

14 April 2011

The General Manager
Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: crossborder@treasury.gov.au

Dear Sir

Submission on Implementation of the recommendations of the Board of Taxation's review of the GST cross-border transactions

Thank you for your invitation to provide submissions on the implementation of the recommendations of the Board of Taxation's review of the GST cross-border transactions.

The NSW Young Lawyers Tax Committee is pleased to provide the attached submission. To provide a meaningful submission, we have only made comment on the focus questions that we had specific points to raise.

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If you would like to discuss any of our comments, or have any questions, please contact Adam Gulfam Ahmed on (03) 9613 8768 or Grace Ho (02) 8922 5262.

Yours faithfully

Adam Gulfam Ahmed
Chair, Taxation Law Committee
NSW Young Lawyers

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Question	Response
1.1	We do not have any comments in relation to this question other than what may have already been identified under the current rules.
1.2	<p>This should only be allowed under transitional rules and should have a phase out date as it creates inconsistencies in the GST law.</p> <p>If such an option were allowed, it will rise to two types of non-resident taxpayers for GST purposes:</p> <ul style="list-style-type: none"> (a) Where some non-residents (NR) can claim input tax credits (ITC) for GST incurred in respect of their Australian inputs (however having to account for the supplies they make as taxable supplies even if they do not have a business presence in Australia); and (b) Those who chose not to register for GST (as they do not have a business presence in Australia for GST purposes) but will not be able to claim any ITCs. <p>We agree that option 1 will be much more practical for NRs who make supplies to both registered and unregistered recipients. This will reduce a NR's overall GST compliance cost (reduce time in determining/characterizing supplies).</p> <p>Whilst subject to review of the legislative amendments in implementing this recommendation, the availability of choice to NR will give rise to opportunities for taxpayers to take advantage of the options provided which may optimise their tax affairs (e.g. chose to register on or about the tax period where they may have greater expenses in respect of the otherwise taxable supplies). However we expect that Division 165 may be relied upon to deny the claim for an ITC or registration of a taxpayer in that given circumstance. Further clarification should be given in relation to how this will operate.</p> <p>Furthermore, in the event that such option is only available to existing GST registered NR (and who may no longer be required to be registered as a result of recommendations contained in this Discussion Paper), this concession creates inequality within the GST regime and where there are different outcomes between taxpayers in respect of similar supplies. It may be likely that a significant number of NR who will elect to register for GST purposes before the effective date of the amendment commences so to preserve its ability to claim ITC in respect of GST on inputs acquired for a creditable purpose.</p>
1.3	We believe that the general proposition to not apply Proposal 1 to recipients that are required to be registered is favourable as it would be too difficult for NR suppliers to determine whether the recipient of the relevant supply is required to be registered (especially as the recipient is also a NR). Generally this information is difficult to obtain in the event that the recipient refuses to provide an undertaking of their tax affairs to a supplier at the time of supply or to disclose anything that may be commercially sensitive.

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	<p>There is also another potential compliance cost to the NR suppliers in monitoring when their customer will become registered (where there is an on-going relationship) and then they have to continually (or at least regularly) updating their records and in turn GST treatment of supplies made where those supplies are periodic supplies or there are multiple supplies made overtime to the same customer.</p>
1.4	N/A
1.5	<p>Overall, unless this information can be found in the public domain, it is difficult to find out whether a recipient has a GST PE in Australia (if they are not registered). Even if they are registered, such status does not distinguish those entities that are GST registered but do not have an Australian GST PE and register namely to claim any available ITC.</p> <p>The following are some of the ways to find out whether a recipient has a GST PE in Australia:</p> <ul style="list-style-type: none"> - Do they have an Australian Business Number (ABN)? - Do they have an ASIC registration? - Internet searches regarding the business activities of the entity - Obtain this information directly from the recipient / seek an undertaking from such recipient.
1.6	N/A
1.7	<p>We agree with the identified concerns in adopting the alternative model of making the relevant supply out of scope by virtue of it not being connected with Australia as discussed in paragraphs 80-83.</p> <p>Consideration should be given to the revenue implication of relying on the application of Division 165 to recover any unintended outcomes as a result of the proposed amendment (and the success rate in relying on Division 165 where there are genuine reasons for acquiring supplies via offshore or unregistered entities).</p>
1.8	<p>We also agree with comments set out in the Discussion Paper regarding the pros and cons of each of these proposed models.</p> <p>The alternative model is favourable for NR suppliers in respect of meeting their compliance obligations as they generally do not need to investigate any further where the supply is <i>provided to</i> a GST registered enterprise. Once the identity of the entity to which the supply is made is ascertained, a search on the public records should allow the NR to easily identify whether the supply made is out of scope.</p>

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	<p>However, where there are pending applications to register for GST purposes that require retrospective commencement of an entity's GST registration, this may create inaccuracies in the NR supplier's assessment of the GST treatment of the relevant supply.</p> <p>It may be difficult to obtain any undertaking about the GST status of the registered Australian entity, as there is not usually any direct contractual relationship between the NR supplier and the Australian GST registered entity that the supply is provided to.</p>
1.9	<p>Further explanation should be given in respect of the alternative model and how it is envisaged that it will operate in order to further comment on its effectiveness.</p> <p>We are of the view that the Discussion Paper correctly identifies the difficulties in a NR supplier's ability to determine the GST status of the recipient (and in addition whether it is "acting in that capacity"). This is a compliance burden on the NR supplier.</p> <p>Whilst we will need to consider draft amendments to the provisions to Division 84 to comment further, we are of the opinion that the expansion of the provisions of Division 84 would be less complex and result in a lower compliance cost. However, it will result in many more local Australian resident entities to have to register for GST purposes as a result of the operation of the reverse charging provisions.</p>
1.10	<p>In light of the response to Question 1.9, consideration should be given to the cost of compliance to those taxpayers who will be part of the GST system as a result of the operation of the proposed amended Division 84 (especially for those taxpayers who are required to be registered as their turnover meets to the registration thresholds as a result of the proposed amendment).</p> <p>In particular, there would be an unfair shift of the burden of tax onto those resident taxpayers who have a GST PE but did not meet the relevant turnover thresholds who will now need to be registered for GST purposes but yet are unable to claim any ITCs as the relevant acquisitions in respect of the GST reverse charged supplies that are made for a private or domestic purpose or other non-creditable purpose and are also unable to recover any GST payable from the NR supplier if there is no contractual relationship between the resident taxpayer and the NR supplier and/or the NR recipient (where applicable).</p>
1.11	N/A
1.12	<p>To the extent that there are any inconsistencies created by the proposed amendments under proposal 1 and Division 85 this should be clarified (in addition to section 85-5(3)).</p> <p>However, consideration should be given to proposals in chapter 3.5 and 3.9 to ensure that any GST free treatment does not affect the intended purpose of Division 85.</p>

1.13	N/A
2.4	Similar issues as discussed in our response to questions in Chapter 3.1.
3.1	<p>There is a potential shift of the burden of tax to the lessee as a result of the proposed amendments to Division 84 as there a prima facie cost of leasing where an input tax credit can not be claimed. In some circumstances, parties will need to reconsider their contractual arrangements to ensure the correct entity is remitting GST and determine whether there is a need to be specific about cost sharing. Consideration should be given to whether there is a distinction between assignment or novation of the relevant lease may potentially which may create a different tax outcome.</p> <p>We will be able to comment regarding other potential compliance risks once we review the proposed amendments to the legislation that gives effect this proposal.</p>
4.1	<p>We are generally in support of this proposal and agree that Division 84 needs to be expanded in support of the proposals in Chapter 3.1 and 3.2 to ensure it is revenue neutral.</p> <p>We would like to comment further once the proposed amendments to Division 129 become available to ensure that there is no over or under claiming of input tax credits. Furthermore, Division 84-13 should be extended to ensure the "extent of consideration" test does not limit the Resident's ability to claim an ITC as they are liable to pay 100% of the GST.</p>
5.1	Yes, we are in support of this proposal.
5.2	N/A
5.3	N/A
5.4	N/A

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6.1	<p>We consider that the definition of 'repairer services' needs to be carefully considered as it ultimately defines the scope of the concession. We are of the view that it should be defined to include repairs and other services (including replacement parts) that are done by a resident for a non-resident, in fulfillment of a warranty provided by that non-resident.</p> <p>We note that the Discussion Paper uses the term 'warranty agreement'. If this term is to be used in legislation, we submit that it needs to be defined to include a warranty made under <i>any</i> agreement, not a separate and specific agreement to provide a warranty.</p>
6.2	<p>There may be situations where it is difficult for the supplier to identify whether or not the supply is GST-Free. For instance, where a resident provides repairer services in respect of a good purchased or leased by a third party that is still under warranty or where an extended warranty is purchased pursuant to the original warranty agreement.</p> <p>It may be difficult in such cases, for the supplier decide that the warranty agreement is "provided as part of the original purchase" or whether the fact it is entered into <u>after</u> the original purchase means that it is not GST-Free (e.g. to be treated as a new agreement).</p> <p>We are of the view that as long as there is an entitlement under a warranty agreement held by a GST registered entity in Australia, then the GST-Free status should <u>not</u> be negated. This approach ensures neutrality and supports the policy objective of not unnecessarily bringing non-residents into the Australian GST system.</p>
6.3	N/A
7.1	N/A
7.2	<p>We support the move to expand Division 57 to include resident agents for a non-resident but who cannot conclude contracts for the non-resident. We suggest that a definition of "resident agent" should be inserted to reflect this change.</p> <p>We seek confirmation whether the amendment to Division 57 would incorporate "consignment agents" (as noted in the GST and Consignment Sales fact sheet published by the ATO).</p> <p>Specifically, will a "sale or return" consignment arrangement be possible? A sale or return arrangement may occur where a resident agent imports goods into Australia on behalf of a non-resident. After importation a back-to-back sale is made from the non-resident to the resident agent (in its capacity as a subsidiary entity in Australia that is registered for GST). The subsidiary then on sells the goods to consumers in Australia.</p> <p>Will Division 57 apply to the back-to-back sale such that the resident agent can contract with itself in a different capacity?</p>

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	We submit that in such instances, it may be necessary for the resident agent to lodge separate business activity statements for each of their non-resident roles.
8.1	<p>We strongly support the proposals 8.1 and 8.2.</p> <p>However, there is a level of difficulty in obtaining information from non-resident's regarding whether it is required to be registered for GST purposes in Australia. Specifically, it may be difficult to obtain accurate information, especially at times when the non-resident may be planning to make future supplies in Australia that will impact its 'projected turnover' threshold. How often should undertakings be obtained so that the Commissioner is satisfied that the Resident Agent has discharged its onus in establishing that the Non Resident does or does not have a GST PE in Australia?</p> <p>In GSTR 2002/6, the Commissioner specifies that reasonable enquiries will include obtaining a signed letter from the recipient declaring that it is not required to be registered for GST. <i>"This is only accepted where the supplier has no reason to believe that the statement is not accurate"</i> (GSTR 2002/6 at paragraph 259).</p> <p>We are concerned that imposing such a high standard of proof on the resident agent would result in a heavier compliance burden on such entities and will increase the cost of agency relationship, discouraging the use of agencies. This will undoubtedly require adjustment in the agency agreement to ensure that the agent is informed in a timely manner by the non-resident of a change in the non-resident's "required to be registered" status. The level of proof required in GSTR 2002/6 suggests that a positive action on behalf of the resident agent would be required.</p> <p>Furthermore, we seek clarification of whether a subjective or objective standard will be used when determining whether the agent "has no reason to believe that the statement provided by the non-resident is not accurate." Arguably, if the a related entity is involved, it should be able to obtain information from its non-resident related entity.</p>
9.1	We are in support of Proposal 9.1, especially when read in conjunction with the proposed amendments to Chapters 3.1 and 3.2. We also agree with the inequality conceived in paragraph 245-250 and therefore believe that the alternative proposal 9 may have merit. This is consistent with the other proposal in this Discussion Paper to make non-resident suppliers (where no GST PE) out of scope or GST-Free.
10.1	N/A
10.2	N/A

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10.3	N/A
10.4	N/A
10.5	N/A

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