).

Yours faithfully



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