

18 July 2014

GST treatment of bodies corporate
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GST treatment of bodies corporate

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the Government discussion document *GST treatment of bodies corporate* (discussion document). The discussion document sets out proposed amendments to the Goods and Services Tax Act 1985, which are made in response to submissions received on the May 2013 Issues Paper IRRUIP7: *Bodies corporate – GST registration*, and invites comment on the proposed amendments.

Proposed new sections 14(1)(f) and 60C, Goods and Services Tax Act 1985

2. The discussion document proposes to prevent bodies corporate from being required, or able to register for GST by amending section 14(1) to treat supplies made by a body corporate to unit owners in the discharge of the body corporate's duties under the Unit Titles Act 2010 as being exempt from GST.
3. To mitigate the potential for there to be tax cascades arising as a consequence of bodies corporate being unable to register for and recover GST on supplies received by bodies corporate, the discussion document proposes to enact a "look through" rule to treat any supplies (such as insurance or maintenance) received by a body corporate as being received by the underlying unit owners in proportion to the unit owners' ownership interest in the body corporate.
4. Both amendments are proposed with retrospective effect: the exemption to apply from 1 October 1986, subject to a savings provision for those bodies corporate that are currently registered for GST which would treat supplies made by those bodies corporate as exempt from 6 June 2014, and the look through to apply to supplies received by bodies corporate from 6 June 2014 (the date of the discussion document).

Discussion

5. The Law Society agrees that the current position of bodies corporate under the GST Act is potentially unsatisfactory given Inland Revenue's historic position that bodies corporate are not entitled to register for GST. Requiring that all bodies corporate register for GST where the amount levied from unit owners equals \$60,000 or more per annum will impose compliance costs on bodies corporate, many of whom do not have the systems or personnel to manage the filing of returns. A number of bodies corporate receive income from, for example, naming rights or carpark rentals, which would take them over the \$60,000 threshold. There are a few hybrid bodies corporate which incorporate timeshare units or other holiday accommodation which would further complicate matters.

6. However, the Law Society does not believe that the solution is to remove all bodies corporate from the GST system in the manner proposed.
7. The Law Society considers that the proposed amendments (and especially the look through rule) have the potential to create more compliance and other issues than they resolve for many bodies corporate. The discussion document seems to address residential unit title developments only. There are many unit title developments which are exclusively commercial or industrial, where most, if not all, members would be registered for GST. Further, hybrid developments also exist, where there are both commercial and residential units within the same development. The policy intent behind the proposed amendments could be achieved with more targeted amendments to the GST Act. The Law Society considers that if legislative amendment is considered necessary then allowing bodies corporate and their members to determine whether they wish to "opt in" to the look through rules, or whether they wish to treat the body corporate as an entity required or entitled to register for GST under the GST Act, would be more appropriate.

Administrative complexity likely to increase

8. The Law Society agrees that a look through rule would work well and reduce unnecessary compliance costs in some scenarios. For example, in large developments where all unit owners are residential (and therefore not entitled to register for GST) applying look through treatment makes sense as it would enable the body corporate to avoid the compliance cost of having to register for and return GST.
9. However, look through treatment will not reduce compliance costs nor produce administrative convenience in all cases.
10. GST registered unit owners in large developments who previously only received a single invoice for levies from their GST registered body corporate will be faced with a significant increase in administration and compliance costs under a compulsory look through rule, as they will need to collate copies of all invoices issued to the body corporate and determine their proportionate ownership share of any GST charged in order to complete their GST returns.
11. Bodies corporate in such circumstances will also face increased administration, as they will be required to forward copies of all invoices for goods and services they receive to relevant unit owners.
12. The application of the look through rule also has the potential to create more administrative complexity and risk for Inland Revenue.
13. The draft legislation set out in the discussion document does not specify how tax invoices should be issued by suppliers to bodies corporate, nor does it specify whether unit owners may hold a copy of a tax invoice (rather than an original) in order to claim their share of input tax. Without the Commissioner's approval, an original tax invoice must be held by a registered person in order to claim any input tax deduction and it is an offence under the GST Act to issue more than one tax invoice for the same supply.
14. If copies of tax invoices are considered to be "sufficient documentation" pursuant to section 24(6) of the GST Act for unit owners to hold when claiming GST, there will clearly be additional audit risks for Inland Revenue due to having multiple registered persons claiming GST shown on a single tax invoice. These risks will be more acute where the unit owners are members in large developments with a high proportion of GST registered unit owners.
15. The Law Society considers these issues require more consideration prior to any look through rule being enacted.

Substantive problems may arise

16. In addition to the administration issues identified above, the application of a look through rule could also result in more substantive issues and could produce unfair outcomes for taxpayers.
17. For example, the core assumption underlying the look through rule is that all unit owners benefit equally and in proportion to their ownership share in respect of the goods and services acquired by their body corporate.
18. This may not always be the case. The majority of levies set under the Unit Titles Act 2010 are levied by bodies corporate by reference to the "utility share" of unit owners, which may not be the same as the relevant unit owner's "ownership share". Many, if not most, unit developments will not have completed a utility assessment, and so the utility assessment will be the same as ownership shares. In any event, goods and services may be acquired by a body corporate for unit owners to receive on a "per unit" basis rather than an ownership or utility share basis. Goods and services may also be acquired by a body corporate in respect of some, but not all units: in such cases, sections 126 and 127 of the Unit Titles Act 2010 enable bodies corporate to recover amounts expended directly from the relevant unit owners affected.
19. GST registered unit owners funding unit-specific works will not be entitled via the proposed look through rule to receive full credit for the GST they have funded, and non-affected GST registered unit owners will be entitled to obtain an input tax credit for a proportion of goods or services which they have not received and were not required to fund. The look through rule will also be problematic where services are supplied to a body corporate which has a proportion of non-resident unit owners who would ordinarily be entitled to receive supplies of services zero rated for GST.
20. Unfair outcomes will also arise if the change in treatment to a look through rule is made compulsorily.
21. Non-GST registered unit owners whose body corporate has previously been registered for GST will be disadvantaged to the extent that those bodies corporate have not yet expended the funds levied, as GST will have been charged and returned on all levies charged to unit owners but the relevant bodies corporate will no longer be entitled to claim input tax credits in respect of the goods and services they acquire using those funds.
22. GST registered unit owners whose body corporate has previously been non-registered for GST could also be disadvantaged. Unit owners receiving insurance settlement payments who have not previously received the benefit of any input tax for GST charged on insurance premiums could be required by Inland Revenue investigators to pay GST in respect of any insurance payments made to the body corporate, based on an argument that the payment is "received" by the unit owners as a consequence of the look through rule deeming the insurance to be supplied to the unit owners.
23. For the reasons set out above, the Law Society considers that amendment to the GST Act to impose compulsory look through treatment on all unit owners and all bodies corporate is not appropriate. Rather, bodies corporate and their members should have to determine whether they wish to "opt in" to treat the body corporate as look-through. An 'opt-in' scenario would alleviate Inland Revenue's stated concerns regarding compliance costs for bodies corporate receiving in excess of \$60,000 per annum in levies, and which are not currently registered for GST as a consequence of Inland Revenue's historic position.
24. Those residential units involved in leaky building litigation or insurance claims should be treated carefully. Those currently registered for GST cannot simply be deregistered. There are some large developments part way through remedial works programmes which can be worth millions of

dollars. Any steps to remove GST status would mean that the remaining programme work could cost significantly more than the negotiated settlements with the defendants. Grandfathering provisions will be required for these bodies corporate.

Retrospective application not appropriate

25. The Law Society does not consider that any amendments should 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.
26. The Law Society does not believe that retrospective application of the changes is justified in the present case.
27. To the extent that it is not compliance costs and administration issues that are of concern to Inland Revenue but rather that GST-registered bodies corporate are currently receiving a tax advantage when they receive settlement sums (for example, for remediation of poor construction), then the Law Society considers this should be addressed openly by proposing specific amendments to the GST Act.

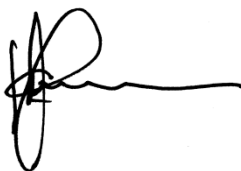
Recommendation

28. The Law Society submits that legislative amendment is not required.
29. In the alternative, the Law Society submits that:
 - (a) The GST Act should be amended to provide that bodies corporate and their unit owners may "opt in" to the proposed look through rules/exempt treatment of supplies made by the body corporate to unit owners; and
 - (b) Associated technical issues such as the operation of the tax invoice/input tax claim rules require further consideration prior to any such amendment.

Conclusion

30. This submission was prepared with assistance from the Law Society's Tax Law Committee. If you wish to discuss this further please do not hesitate to contact the committee convenor Neil Russ, through the committee secretary Rhyn Visser (04 463 2962), rhyn.visser@lawsociety.org.nz.

Yours sincerely



Chris Moore
President