



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

7 August 2009

Attention: Michael Harms

E-mail: incapacitatedentities@treasury.gov.au

Dear Michael

GST and Representatives of incapacitated entities - comments on exposure draft

Thank you for the opportunity to comment on the Treasury Exposure Draft: *Tax Laws Amendment (2009 Measures 3 No. 5) Bill 2009: GST and representatives of incapacitated entities.*

As you are aware, the Property Council is the peak body representing the interests of owners and investors in Australia's \$360bn property investment sector. The Property Council serves the interests of companies across all four quadrants of property investment – debt, equity, public and private.

The Property Council understands that the Government wants to clearly articulate when a representative of an incapacitated entity is responsible for the GST consequences that arise during its appointment.

We consider however that the following necessary changes will significantly improve the operation of the legislation by:

- 1) clarifying that representatives are able to enter into agreements regarding GST-free going concerns and input taxed supplies of commercial residential premises;
- 2) adding time of supply rules regarding periodic and progressive supplies and acquisitions or alternatively, treating each periodic supply or acquisition as a separate supply or acquisition; and
- 3) retaining the specific provisions which confirm that increasing adjustments remain the liability of the incapacitated entity rather than the representative.

Without these relatively simple amendments, the proposed legislation will unnecessarily:

- 1) interfere with the ability of incapacitated entities to trade out of difficulties;
- 2) increase the confusion and uncertainty regarding the liability for GST and credits post representative appointment; and

- 3) prevent representatives from properly and fairly administering incapacitated entities.

Executive Summary

In summary, it is the view of the Property Council and its members that:

- proposed section 58-5(2) should be extended to make it clear that acts or omissions of the representative will also be relevant for determining whether a supply is GST-free or input taxed (for example, the representative should be able to enter into agreements relating to supplies of GST-free going concerns or to make the choice to treat long-term stays in commercial residential premises as input taxed supplies);
- the GST Act should be amended to include clear time of supply rules (which deal specifically with periodic and progressive supplies and acquisitions);
- failing the insertion of time of supply rules, a provision should be inserted into Division 58 to make it clear that, for the purposes of Division 58, each component of a periodic or progressive supply or acquisition (to with Division 156 applies) will be treated as a separate supply or acquisition; and
- the Bill should be amended to continue to allow a representative to make the incapacitated entity liable for adjustments arising after their appointment (where they relate to an acquisition by the incapacitated entity) by inserting the words "or obtained a tax invoice" after the words "for the supply" in proposed section 58-10(4)(b).

We have provided more detailed comments on each of these points below.

1 GST-free and input taxed supplies

Proposed section 58-5(2)(a) provides that, for the purposes of determining whether a supply is a taxable supply, or the amount of GST payable on a taxable supply, acts or omissions of a representative are taken to be acts or omissions that have been made by the incapacitated entity.

Paragraph 1.23 of the Explanatory Memorandum makes it clear that this section is intended to ensure that any method available to the incapacitated entity in working out the GST payable on its taxable supplies (for example, the margin scheme under Division 75) can be used.

It is arguable that this section would also allow the going concern exemption to be used (on the basis that the application of the going concern exemption is relevant to determining "whether a supply is a taxable supply").

The same comments would equally apply to the choice that is available to treat certain supplies of long-term accommodation in commercial residential premises as an input taxed supply (section 87-25).

However, to provide certainty and put the issue beyond doubt, we submit that proposed section 58-5(2) should be extended to expressly provide that acts or omissions of a representative are also taken to be acts or omissions of the incapacitated entity for the purposes of determining whether a supply is GST-free or input taxed.

2 Time of supply rules

There were two fundamental conceptual difficulties, from a taxpayer and tax practitioner's perspective, with existing Division 147. The first difficulty was that the Division purported to pass the GST liability and input tax credit entitlement for certain taxable supplies and creditable acquisitions from a GST registered incapacitated entity to its representative, but lacked an explicit deeming mechanism to do this.

The second difficulty lay in determining "for which" taxable supplies and creditable acquisitions the GST liability or input tax credit entitlement passed. This difficulty arises because implicit in Division 147 is the need to determine "when" a taxable supply or creditable acquisition "is made", but the GST Act does not contain any "time of supply" rules to answer the question.

The first difficulty was tellingly highlighted by Logan J's in *Deputy Commissioner of Taxation v PM Developments Ltd* [2008] FCA 1886 and should be rectified by the proposed amendments.

The second difficulty will, on the current drafting, be incorporated into new Division 58. In particular, the "General rule" in section 58-10(1) provides for the passing of GST-related liabilities and entitlements where the representative "mak[es] the supply, importation or acquisition and that is within the scope of its authority". But, the GST Act, as already noted, contains no rules, or guidance, as to when a supply or acquisition is "made".

The GST Act only provides rules to determine when a GST-related liability and entitlement "is attributed". (An "importation" is made when the goods are entered for home consumption, but the time of supply rule in this instance is imported into the GST Act by the word "import").

We submit that this defect should be redressed by defining the meaning of "the making of the supply, importation or acquisition" in section 58-10(1), or in the alternative (and preferably) enacting general time of supply rules in the GST Act. If general time of supply rules are inserted, those rules should deal with periodic and progressive supplies.

3 Periodic and progressive supplies

Division 156 of the GST Act deals with the attribution of GST and input tax credits for taxable supplies and creditable acquisitions which are made on periodic and progressive basis. For attribution purposes, Division 156 provides that each periodic or progressive component of a supply or acquisition is to be treated as if it were a separate supply or acquisition.

The provisions in Division 156 of the GST Act apply for attribution purposes only. The provisions do not deem each periodic or progressive component of a supply or acquisition to be a separate supply or acquisition for any other purpose.

In the absence of any specific provisions dealing with periodic and progressive supplies and acquisitions in Division 58, there is likely to be confusion and debate as to which entity (i.e. the representative or the incapacitated entity) is responsible for such supplies and acquisitions.

By way of example, it is clear that an entity which owns commercial premises makes a supply when it grants a lease. However, once the lease is granted, it is not clear whether the entity continues to make further supplies to the tenant (or, if supplies are made, the nature of those supplies). This issue does not create problems from an attribution perspective, as section 156-22 makes it clear that leases are to be treated as periodic and progressive supplies.

If an incapacitated entity has made a taxable supply by granting a lease over commercial premises prior to a representative being appointed, it may not be clear for the purposes of proposed section 58-10(1) whether it is the

incapacitated entity or the representative that is liable for the GST in respect of the rents and other consideration amounts received under the lease following the representative's appointment.

To address these concerns, we submit that proposed Division 58 should be amended to include a provision which makes it clear that, for the purposes of Division 58, each periodic or progressive component of a supply or acquisition is to be treated as a separate supply or acquisition.

4 Increasing adjustments for acquisitions

The proposed prospective repeal of division 147 will remove the ability for a representative to avoid personal liability for an adjustment arising after their appointment that related to an acquisition by the incapacitated entity.

For example, where the incapacitated entity received goods or services prior to the appointment of the representative, claimed input tax credits but did not pay the supplier and the representative now only has funds to pay part of the supplier's invoice.

The current section 147-20 allows a representative to make the incapacitated entity liable for such adjustments through provision of a notice to the Commissioner.

The new Division 58 retains provisions for the representative to provide a notice to the Commissioner regarding the incapacitated entities GST related liabilities, but not make those increasing adjustments a liability of the incapacitated entity.

This feature of Division 147 was part of the original policy framework for representatives and is an important feature given that a key role for many representatives is determining what is able to be paid out to creditors.

The Government policy announcement (to overturn the impact of the PM Developments decision), did not extend to removing this original policy feature.

We suggest that the Bill be amended to continue the original policy by inserting the words "or obtained a tax invoice" after the words "for the supply" in proposed section 58-10(4)(b).

If you have any queries regarding the comments or submissions set out above, please contact Andrew Mihno on (02) 9033 1944 to discuss.

Yours sincerely



Andrew Mihno
Deputy Executive Director International & Capital Markets
Property Council of Australia