



THE TAX INSTITUTE

THE MARK OF EXPERTISE

7 July 2015

Mr Tom Reid
General Manager
Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

By email: taxlawdesign@treasury.gov.au

Dear Mr Reid,

Tax Integrity: Extending GST to digital products and other services imported by consumers.

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Tax Laws Amendment (Tax Integrity: GST and Digital Products) Bill 2015 Exposure Draft (Exposure Draft)*.

We thank Treasury and the Australian Taxation Office (**ATO**) for the time taken to discuss the Exposure Draft with us during the consultation period. Our submission below follows from that discussion.

Summary

The Tax Institute is broadly supportive of the measure captured in the Exposure Draft and is keen to ensure the legislation achieves its policy intent. As such, we have suggested some areas for review that Treasury should consider prior to advancing the Exposure Draft, including interactions with other parts of the GST law.

Discussion

1. Overview

The Tax Institute is keen to assist Treasury to ensure the legislation achieves its policy objective, which we understand to be ensuring digital products and services provided to Australian consumers receive equivalent GST treatment whether provided by Australian or foreign suppliers.

However, we are unsure that the Exposure Draft as drafted achieves the intended goal for the reasons set out below.

Amendment is to a core concept and creates a significant risk of broadening the tax base beyond the supply of digital products

The core concept of 'supplies connected with Australia' is being amended by the Exposure Draft. This is a fundamental change to the GST legislation which inevitably will have the effect of broadening the GST base. It appears that the amendments are intended to bring all supplies within the scope of the GST except for real property and goods¹.

Such a broad approach to a core provision increases the risk of unintended consequences particularly given the compliance and enforcement difficulties highlighted below. As an alternative, The Tax Institute recommends Treasury consider a more specific rule limited to supplies of digital products. For example, Division 85 already operates in this manner with respect to similar supplies of Telecommunication Services.

Insufficient consultation and time to address amendments to core provisions

We understand that the Exposure Draft was prepared expeditiously and consequently, that only a short time frame has been provided for consultation. This is of significant concern given the amendments relate to core provisions of the GST that impact upon all supplies.

We understand that Treasury considers the long implementation date will allow sufficient time for any miscellaneous amendments to be made. However, we note that since the introduction of the GST, it has been difficult to make any amendments to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**). We understand that it is proposed the Exposure Draft will be introduced in the Spring 2015 Parliamentary sittings. As such, we are concerned that it will be difficult to amend the provisions if required to ensure they operate effectively after they have passed into the law.

Operation of provisions may be impractical and not administratively feasible

We also note our concern that the law as drafted may be somewhat impractical for the ATO to administer and will place significant cost burdens on business which will either increase the cost of doing business with Australia and / or affect inbound commerce. The amendments appear to rely on non-residents voluntarily complying with the law in the majority of cases. We are also concerned with the underlying policy of the proposed amendments that impose legal obligations on non-residents, but do not give the ATO the mechanisms to enforce those obligations.

¹ See paragraph 1.26 of the Explanatory Memorandum (**EM**)

Similar issues have been recognised within the GST Act in the context of other electronic supplies. Specifically, section 85-5 of the GST Act provides the Commissioner with a mechanism to treat supplies as not being connected with Australia where he considers collection of GST on a supply is not administratively feasible. The proposed amendments not only lack an equivalent safeguard, but could frustrate the operation of this existing provision².

2. Interaction with other parts of the GST law

There are particular areas of the GST law where interaction issues with the new provisions in the Exposure Draft should be explored in more detail. These include:

- a) The supply of things, other than goods or real property, for consumption outside of Australia in section 38-190 of the GST Act, in particular supplies of rights (e.g. bank notes, acquisition of rights overseas, software packages);
- b) The financial supplies provisions in Division 40 of the GST Act, in particular in relation to offshore bank accounts;
- c) Insurance provisions in Division 78 of the GST Act;
- d) Taxes, fees and charges in Division 81;
- e) Telecommunication supplies provisions in Division 85 of the GST Act; and
- f) Vouchers provisions in Division 100 of the GST Act – currently not all digital content cards are caught by Division 100. Treasury should give consideration to whether Division 100 should be broadened to achieve consistency.

Although not necessarily an exclusive list, it would be useful if Treasury could consider these interaction issues further prior to advancing the Exposure Draft to ensure such issues receive adequate and timely consideration, particularly as the amendment being made by the Exposure Draft affects a core concept in the GST law. We would be pleased to discuss these areas with Treasury in more detail.

3. 'Reasonableness' test

Proposed Subdivision 84-C contains a test requiring an entity subject to these new provisions to 'take all reasonable steps' to determine whether the consumer is an 'Australian consumer' or not (and therefore whether the provisions contained in the Division will apply to the supply). What an entity has to do to satisfy the requirement to have taken '*all* reasonable steps' (emphasis added) needs to be clearly explained.

For example, if an Australian recipient claims to be registered for GST and to have an Australian Business Number, is it intended that the non-resident supplier must independently verify this (e.g. by checking the Australian Business Register – would this then mean they have taken all reasonable steps)? Alternatively, is it intended that

² By operation of new section 9-25(5)(d), the supply of telecommunications to Australian consumers will be connected with Australia. Section 85-5(2) therefore becomes inoperative as even if the Commissioner makes a determination, the supply will still be connected with Australia under section 9-25.

the non-resident would be able to rely on the information provided (e.g. they sought information from the recipient about their GST registration and have been provided with a response – similar to the current ‘Statement by a Supplier’ process for no ABN withholding)? By seeking and relying on the response, it is our view that the non-resident supplier should be regarded as having taken all reasonable steps to determine if the recipient is an ‘Australian consumer’. Additionally, what is to be made of the scenario where the supplier has all of the information, for example from separate transactions, but that information is in different systems thereby rendering it very difficult for the supplier to make the relevant determination?

More guidance is needed in the EM regarding what actions Treasury considers an entity needs to take to satisfy the ‘all reasonable steps’ requirement rather than leave the matter to the ATO to determine sometime in the future. We would be pleased to assist Treasury and the ATO in developing more helpful guidance in this area.

4. Electronic distribution services

New Subdivision 84-B introduces the new concept of ‘electronic distribution services’ (EDS) into the GST Act. We highlight our concerns with these new provisions below.

- i) ‘Made through’ - it would be useful to understand precisely what Treasury means when using the term ‘made through’ in new section 84-50. The EM does not offer any explanation.
- ii) It is unclear what happens if there are two operators of EDS both of whom satisfy the provisions in sections 84-50 and 84-65 and therefore either or both could be regarded as the supplier. It would be useful if Treasury could confirm in the EM whether in fact there could be two EDS operators who could satisfy the provisions and both be regarded as the supplier for the same supply and if so, what is the mechanism (e.g. tie breaker) to determine who has the GST liability for that supply.
- iii) It is also unclear what types of EDS operators the provisions are intended to capture. In our view, a range of suppliers including ‘application stores’ (e.g. the Apple ‘App Store’, the Android ‘Google Play’ store), online music stores (e.g. Apple iTunes store) and other electronic market places such as travel websites (e.g. Expedia) and group buying sites (e.g. Groupon, TravelZoo, OurDeal etc) could potentially be captured. If this cannot be made clear in the legislation, it would be useful if Treasury could make this clear in the EM, particularly in light of the operation of the new ‘statutory remedial power’ that is intended to be provided to the Commissioner who may be put in a position where he may need to apply the provision more widely than intended.

5. Application date

It would be useful if Treasury could provide guidance regarding how the provisions are intended to apply to:

- (a) supplies made prior to the proposed start date of 1 July 2017 but where the attribution point occurs post 1 July 2017 e.g. a 12 month subscription with monthly payments commencing 1 January 2017; and
- (b) Supplies made after 1 July 2017 but where the attribution point occurs prior to 1 July 2017 e.g. an online television platform may accept subscriptions now for television services to be provided post 1 July 2017. If payment is received in advance, or an invoice is issued, GST may be attributed in the current tax period.

We note there are no express time of supply rules in the GST law, which creates uncertainty as to how the new rules should apply. The transitional rules in the *A New Tax System (Goods and Services Tax Transition) Act 1999* (Cth) could be adopted to assist in these circumstances. Some guidance in this regard would be useful.

6. Simplified registration rules

We observe that the effect of opting out of claiming input tax credits as envisaged by the simplified registration rules, particularly section 84-105, gives the same result as if the supplies were 'input taxed.' While some non-resident taxpayers will likely take up the simplified registration option, other taxpayers that would prefer to be able to access the full benefits of the GST system, such as being able to claim input tax credits, are likely to apply for full registration for GST purposes. As such, it would be useful to consider ways that compliance could be streamlined for these taxpayers.

In our teleconference with Treasury and the ATO, the option of employing a system in the Asia-Pacific region similar to the 'mini one-stop shop'³ approach used in the European Union was canvassed on the assumption that countries in this region adopt the same approach to recovering GST/VAT taxes from non-residents that Australia does⁴. In our view, there is little potential for this to be successful. In the event New Zealand adopts the same approach, it may be worth considering this option between Australia and New Zealand only; other than that, we see this as being difficult to employ effectively across the Asia-Pacific region.

There may be other mechanisms that could be considered to simplify GST compliance and we would be pleased to explore these with Treasury.

³ For further information on this, see <https://www.gov.uk/register-and-use-the-vat-mini-one-stop-shop/>

⁴ As is being explored by OECD Working Party 9 as part of the OECD's work on base erosion and profit shifting.

7. Other

'Futureproofing' the GST law

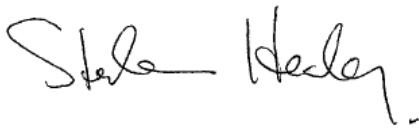
We would like to raise with Treasury to what extent these new rules 'future-proof' the GST law. That is, whether they contemplate or could apply to further economic changes (including global changes) that will likely affect the nature of supplies being made, particularly as new types of markets and new types of supplies are likely to emerge in the future that are yet to be developed.

Revised GST Administration rules

The Tax Institute intends to provide preliminary feedback to Treasury in the near future in relation to amendments that may be required to be made to the GST administration rules to cater for the introduction of the new provisions contained in the Exposure Draft.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Steve Healey', with a small horizontal line at the end.

Stephen Healey
President