
GST Treatment of Cross-Border Transactions: Law changes tabled in Parliament

12 February 2016

In brief

The Tax and Superannuation Laws Amendment (2016 Measures No.1) Bill 2016 was introduced into Parliament on 10 February 2016 (the Bill). Following several rounds of consultation on these measures, this Bill:

- (a) extends the goods and services tax (GST) to digital products and services supplied by non-residents to Australian consumers, with effect from 1 July 2017, and
- (b) contains the long awaited measures to reduce the compliance burden for non-residents transacting with Australian GST registered entities. These changes will be effective from the beginning of the second quarterly tax period following Royal Assent of the Bill (we expect the start date to be 1 October 2016).

The latter provisions will significantly narrow the scope of non-residents being brought within the GST system, but will impact some Australian taxpayers due to the potential application of the reverse charge provisions. In addition, supplies of services and intangibles by Australian taxpayers to non-residents may now be GST-free where those supplies are provided to GST registered Australian entities.

Given that the measures are generally supported by both sides of Government, we anticipate that the Bill will likely be passed in its current form. We note that no changes have been announced in relation to the low-value threshold for imported goods.

In detail

GST and imported digital products and services

By way of background, the Government announced on Federal Budget night on 12 May 2015 that it would introduce measures that will require non-resident suppliers to register, collect and remit GST on the digital products and services that they provide to Australian consumers. There have been two exposure drafts subject to public consultation, culminating in the release of this Bill.

The proposed new law involves extending the meaning of 'connected with Australia' to include supplies of services and intangibles made to 'Australian consumers'. As such supplies made by Australian resident GST registered suppliers to Australian consumers are already within the scope of the GST law, the effect of these changes is to include within its scope supplies of services and intangibles by non-resident suppliers to Australian consumers. An Australian consumer is broadly defined as an Australian resident that is not registered for GST.

If a supplier incorrectly determines that a customer is not an Australian consumer (and does not charge GST), the supplier will be liable for GST unless they can demonstrate that they took 'reasonable steps' to reach that conclusion. The Bill recognises that a supplier should be able to rely on its existing business systems and processes for forming this conclusion provided it also has a reasonable belief that the entity is not an Australian consumer. However, the Bill then states that a belief will not be reasonable if the supplier does not collect an Australian Business Number and a declaration that the customer is registered for GST. We expect this part of the legislation to cause the biggest practical challenges for taxpayers in terms of how they automate this process for customers.

The new measures may require a non-resident supplier to register and account for GST. In this regard, the Bill sets out an elective regime for simplified and limited registration which also restricts participating taxpayers from claiming input tax credits on related costs.

In many circumstances, responsibility for the GST liability that arises under the amendments will be shifted from the supplier to the operator of an electronic distribution platform. This will occur where the operator controls any of the key elements of the supply such as 'product' delivery, charging or setting terms and conditions. Shifting responsibility for the GST liability to operators is stated to minimise compliance costs as operators are generally better placed to comply. However, this additional collection responsibility may add significant risk, and compliance and systems costs for the intermediary.

The legislation also contains rules which clarify which operator is liable for the GST on the supply, where supplies are made through multiple electronic distribution platforms.

The key changes since the last iteration of the draft legislation are broadly as follows:

- Neither tax invoices nor adjustment notes are required for offshore supplies to Australian consumers.
- Entities that are operators of an electronic distribution platform can agree with their suppliers to assume the GST liabilities for other supplies made by a supplier (that are not otherwise inbound intangible supplies). This election is a simplification measure that allows electronic platform operators to treat all digital supplies (whether made by a non-resident or by an Australian resident) in the same way.
- There are provisions which allow an entity to revoke its election to become a limited registration entity within a reasonable period without losing its entitlement to input tax credits.
- Gambling supplies will be connected with Australia if the recipient of the supply is an Australian resident.

Consistent with the previous exposure draft, the Bill partly addresses concerns raised by industry in relation to gift cards by confirming that entities who sell vouchers that fall within Division 100 of the GST Act are not operators of an electronic distribution platform. GST will therefore not be payable on the sale of such vouchers.

However, a number of digital content gift cards sold by Australian retailers do not fall within Division 100 and entities selling such cards may be liable for GST. The effect of this is that uncertainty still exists over who is required to account for GST in the distribution chain in relation to digital content gift cards.

GST and business to business cross-border changes

This proposed measure aims to reduce the number of non-resident suppliers in cross-border business to business arrangements that are drawn into Australia's GST system where there is little or no GST revenue impact.

In summary, the measures:

- Modify the test for when an entity is carrying on an enterprise in Australia so that it is more closely aligned with key GST concepts. While the new test moves away from using a definition of 'permanent establishment' to determine where an enterprise is carried on, it is still based on factors relevant for determining a permanent establishment for income tax purposes.
- The 'connected with Australia' test will have a more limited application where supplies are made between businesses. In particular, as a general rule, the following supplies will not be connected with Australia:
 - Supplies of services and intangibles by a non-resident supplier to a GST registered entity carrying on business in Australia.
 - Supplies of services and intangibles by a non-resident supplier to a non-resident recipient who makes the acquisition solely for the purpose of its enterprise carried on outside Australia.
 - A supply of the ownership of leased goods where the recipient is a non-resident and the lessee made a taxable importation of the goods before, and continues to lease the goods after, ownership transfers, and
 - A supply by way of lease of the goods referred to in the previous point.
- Due to a reduction in the scope of supplies caught by the 'connected with Australia' test, there will be a greater application of the reverse charge provisions to Australian businesses that acquire services for non-creditable purposes.
- GST-free treatment may be available to supplies made to non-residents but provided to GST registered entities in Australia.
- Non-residents will no longer be required to register for GST if they only make GST-free supplies.
- Changes to the calculation of the value of a taxable importation by providing importers with an election to use a 10% uplift factor (unless an alternative amount is included in the regulations to the Act) to the customs value, in lieu of determining the actual value of transport and related costs.

The key changes since the last exposure draft are as follows:

- References to 'potentially chargeable' entity have been replaced with 'Australian-based business recipient'.
- Supplies of goods to Australia will only be 'connected with Australia' where the supplier imports the goods into Australia.
- If a supply involves goods being brought to Australia and the goods are installed or assembled in Australia, then the supply will be treated as if it were two separate supplies, being of installation or assembly services and of goods. A new rule has been included to determine the price of each separate supply.

- In relation to the sale of leased goods by non-residents, it is now required that the lease be on substantially similar terms rather than the same terms after the sale.
- Amendments to the Division 84 compulsory reverse charge provisions to ensure that adjustment provisions to previously declared GST or input tax credits will apply to supplies that are subject to the Division 84 provisions.
- Consequential amendments to clarify the interaction between the Division 84 reverse charge provisions and the associate provisions in Division 72 and the interaction between reverse charge provisions and Division 57 resident agent provisions.

The takeaway

In our view, these law changes are perhaps the most significant changes to the GST law since its introduction and will place a significant burden on accounting systems to track cross-border GST obligations and the nature of the underlying supplies.

In relation to the cross-border supply of digital products in particular, affected taxpayers will be looking to automate their compliance. It will be a challenge for many non-resident suppliers to be fully compliant by the implementation date. Further, these taxpayers will need to work with the ATO to agree on practical ways for billing systems spanning multiple territories to establish a consumer's status in order to allow them to efficiently comply with the new law.

In relation to the broader business to business changes, some (but not all) non-residents can de-register for GST. Australian taxpayers will need to determine whether they have a requirement to self-assess GST under the compulsory reverse charge provisions and determine whether supplies made to non-residents but provided to entities in Australia now attract GST-free status. Taxpayers will also need to consider including additional disclosure requirements and/or warranties in commercial agreements, given that the GST treatment of the supplies will depend on the status of a particular customer (or entity receiving a supply in Australia) or nature of ongoing arrangements, particularly involving leased goods and warranties.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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