

12 September 2008

Review of Legal Framework for Administration of the GST
Board of Taxation Secretariat
C/- The Treasury
Langton Crescent
PARKES ACT 2600

Our ref: BoardofTax final

By email: taxboard@treasury.gov.au

Dear Sir/Madam

Review of the Legal Framework for the Administration of GST

The Insolvency Practitioners Association of Australia (IPA) welcomes the opportunity to provide submissions to the Board of Taxation in its Review of the Legal Framework for the Administration of GST. Due to the Board's strict deadline, this submission is a summary of the IPA's recommendations and directions. A more detailed submission outlining a preferred GST model for insolvency and specific recommendations is expected to be lodged by 30 September 2008.

This submission is made by the IPA, the peak professional body representing company liquidators, trustees in bankruptcy and other insolvency professionals. We appreciate the opportunity to comment.

The IPA recognises that GST will apply to transactions undertaken in the course of personal and corporate insolvency, where the entity is registered. However, that outcome should reflect the fundamental principle that GST is not a tax on business but a consumption tax. The IPA's recommendations are specific reforms to the law which, in our view, will enable the GST system to better achieve the fundamental objective of taxing final private consumption. Thus, the overall economic burden of the GST on insolvency should be negligible. The application of GST to insolvency should be economically efficient and neutral with the economic impact passed through the transaction chain from incapacitated entities and their representatives to final consumers who acquire goods and services directly or indirectly from those entities and representatives.

Our summary recommendations and comments are set out below:

1. **Status of the representative's responsibilities** – Activities done by the representative, in its capacity as representative, should be taken, for GST purposes, to be activities done by the incapacitated entity (and not the representative).
2. **Liability** - The representative (and not the incapacitated entity) should only be liable for, or entitled to, the GST consequences that arise from a supply, acquisition or importation made during the representative's appointment – but only to the extent that the supply, acquisition, or importation falls within the scope of the representative's responsibility or authority for managing the incapacitated entity's affairs. As far as possible, GST liability and input tax credits will attach to the entity (incapacitated entity or representative) that received or issued consideration for the supply or acquisition in question. Where there are two or more representatives, they should not be jointly and severally liable for GST.



3. **End of incapacitated entity's final tax period** – The tax period applying to any type of incapacitated entity at the time it becomes incapacitated should end immediately on the day that the entity becomes incapacitated. If that tax period were to end on the day before the entity became incapacitated then the representative may become liable for GST on supplies made on the day of, but before, its appointment.
4. **GST Groups** - If a member of a GST group becomes incapacitated, the representative member of that group should be able to elect to have the tax period that applies to group members cease at the same time as the incapacitated entity's tax period ceases. However, it should ultimately be the representative of the incapacitated entity and not the representative member of the Group who decides whether the incapacitated entity remains part of the GST group.
5. **GST Returns for GST group members** - An individual that is appointed as a representative of two or more incapacitated entities should be able to elect to lodge one consolidated GST return per tax period (rather than a separate return for each incapacitated entity) if the incapacitated entities are members of the same GST group. This would be a formalisation of the current administrative practice (PS LA 2004/2 (GA)).
6. **Mortgagees in possession** – There is currently uncertainty around who has the GST responsibility where a secured creditor appoints a receiver to sell a secured asset. The law currently provides that a Mortgagee in Possession has the GST liability on sales of secured assets (Div 105, GST Act). However, it is not clear what the current position is where a receiver is acting and it might remain uncertain if our recommendation 2 above is introduced. The entity which is to have the GST liability should be clearly identified.
7. **Registration** – Representatives should be able to elect not to register for GST if they are not continuing to trade the incapacitated entity's enterprise but are merely selling the incapacitated entity's assets, including trading assets. The liability for any required adjustment for input tax credits claimed on the acquisition of those assets by the incapacitated entity would not be transferred to the representative. The current position is that the representative is required to be registered if the incapacitated entity is registered or required to be registered.
8. **Member's Voluntary Liquidations** – If the status of insolvency practitioners is changed in accordance with recommendation 1 above, there will be ramifications for the in-specie distribution of assets to a shareholder as the distribution will then be made by the incapacitated entity to an associate. These issues need to be carefully considered and appropriate transitional arrangements put in place to provide for completion of Members' Voluntary Liquidations currently in progress. It is conceivable in an asset rich but cash poor company that the representative may have a GST liability on the transfer, yet no assets are left in the entity with which to pay the GST or seek indemnity.
9. **Incapacitated entity's GST compliance** – As far as possible, incapacitated entities should not have GST responsibilities during their period of incapacity including the lodgement of GST returns and the requirement to give notices to the Commissioner. The exception will be where the incapacitated entity is continuing to operate in its own right outside of the insolvency administration (ie. where there has been an appointment of a receiver to only some of the company's assets).
10. **Representatives' GST returns** – Regard should be given to waiving the requirement for representatives to lodge GST returns in particular circumstances especially when more than one representative has been appointed and the role of one representative is passive until the other representative's responsibility has been completed.



11. **Indemnity for GST** - A representative should be indemnified for any payment it makes to meet its GST obligations. A representative should not be personally liable for the incapacitated entity's GST liabilities or adjustments.
12. **Representatives notifying the Commissioner of adjustments** – It is preferable that representatives should not be required to notify the Commissioner if the incapacitated entity has any increasing adjustments relating to pre-appointment supplies, acquisitions or importations. However, should this obligation to notify continue, representatives should not be personally liable for the GST even where they fail to make the notification. Failure to make the notification should be treated as a statutory compliance offence and not an event which triggers or transfers the underlying GST liability.
13. **Discretion to waive notification** - The Commissioner should be provided with discretion to determine particular instances in which GST liabilities and adjustments do not require notification. The Commissioner could, for instance, determine that notification is not required in instances where no dividends are payable to unsecured creditors or in relation to adjustments of less than a certain value.
14. **Frequency of notification** - Representatives should not be required to provide a notification under section 147-20 in relation to each adjustment or amount of GST or for each tax period. Rather, the representative should be allowed to provide one notification to the Commissioner prior to the declaration of a dividend to unsecured creditors. Alternatively, the notification could be required for any such period longer than a tax period that the Commissioner allows on a case by case basis.
15. **Application date for any legislative amendments** – In principle, any amendments should take effect in relation to net amounts for tax periods that start on or after the date of Royal Assent. However, representatives could be allowed to elect to continue with the current GST responsibilities for engagements that have commenced prior to the date of assent.
16. **Input tax credit and bad debt adjustments when a dividend is paid to creditors** – The obligations upon a representative and the resulting calculations are extraordinarily complicated (refer GSTB 2003/1). Consideration should be given to a complete overhaul of the GST responsibilities of the bad debt adjustment process for representatives of incapacitated entities. A process which is easier to understand and carry out will lead to a lower burden of compliance.

All of the above matters will be discussed in more detail in our follow up submission.

The IPA is available to work with the Board of Taxation to achieve an appropriate outcome in relation to this Review. In the meantime, should you have any queries in relation to above comments, please do not hesitate to contact Kim Arnold on (02) 4283 2402.

Yours faithfully
Insolvency Practitioners Association

Paul Cook
President