BUDDLE FINDLAY

Legal update - Proposed GST changes for bodies corporate

Tony Wilkinson

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In a discussion document released by the Inland Revenue Department on Friday 6 June 2014, Minister of Revenue Todd McClay announced his intention to amend the GST Act with retrospective effect to ensure that bodies corporate are not required to, and cannot, register for GST.

The proposed changes are of significant concern, particularly to GST registered bodies corporate who intend to claim substantial input tax credits, for example in regard to remediation works for leaky buildings, and to GST registered unit owners whose non-GST registered body corporate expects to receive an insurance claim payout in the near future.

Further details of the proposed changes are set out below.

Proposed amendment

It is proposed that the GST Act will be amended to treat supplies made by bodies corporate to unit owners as being exempt from GST. This will have the effect that bodies corporate will no longer be entitled to register, or remain registered, in respect of the services they supply to unit owners in discharging their duties under the Unit Titles Act 2010.

In addition to the proposed amendment treating supplies made by a body corporate to be exempt from GST, it is proposed that a new 'look through' rule will be introduced to treat supplies of goods and services acquired by a body corporate as being acquired by the underlying unit owners in proportion to their ownership shares.

Key concerns

The proposed changes are of significant concern and have attracted significant negative comment in the media, as the changes are contrary to the underlying policy of the GST Act and are in response to a problem created by IRD's historic position that bodies corporate are generally not entitled to register for GST. In addition to the practical problems highlighted below regarding the application of a look through rule, consequences that have not been highlighted by IRD include:

- IRD will be able to require GST-registered unit owners to pay GST in respect of insurance claim payouts made by insurers to bodies corporate, irrespective of whether those amounts are distributed by bodies corporate to the unit owners, due to the interaction of the proposed 'look through' rule with existing rules in the GST Act with respect to the receipt of insurance payments
- Bodies corporate that are currently registered for GST will be unable to claim GST credits on goods and services they acquire using funds on which GST has been returned to IRD, as due to the proposal to treat services supplied by bodies corporate to unit owners as being exempt from GST, GST registered bodies corporate will be unable to maintain their registration status.

No guidance has yet been produced by IRD with respect to how the look through rule will actually work in practice and there appear to us to be a number of practical problems inherent in its application. For example, as the GST profile of unit owners will not always be the same determining the rate of GST that should be applied, and the manner in which invoices should be issued, may therefore be problematic for suppliers. This will particularly be the case for suppliers of services where the recipient body corporate has a mix of resident and non-resident unit owners (as services supplied to non-residents generally attract GST at the rate of 0% rather than 15%).

Retrospective proposal has resulted in uncertainty

For those bodies corporate that are registered for GST, the proposals have resulted in significant uncertainty due to the proposal that the changes have retrospective effect from 6 June 2014.

While this uncertainty has been somewhat reduced by an interim operational statement published by IRD on 23 June 2014, IRD's confirmation that IRD will continue to apply the law as it stands now until such time as the proposed changes are enacted is not surprising, given that IRD cannot do otherwise. The position in the operational statement therefore reduces uncertainty for taxpayers vis a vis the actions of IRD, but does not alleviate the uncertainty as to ultimate outcome which results from the proposal that the changes be of retrospective effect.

GST registered bodies corporate who continue to claim input tax credits in the interim will need to take into consideration the possibility that they may be required to repay the amounts claimed to the IRD, together with use of money interest, in the event that the law is changed with retrospective effect as proposed.

We consider that this is deeply unsatisfactory for taxpayers. Even if the proposed changes are enacted, and there are numerous policy and practical reasons as to why the changes should not proceed, the proposed reforms should not be enacted with retrospective effect. It is a general expectation of the rule of law that legislation should only apply prospectively, and retrospective amendments are generally only enacted if they are beneficial to the public or if they can be fully justified.

We do not believe that retrospective application of the changes is justified in the present case.

Buddle Findlay will be preparing a submission on the discussion document. Bodies corporate who have an interest in the outcome or who wish their views to be considered by IRD are encouraged to contact either a member of the tax team or their usual Buddle Findlay adviser to discuss.

In the meantime, any GST registered bodies corporate who intend to claim substantial input tax credits, or GST registered unit owners whose non-GST registered body corporate expects to receive an insurance claim payout in the near future should contact a member of the tax team to ensure that their GST position is optimised and the effect of the proposed changes considered.

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659