
Chapter x

Exempting Australian taxes, fees and charges from the GST

Outline of chapter

- 1.1 Schedule x to this Bill amends:
- the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to replace the current mechanism for ensuring Australian taxes, fees and charges are not subject to GST with a principles based legislative exemption; and
 - the GST Act to allow for the making of regulations to treat an Australian tax, or an Australian fee or charge to be treated in a particular way; and
 - the *A New Tax System (Luxury Car Tax) Act 1999 (LCT Act)* to account for changes being made to the GST Act.

Context of amendments

1.2 This measure is implemented in response to the Government's decision to replace the current mechanism for ensuring Australian taxes, fees and charges are not subject to GST with a principles based legislative exemption, announced in the 2010-2011 Commonwealth Budget on 11 May 2010.

1.3 The GST Act operates by treating a payment, or the discharging of a liability to make such a payment, of any Australian tax, fee or charge (other than GST) to be consideration for a supply that the Australian government agency makes to the payer in return for that payment (subsection 81-5(1) of the GST Act). This ensures that all Australian taxes, fees and charges are potentially subject to GST regardless of whether they are connected with a supply under the GST basic rules.

1.4 However, the GST Act then allows the Commonwealth Treasurer to specify by legislative instrument (a Determination), that the payment, or discharging of the liability to make such a payment, of any Australian tax, fee or charge is not the provision of consideration

(subsection 81-5(2) of the GST Act). The effect of this is that taxes, fees and charges included in the Determination are not consideration for a taxable supply and therefore not subject to GST.

1.5 The Determination is updated twice a year in accordance with an administrative process that involves the agreement of the GST Administration Sub-Committee of the Ministerial Council for Federal Financial Relations (GSTAS) and the formal agreement of the state and territory Treasurers. The Determination is registered as a legislative instrument and is subject to scrutiny by the Senate Regulations and Ordinances Committee.

1.6 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 of the scope of the GST.

1.7 Australian taxes, fees and charges are not usually associated with commercial transactions and thus should be outside of the scope of the GST.

1.8 Accordingly, under the *Intergovernmental Agreement on Federal Financial Relations* (IGA) the Parties agreed that Division 81 of the GST Act will exempt Australian taxes, fees and charges from GST in accordance with the following principles:

- taxes that are in the nature of a compulsory impost for general purposes and compulsory charges by the way of fines or penalties will be exempt from GST;
- regulatory charges that do not relate to particular goods or services will be exempt from GST, including:
 - fees and charges levied on specific industries and used to finance particular regulatory or other activities in the government sector; and
 - licences, permits and certifications that are required by government prior to undertaking a general activity.

1.9 The current Determination is the *A New Tax System (Goods and Services Tax) (Exempt taxes, fees and charges) Determination 2011 (No.1)*.

1.10 The Determination has grown to over 680 pages. Its size detracts from its utility and from the intended purpose of the determination making process. Given the rigid timelines involved in the Determination making

process, the Commonwealth and the States and Territories have limited flexibility to impose new charges outside of the 'updating' phase of the process and have them listed in a Determination to be exempt from GST.

Summary of new law

Exempting Australian taxes or Australian fees and charges from the GST

1.11 Schedule x repeals and replaces Division 81 of the GST Act to allow entities to self assess the GST treatment of a payment of an Australian tax or an Australian fee or charge in accordance with certain principles. Under these amendments, government entities will no longer need to have an Australian tax or certain categories of Australian fees or charges listed on the Determination in order for those taxes, fees or charges to not be subject to GST.

1.12 In addition, the amendments allow for regulations to be made to treat an Australian tax, or certain categories of Australian fees or charges in a particular way that will determine if the amount paid, or the discharging of a liability to make such payment, is subject to GST.

1.13 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.

1.14 The GST treatment of all new Australian taxes or Australian fees or charges that are not currently entered on the *A New Tax System (Goods and Services Tax) (Exempt taxes, fees and charges) Determination 2011 (No.1)* will be self assessed under the GST basic rules and the changes made by this Schedule with effect from 1 July 2011.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
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| The GST basic rules will apply to the payment of an Australian tax or Australian fee or charge in the first instance. | The payment of any Australian tax, fee or charge is treated in the first instance as the provision of consideration for a supply, which may be a taxable supply. |
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| <p>liability to make such a payment, of an Australian tax, is not treated as consideration for a supply made by the entity to which the payment is made. 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, in which case it may be subject to GST.</p> <p>A payment or the discharging of a liability to make such a payment, of certain categories of Australian fees or charges is not treated as consideration for a supply made by the entity to which the payment is made. Such a payment will not be subject to GST. However, regulations can be made to treat the payment of an Australian fee or charge, or of a kind of payment, as consideration for a supply, in which case it may be subject to GST (in accordance with the GST basic rules).</p> <p>Regulations that are made under the Division 81 provisions can be expressed to take effect from a date before the regulations are registered under the <i>Legislative Instruments Act 2003</i>.</p> | <p>charge is not treated as consideration for a supply if it is included in a legislative instrument made by the Treasurer, in which case it is not subject to GST.</p> <p>The fact a supply is not connected with Australia does not stop the supply being a taxable supply in connection with the payment of an Australian tax, fee or charge</p> |
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Detailed explanation of new law

1.15 Schedule x repeals and replaces Division 81 of the GST Act to allow government agencies to self assess the GST treatment of any Australian tax or Australian fee or charge payable to the agency in accordance with certain principles.

1.16 Under the amendments, an Australian tax, fee or charge will no longer be treated as the provision of consideration for a supply at first instance. Government agencies will no longer need to have an Australian tax, fee or charge listed on a Determination made by the Treasurer as a prerequisite for it not to be subject to GST.

1.17 Under these amendments, the GST basic rules will apply to determine if a tax, fee and charge is subject to GST at first instance. However, a tax, fee or charge (to which this Schedule applies) will not be

treated as consideration for a supply made by the entity to which the tax, fee or charge is payable. The effect of this is that paragraph 9-5(a) of the GST Act cannot be satisfied and therefore the entity to which the tax, fee or charge is paid or payable is not making a taxable supply and the payment will not be subject to GST.

1.18 However, a regulation can be made with the effect of treating payments, or the discharging of a liability to make such payments, of an Australian tax or of certain categories of Australian fees or charges, as consideration for a supply. The GST treatment of the supply to which the tax, fee or charge relates will be determined under the GST basic rules, and may be a taxable supply.

1.19 The changes also provide for the making of regulations that will allow for the payment of an Australian fee or charge, or the discharging of a liability to make such a payment, as not being subject to GST where necessary.

Exempt taxes

1.20 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, the amendments ensure all payments of taxes imposed under an Australian law will not be subject to GST at first instance.

1.21 The payment of an Australian tax, or the discharging of a liability to make such a payment, will not be treated as the provision of consideration for a supply made by the entity to which the tax is payable. Therefore, the supply (if any) will not be a taxable supply as the supply has not been made for consideration in accordance with paragraph 9-5(a) of the GST Act. Consequently, an Australian tax, imposed under an Australian law, will not attract GST. [*Schedule x, item 2, paragraph 81-5(a)*]

1.22 The amendments allow for a payment, or the discharging of a liability to make such a payment, of an Australian tax, or of a kind, that is *not treated as the provision* of consideration for a supply under paragraph 81-5(a) of the GST Act, to be treated, by way of regulation, *as the provision* of consideration for a supply made by the entity to which the tax is payable. Therefore, the supply will be a taxable supply if all of the requirements of section 9-5 of the GST Act are satisfied. [*Schedule x, item 2, paragraph 81-5(b)*]

1.23 The abovementioned regulation making power allows for circumstances where, for policy reasons, the Government considers that GST should apply to the payment of an Australian tax.

1.24 Any regulations would be made through procedures agreed to by the Commonwealth and the States and Territories, in accordance with the *A New Tax System (Managing the GST Rate and Base) Act 1999*. The agreed procedures involve consultation and agreement between the Commonwealth and the States and Territories on all the changes made to the GST base, through the GSTAS. Following consultation, any proposed regulation would require the unanimous agreement of the members of the Ministerial Council for Federal Financial Relations.

Exempt fees and charges

1.25 The amendments ensure that a payment, or the discharging of a liability to make such a payment, for certain categories of Australian fees or charges will not be subject to GST. A payment, or the discharging of a liability to make such a payment, will only not be subject to GST to the extent the payment is for a fee or charge covered by subsection 81-10(1) of these amendments. For a fee or charge not to be subject to GST it must be imposed under an Australian law and be payable to an Australian government agency. [*Schedule x, item 2, subsection 81-10(1)*]

1.26 The payment of an Australian fee or charge that relates to the provision, under an Australian law, of a permission, exemption or licence, will not be treated as the provision of consideration for a supply made by the entity to which the fee or charge is payable. Therefore, the fee or charge will not be subject to GST.

1.27 This treatment also applies to an Australian fee or charge associated with retention of a permission, exemption or licence. An example of such a fee would be a periodic compulsory inspection fee, made under an Australian law and payable to an Australian government agency, for the retention of a permit. In such cases, the inspection fee is directly related to the retention of the permission (the permit) and will not be subject to GST. [*Schedule x, item 2, subsection 81-10(2)*]

1.28 The payment of an Australian fee or charge, to an Australian government agency, in relation to the lodgment of, or access to, documents provided under an Australian law will not be treated as the provision of consideration for a supply made by the Australian government agency. Therefore, the fee or charge will not be subject to GST. For example, a fee that is paid in order to obtain information from a government agency under relevant freedom of information legislation is intended not to be subject to GST.

1.29 It is not intended that these amendments apply to treat consideration that is provided for commercial sales of information supplied by Australian government agencies, including supplies of books by a government bookshop, as not being subject to GST at first instance. *[Schedule x, item 2, subsection 81-10(3)]*

1.30 The amendments allow for an Australian fee or charge, or a fee or charge of a specified kind, that is not treated as the provision of consideration due to the application of subsection 81-10(1) to be treated, by way of regulation, as the provision of consideration for a supply made by the entity to which the fee or charge is payable. This supply will be a taxable supply if the requirements of section 9-5 of the GST Act are met. *[Schedule x, item 2, paragraph 81-10(1)(b)]*

1.31 The abovementioned regulation making power allows for circumstances where, for policy reasons, the Government considers that GST should apply to the payment of certain Australian fees or charges.

1.32 Furthermore, the amendments allow for the payment of an Australian fee or charge, or the discharging of a liability to make such a payment, to be not treated as the provision of consideration and therefore not subject to GST. This power is to apply in circumstances where an Australian fee or charge not covered by subsections 81-10(2) or (3) of these amendments, for policy reasons, the Government considers that GST should not apply. This will also assist with the correcting of unintended consequences that may arise as a result of the operation of the new provisions inserted by these amendments. *[Schedule x, item 2, section 81-15]*

1.33 Any regulations would be made through procedures agreed to by the Commonwealth and the States and Territories, in accordance with the *A New Tax System (Managing the GST Rate and Base) Act 1999*. The agreed procedures involve consultation and agreement between the Commonwealth and the States and Territories on all the changes made to the GST base, through the GSTAS. Following consultation, any proposed regulation would require the unanimous agreement of the members of the Ministerial Council for Federal Financial Relations.

1.34 The changes also allow for a regulation that is made under these amendments to be expressed as taking effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*. This is despite the operation of subsection 12(2) of that Act which otherwise limits the commencement date of regulations in certain circumstances. This would for instance, allow for the correct GST treatment of a new Australian fee or charge to be achieved where the fee or charge is raised under an Australian law before regulations can be made to treat it as not being subject to GST. *[Schedule x, item 2, section 81-20]*

Application and transitional provisions

1.35 Under these amendments, the *A New Tax System (Goods and Services Tax)(Exempt taxes, fees and charges) Determination 2011 (No.1)* which lists all Australian taxes, fees and charges that are not subject to GST, is to be grandfathered for one year. Thus taxes, fees and charges currently listed in the Determination will remain not subject to GST for the transitional period (until 1 July 2012), after which they will be assessed against the principles set out in these amendments.

1.36 This transitional arrangement will allow for Australian government agencies to reconcile the current taxes, fees and charges listed in the *A New Tax System (Goods and Services Tax)(Exempt taxes, fees and charges) Determination 2011 (No.1)* with these amendments.

1.37 Any taxes, fees or charges that are currently listed in the *A New Tax System (Goods and Services Tax)(Exempt taxes, fees and charges) Determination 2011 (No.1)* that become subject to GST under these amendments will attract GST from 1 July 2012 (provided they satisfy the requirements of section 9-5 of the GST Act and are not otherwise treated, by way of regulation, as not being subject to GST).

Consequential amendments

- 1.38 As a consequence of the amendments under Schedule x:
- Subsection 82-10(3) of the GST Act which refers to the previous subsection 81-5(1) is amended to refer to the new provisions inserted by this Schedule; [*Schedule x, item 15, subsection 82-10(3)*]
 - Subparagraph 117-5(1)(ba)(i) of the GST Act which refers to the previous subsection 81-5(2) is amended to refer to the new provisions inserted by this Schedule; [*Schedule x, item 20, subparagraph 117-5(1)(ba)(i)*]
 - The definition of ‘Australian tax, fee or charge’ has been repealed from section 195-1 of the GST Act. Definitions for ‘Australian tax’ and for ‘Australian fee and charge’ have been inserted into section 195-1 of the GST Act. Consequentially, previous references to the former definition have been amended to make reference to the new definitions in section 27-1, paragraph 5-20(1)(b) and paragraph 5-20(6)(b) of the LCT Act; [*Schedule x, items 50, 55, 60, section 27-1, paragraphs 5-20(1)(b), 5-20(6)(b) of the LCT Act*]

- A reference to the previous provisions repealed by this Schedule in section 195-1 (note at the end of the definition of ‘taxable supply’) and in section 195-1 (note at the end of the definition of ‘connected with Australia’) has been removed; *[Schedule x, item 45, section 195-1]* and
- A reference to the previous provisions repealed by this Schedule in section 195-1 (note at the end of the definition of ‘consideration’) has been amended to refer to the new provisions inserted by this Schedule. *[Schedule x, item 35, section 195-1]*