An imposing principle of indirect taxation?

Now I am confused!

On 30 March 2012, the Commissioner issued two ATO IDs dealing with the changes made to Division 81 of the GST law.

You can access them at:

ATOID 2012/21

ATOID 2012/22

It seems that:

- on and from 1 July 2012, the Commissioner intends to be as cavalier about the scope of the term 'supply for consideration' for non-commercial activities of Government agencies as he has been for commercial activities of private sector entities; and
- there is a fundamental problem with the meaning of the term 'imposed' in respect of taxes, fees and charges that the Commissioner has either, mistakenly interpreted, or has identified and intends to fudge.

Division 81 then and now

The original Division 81 of the Australian GST law was brutal but simple. It deemed the payment of an Australian tax fee or charge imposed under an Australian law to be consideration for a (taxable) supply made by the government agency to which it was paid or payable.

But the Division empowered the Treasurer to specify by way of legislative instrument that the payment is not to be so deemed.

At the time of its drafting it seemed clear that the original Division was designed to overcome doubts that:

- Government charges may not be for a supply made by the Government (even where it might generally be referred to as being made under the 'user pays' principle)[1]
- A compulsory statutory exaction, particularly one imposed under a taxation power, could be consideration at all.

The Explanatory memorandum to the 2011 amendments to Division 81 confirmed this, at least in part:

> 4.6 When the GST was introduced, the Commonwealth, states and territories agreed that the GST would apply to the commercial activities of government at all levels and that the non-commercial activities of government would be outside the scope of the GST. ...
>
> 4.20 Taxes are imposed as part of the general revenue raising activities of government and should not be subject to GST. Generally, taxes are not considered to be associated with a supply and are not subject to GST under the GST basic rules. However, given the expansive definition of 'supply' and 'consideration' contained within the GST Act, these amendments ensure all payments of taxes imposed under an Australian law will not be subject to GST at first instance.

1 See, e.g., *Apple and Pear Development Council v Customs and Excise Commissioners*, (Case 102/86), *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners* [1999] STC 398.

The Explanatory Memorandum explained that the inefficient process of updating the Treasurer's determination was in need of change

> The Determination has grown to over 680 pages and its making involves a lengthy process that places an administrative burden on all levels of government. This amendment will reduce administrative costs by removing the need to list items in a Determination and undertake a twice yearly exhaustive process of updating the Determination. It will also provide increased certainty by allowing government entities to treat eligible items as exempt from the time that they are introduced rather than some later time when they are listed in a Determination.

The new Division 81 was explained in the Explanatory Memorandum to work as follows:

> The payment, … of an Australian tax is not treated as the provision of consideration. Such a payment will not be subject to GST.
>
> However, regulations can be made to treat the payment of a tax, or of a kind of tax, as consideration for a supply made by the entity to which the tax is payable, in which case it will be subject to GST.
>
> A payment … of certain categories of Australian fees or charges is not treated as the provision of consideration. Such a payment will not be subject to GST. However, regulations can be made to treat the payment of any Australian fee or charge, or of a kind of payment, as consideration for a supply made by the entity to which the fee or charge is payable, in which case it may be subject to GST.
>
> The payment, … of an Australian tax or an Australian fee or charge that is not exempted by a specific provision within Division 81, including by regulation made under that Division, may be consideration for a taxable supply if the requirements of section 9-5 of the GST Act are met.

That is:

- A tax cannot be consideration for a supply unless it is specified to be so by way of regulations;
- A fee or charge may be consideration for a taxable supply if:
  - It is consideration for a supply under the general rules and is not specifically excluded under subsections (4) and (5) of the new section 81-10; or
  - It is deemed to be consideration for a supply under the regulations.
- A fee or charge may be excluded from being consideration for a supply by way of regulations.

These new provisions took effect for taxes, fees or charges imposed on or after 1 July 2011.

But the amendments do not apply to taxes fees or charges imposed before 1 July 2012 that are covered by a Treasurer's determination under the old law – these remain free of GST. The amending Act specifies that 'a Division 81 determination continues to have effect, after the commencement of this item and before 1 July 2012.'

The Explanatory Memorandum explained the transitional provision as follows:

> Those Australian taxes, fees and charges currently not subject to GST under the A New Tax System (Goods and Services Tax) (Exempt taxes, fees and charges) Determination 2011 (No. 1) will remain not subject to GST until 1 July 2012 and thereafter will be assessed under the changes made in this Schedule.

Imposed … *Hmmm!?*

We can see that the new provisions take effect 'in relation to the payment, or the discharging of liability to make a payment, relating to an Australian tax, or an Australian fee or charge, imposed on or after 1 July 2011.'[2] (emphasis added)

The 'grandfathering' provides that 'the amendments do not apply in relation to a payment, or a discharge of a liability to make a payment, relating to an Australian tax, or an Australian fee or charge, imposed before 1 July 2012', if the tax etc. is covered by a Treasurer's determination. BUT, the determination continues to have effect, ONLY before 1 July 2012.

Aren't taxes, fees and charges 'imposed' by acts and regulations at the time those instruments take effect? Or does imposed mean 'payable'?

Enter the ATO IDs

The two ATO IDs that were issued deal with 'daily hearing fees' charged by a State Tribunal for disputes between builders and householders in relation to a newly constructed domestic residence.

ATO ID 2012/21

ATO ID 2012/21 covers the situation for a fee imposed before 1 July 2012[3] but covered by a Treasurer's determination.

The ID reasons that the fee is not subject to GST – as follows:

- The new Division 81 applies because the fee is imposed on or after 1 July 2011;
- It is not a 'tax' – but it is an Australian fee or charge;
- The grandfathering provision in the amending Act applies because the fee is covered by a Treasurer's determination that was in force immediately before the commencement of the item (27 June 2011).

Interestingly, the ATO ID does not state the date of the fee. If the fee is payable after 1 July 2012, is it covered by the Determination?

The ATO ID is silent on this question and only refers to the pre 1 July 2011 or 2012 imposition of the fee. In fact, the ATO ID implies that the fee is 'imposed' at the time it becomes payable.

For Federal taxes, a tax is imposed by an imposition Act (separate from the assessment act).

The Treasurer's December 2010 determination lists, for Victorian Tribunal hearing fees, a fee that is payable under Victorian Civil and Administrative Tribunal (Fees) Regulations 2001.

It would seem that fees are 'imposed' by means of statute or regulation and, if the imposition took place before 1 July 2011, the new law does not apply.

However, the Treasurer's Determination ceases to have effect after 30 June 2012.

Does this mean that:

- Division 81 has no application to fees, imposed before 1 July 2011, but payable after 1 July 2012?
- If so, our question is whether the fee is consideration for a supply made by the Tribunal under section 9-5.

Here the second ATO ID comes into play.

[2] Subitem 16(1) of the amending Act.
[3] This is a stated fact – there is no discussion about how it is imposed and when.

ATO ID 2012/22

This ID covers the same fee but one that is imposed on or after 1 July 2012.[4]

The ID reasons that the fee is subject to GST – as follows:

- The new Division 81 applies because the fee is imposed on or after 1 July 2011;
- It is not a 'tax' – but it is an Australian fee or charge;
- The grandfathering provision in the amending Act does not apply because the fee is imposed on or after 1 July 2012;
- The fee is 'Australian fee or charge';
- The payment is not covered either by subsection 81-10(4) of the GST Act, which is about permissions, exemptions, authorities or licences; or by subsection 81-10(5) of the GST Act which is about the provision of information;
- The payment of the fee or charge is not covered by a regulation made under section 81-15 of the GST Act;
- The fee or charge is not prescribed in a regulation made under subsection 81-10(2) of the GST Act which is about treating a payment as the provision of consideration.
- The fee is, under section 9-5, consideration for a taxable supply made by the Tribunal that is registered for GST
  - There is a supply of services of hearing and resolving the dispute is a thing done in Australia;
  - The fee has a nexus with the supply of services and is 'consideration';
  - The Tribunal carries out its activities 'in the form of a business';
  - The supply is not GST-free or input taxed.

By way of clarification for myself, ***is it true that***:

- If the fee is, imposed (e.g., is the subject of a regulation) after 1 July 2011, the Division will apply.
  - The grandfathering will apply if it is listed in the December 2010 Treasurer's determination, provided it is payable before 1 July 2012 when the Treasurer's determination ceases to be effective.
  - If the fee is imposed after 1 July 2012 but payable after 1 July 2012, the new rules will apply which means, absent any reference to the kind of fee in Division 81 or the regulations, the operative provision is section 9-5;
- If the fee is imposed on or after 1 July 2012, absent any reference to the kind of fee in Division 81 or the regulations, the operative provision is section 9-5?

The operation of section 9-5 – the Oops moment

Unhelpfully, note 2 to the ID explains the surprising reference in the ID to term 'in the form of a business' as follows:

> For the purpose of applying the enterprise requirement in paragraph 9-5(b) of the GST Act, this ATO ID refers to the Australian government agency carrying on its activities 'in the form of a

[4] Since we have not yet arrived at this date, the inference that the term 'imposed' is interpreted as becomes payable is reinforced.

> business'. Miscellaneous Tax Ruling MT 2006/1 The New Tax System : the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number explains the meaning of 'form of a business'. An alternative provision that may apply is paragraph 9-20(1)(g) of the GST Act, which is about the activities of the Commonwealth, a State, or a Territory, or by a body corporate, or corporation sole established for a public purpose under a law of the Commonwealth, a State or a Territory. This provision also is explained in MT 2006/1.

And I thought we had dealt with this ludicrous notion that the words 'in the form of' could be called upon to obscure the scope of the term business!

Of course, paragraph 9-20(1)(g) was designed to deal with the question of whether the activities of government agencies were within GST. There is no need to try to wriggle the activities of government into business.

There is, however, a fundamental point about whether government charges are consideration for a supply – this is the reason for Division 81 in the first place!

It seems reasonably clear that the fee charged for access to a State government tribunal to determine a dispute:

- **is not** consideration for the supply of a service under the normal rules;
- the activities of the Tribunal are not of a commercial nature and so, are not within the policy of inclusion with the GST net – this is evidenced by the fact that the Treasurer listed them in the original determination.

Wow!!!

In one simplistic ATO ID we dispense with all of the doubts about whether:

- the nature of Government activities is a business;
- a regulatory function can be a supply;
- a compulsory statutory charge can be consideration for any supply;
- the policy intent is that the non-commercial activities of government related entities not be subject to the Goods and Services Tax (GST). [5]

If it was that simple, can someone tell me why:

- We needed Div 81 in the first place; and
- We included all government activities in the scope of enterprise?

Moreover, where are the States and Territories in all of this shemozzle? After all this is not only their revenue it is also their liability.

[5] See proposed amendments to paragraph 9-15(30(c) dealing with appropriations.