



12 September 2008

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Ms Anne Millward
Board of Taxation
c/- The Treasury
Langton Crescent
PARKES ACT 2600

Dear Ms Millward

Re: Review of the Legal Framework for the Administration of GST

Attached please find the Association of Heads of Australian University Colleges and Halls, Inc. (**AHAUCHI**) submission to the Board of Taxation's Review of the Legal Framework for the Administration of GST.

In summary, the submission seeks amendments to the GST Act¹ to permit indexation of professional valuations of accommodation supplies provided by colleges and halls of residence (and other types of charities) for purposes of compliance with the provisions of subsection 38-250(1) of the Act.

This submission supplements the matters raised by our officers and representatives at the Hearing the Board conducted in Melbourne on 8 August 2008.

1. About AHAUCHI

AHAUCHI represents the vast majority of the 145 residential colleges and halls which operate at university level within Australia. We have a formal constitutional objective of promoting university college residence as a means to a broad education incorporating academic, social, cultural and moral development.

One of the defining characteristics of our member colleges is that they provide pastoral care and educational assistance to our resident students.

¹ *A New Tax System (Goods and Services Tax) Act 1999 (the GST Act).*

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2. Factual Background on Residential Colleges and Halls

Some 42 per cent of the tertiary residential colleges and halls in Australia are owned by public universities with the remainder in nearly all cases being owned by or affiliated with religious organisations or charitable foundations/trusts.

Colleges and halls or the entity of which they are a part invariably have charitable institution status for purposes of accessing the relevant GST concessions and in addition have deductible gift recipient status for purposes of receiving income tax deductible gifts.

3. Valuations Requirements for Colleges and Halls under GST Law

As charitable institutions colleges and halls of residence are entitled to make supplies of accommodation on a GST-free basis provided supplied for consideration which is less than 75 per cent of the GST-inclusive market value of the supply. Meals may be supplied on a GST-free basis provided supplied for consideration which is less than 50 per cent of the GST-inclusive market value of the supply.² The relevant parts of the GST Act, subparagraphs 38-250(1)(b)(i) and 38-250(1)(b)(ii) of the GST Act respectively, provide that:

38-250 Nominal consideration etc.

(1) A supply is GST-free if:

*(a) the supplier is a charitable institution, a trustee of a charitable fund, a *gift-deductible entity or a *government school; and*

*(b) the supply is for *consideration that:*

*(i) if the supply is a supply of accommodation—is less than 75% of the *GST inclusive market value of the supply;*

or

(ii) if the supply is not a supply of accommodation—is less than 50% of the GST inclusive market value of the supply.

4. Provision of Benchmark Market Values by the Commissioner

To assist certain types of charities and other entities to determine market value for purposes of establishing whether their supplies are GST-free under the provisions of

² For these purposes the Commissioner requires accommodation and meals to be treated as separate supplies notwithstanding that the accommodation and meals may be supplied by the college as one bundled supply to the student in residence. Refer to footnote 52 of Goods and Services Tax Ruling GSTR 2001/1: *supplies that are GST-free for tertiary education courses*. As at 9 September 2008 a copy of GSTR 2001/1 could be obtained from the ATO web site at:

<http://law.ato.gov.au/pdf/gstr2001-001c1.pdf>

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subsection 38-250(1) of the GST Act the Commissioner of Taxation (**the Commissioner**) provides benchmark market value guidelines which are updated annually with effect from 1 January each year. These benchmarks are provided in the Commissioner's *Charities Consultative Committee resolved issues document (CCCRID)*.³

Where a charity uses the benchmark market values provided in the CCCRID as the basis to determine whether the supplies they are making are taxable, input taxed or GST-free because of the application of subsection 38-250(1) that market value will be accepted by the Tax Office.

The Commissioner has listed which types of charities may or may not elect to use the benchmark market value guidelines. The CCCRID states, in section C of part 3:

C. Benchmark Market Values for Charities

...

What organisations may use these guidelines

*The use of the benchmarks (accommodation and meals) as an alternative to the general rules provided in the 'Market Value Guidelines' document is **limited to the following** types of organisations (and supplies by those organisations):*

- *supported accommodation and community housing (long-term accommodation rates)*
- *crisis care (short-term and long-term accommodation as appropriate)*
- *retirement villages not meeting the definition of 'retirement village' in [section 195-1 of the GST Act](#) (long-term accommodation)*
- *residential housing (long-term accommodation),*
- *'Meals on Wheels', charity 'soup kitchens' and organisations that provide or supply meals to the frail, homeless or needy (food guidelines).*

*The accommodation benchmarks are not for use by organisations where there is a market value that can be established using the first two tests described in Part B, that is, actual market value for a supply or a market value of a similar supply. That is, the **benchmarks do not apply** to the following types of organisations or supplies:*

- *campsite accommodation*
- *university halls and colleges*
- *boarding schools,*
- *non-residential buildings like halls and offices.*

[underlines added]

³ As at 9 September 2008 the *Charities Consultative Committee resolved issues document*, inclusive of the market value benchmarks, was available on the ATO website at:

<http://www.ato.gov.au/businesses/content.asp?doc=/Content/16250.htm&page=1&H1>

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For these purposes colleges and halls of residence are not permitted to use the market value benchmarks supplied by the Commissioner in the CCCRID.

5. Guidelines Provided by the Commissioner for Determining Market Value

In recognition of the fact that colleges and halls of residence are not permitted to use the market value benchmarks and must make or obtain their own determination of the market value of their supplies the Commissioner has issued CCCRID guidelines in consultation with the Australian Valuation Office (AVO) that are designed principally for use by colleges and halls of residence. The guidelines are provided at section G of part 3 of the CCCRID and give an outline methodology which colleges and halls may follow in order to make their own determination of market value.

The experience of the colleges and halls of residence with this part of the Act and with the section G, part 3 CCCRID guidelines is that the determination of market value invariably requires an exercise of judgment on the part of the college or hall – to quantify in market value terms the differences between similar supplies which exist in the open market and the supplies made by the college or hall.

For example, the nearest comparable evidence in the open market for the supply of student accommodation may provide a private en-suite bathroom in the student room whereas the college may provide communal or shared bathrooms for the use of its students. In this case and in circumstances where the college is preparing its own assessment of the market value of its accommodation supply to its students in residence, the college is required to exercise judgment as to the market value adjustment required to take account of the difference between en-suite versus communal bathrooms.

For the most part and notwithstanding the clarifications and guidelines provided by the Commissioner and the AVO in section G of part 3 of the CCCRID the colleges and halls do not consider they have the necessary expertise to make these judgments about market value.

6. Use of Professional Valuers by Colleges to Determine Market Value

To mitigate the uncertainty and risks associated with determination by the college or hall of residence of the market value of its supplies large numbers of colleges and halls use the services of professional valuers. These valuers typically have relevant tertiary qualifications in property valuations matters and membership of a professional or accrediting body such as the Australian Property Institute (API).

In section G of part 3 of the CCCRID the Commissioner has clarified that there is no requirement for the college or hall to use a professional valuer for these purposes. The relevant part of the CCCRID states:

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There is no requirement for an entity to have a formal valuation of its supply of accommodation undertaken. An entity can undertake a market valuation or comparison based on information and evidence available to them. Whether a formal valuation is undertaken or not, the general principles are the same.

The Commissioner's clarification that there is no requirement to have formal valuations undertaken by professional valuers for these purposes has not dissuaded material numbers of colleges and halls from using professional valuers.

Professional valuations for these purposes typically cost in the vicinity of \$15,000 to \$25,000 per college and end up as bound reports containing 20 to 80 pages of text inclusive of attachments and photographs and so on and depending upon the circumstances and location of the particular college property subject to valuation.

The costs of these professional valuations increase materially the overall GST compliance costs incurred by colleges and halls of residence nationally.

7. Previous Attempt to Obtain Commissioner's Agreement to Indexation

Concerned at the large annual cost of these professional valuations AHAUCHI in January 2001 sought⁴ on behalf of its members a ruling or some other form of guidance from the Commissioner which would permit the indexation of the accommodation valuations under an agreed component of the Australian Bureau of Statistics (ABS) Consumer Price Index (CPI) – similar to what is provided for in the case of valuations of non-remote housing benefits under sections 26 and 28 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 86).⁵

Although no formal response was provided by the ATO to AHAUCHI's January 2001 request for indexation of valuations, ATO members at the ATO's Education Industry Partnership (EIP) noted in the course of unminuted discussion the absence of any valuations indexation provision within the GST Act, as exists under sections 26 and 28 of FBTAA 86.

The Commissioner has never agreed to the indexation of professional valuations commissioned by charities for purposes of subsection 38-250(1) of the GST Act.

⁴ AHAUCHI email to ATO members of the Education Industry Partnership (EIP) dated 11 January 2001, headed *Valuations for Subdivision 38-G – CPI adjustment for future years*. Note that AHAUCHI was a member of the EIP.

⁵ See, for example, the Commissioner's Taxation Determination TD 2008/5 – *Fringe benefits tax: for the purposes of section 28 of the Fringe Benefits Tax Assessment Act 1986, what are the indexation factors for valuing non-remote housing for the fringe benefits tax year commencing on 1 April 2008?* As at 9 September 2008 a copy of this Determination was available on the ATO web site at:

<http://law.ato.gov.au/pdf/td2008-005.pdf>

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8. GST Tool – An Initiative by the Commissioner to Reduce Compliance Costs

In 2004, in the context of some GST audits conducted by the ATO, AHAUCHI again raised with the ATO the compliance difficulties facing colleges and halls of residence when determining market value for purposes of subsection 38-250(1) of the GST Act. In acknowledging these and other compliance concerns at the time the ATO agreed to undertake in collaboration with the AVO the development of a *GST accounting tool for residential colleges (the GST Tool)*.

Amongst other things the GST Tool is intended to provide colleges and halls with a non-prescriptive ‘safe-harbour’ valuation (acceptable to the Commissioner) for their supplies of meals and accommodation.

The GST Tool for the colleges and halls of residence has been under development by the ATO since October 2004. The on-going development of the Tool by the ATO was referred to at page 51 of the ATO’s *Compliance program 2007-08*.⁶

The GST Tool, which is presently released by the ATO in a test version, may not be used by colleges and halls for purposes of determining ‘live’ GST treatment of supplies until such time as it is released by the Commissioner on an official basis. AHAUCHI is presently in discussion with the ATO on the matter of whether and/or when the Tool may be released on an official basis.

In circumstances where the Commissioner releases the GST Tool on an official basis and that use of the Tool is non-prescriptive, it is estimated by AHAUCHI there will be:

- major reduction in GST compliance costs for the majority of colleges and halls of residence in the sector nationally – particularly as related to costs of determining market value; and
- part (expected to be a minority) of the sector which will elect to determine market value by way of commissioning professional valuations rather than by way of use of the GST Tool; and
- part (also expected to be a minority) of the sector which will avoid the requirement to determine market value because they will assess as GST-free on supplies of meals and/or accommodation under the cost and consideration tests at subsection 38-250(2) of the GST Act.

There will be more colleges and halls wishing to index their valuations if the GST Tool is not released on an official basis or, if once released, the Tool is withdrawn at some point in the future.

⁶ The ATO’s *Compliance program 2007-08* was released in Sydney by the Commissioner on 16 August 2007 and as at 9 September 2008 was available on the ATO web site at:

http://www.ato.gov.au/content/downloads/87592_CP_Main.pdf

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Clearly, whether or not the Commissioner releases the GST Tool on an official basis, there will be GST compliance benefits for the sector if section 38-250(1) professional valuations can be indexed.

It is of pressing concern to AHAUCHI that there is as yet no agreement with the ATO on the matter of whether and/or when the Commissioner will release the GST Tool for colleges and halls on an official basis.

9. Proposal to Permit Indexation of 38-250(1) GST Valuations

The proposal is that sub-section 38-250(1) be amended to permit indexation of professional valuations of the market value of accommodation supplies.

Similar indexation factors to those provided annually by the Commissioner for purposes of section 28 of FBTA 86 (see TD 2008/5 as noted above and TD 2007/6, TD 2006/14, TD 2005/10 and so on for earlier years) could be issued by the Commissioner to give effect to the proposed amendments to sub-section 38-250(1) of the GST Act.

The indexation factors for GST purposes should preferably relate to the calendar years commencing 1 January as this is considered more in alignment with the needs of charities such as colleges and halls of residence, rather than the FBT years commencing 1 April or the taxation years commencing 1 July.

Nine years of indexation, in addition to the base year, of the market value of the non-remote housing is permitted under section 26 of FBTA 86 – subject to certain conditions. Nine years of indexation, in addition to a base year, is proposed in this case for GST purposes.

The indexation of professional valuations for these purposes would not unduly restrict the ATO's on-going compliance role of ensuring that section 38-250(1) GST valuations were in conducted in accordance with valuations law.⁷ The ATO presently fulfil the compliance role of ensuring valuations of non-remote housing benefits for FBT purposes are conducted in accordance with valuations law notwithstanding the indexation provisions at sections 26 and 28 of FBTA 86.

The indexation provisions proposed for sub-section 38-250(1) would be drafted with a view to ensuring the amendments are revenue neutral, as would appear to be the case for sections 26 and 28 of FBTA 86.

10. Summary

The cost to the colleges and halls of residence of obtaining professional valuations for purposes of their subsection 38-250(1) compliance is an onerous, long-term GST compliance burden confronting our sector nationally. Any assistance the Board of

⁷ *Spencer v Commonwealth* (1907) 5 CLR 418 and subsequent cases.

**AHAUCHI Submission to the Board of Taxation
Review of the Legal Framework for the Administration of the GST**

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11 September 2008

Yours sincerely

A handwritten signature in cursive script that reads "Yvonne Rate". The signature is written in dark ink and is positioned above the printed name and title.

Mrs Yvonne Rate AM, President
Association of Heads of Australian University Colleges & Halls, Inc.