

GST Bulletin

GST Update for Insolvency Practitioners

In brief

On 21 August 2012, an article was published in *The Australian* newspaper entitled "ATO targets banks, receivers over missing billions in lost GST payments". The article made a number of claims about possible investigations by the Australian Tax Office ("ATO") into alleged roting by the banking and insolvency industries for lost GST payments.

Despite the claims, the article does not appear to raise any major concerns or new issues for the insolvency industry concerning the application and enforcement of the GST rules.

The principal GST rules that affect insolvency practitioners are:

- When the debtor has made a taxable supply, the liability for that supply would rest with the debtor. The ATO ranks as an unsecured creditor and must prove its unsecured GST debt in the usual way.
- A creditor or an insolvency representative will only be liable for GST on a supply when the company's property is sold for the discharge of a debt in the creditor's capacity as a mortgagee in possession or as a representative of the incapacitated entity.
- [Division 58](#) and [105](#) of the *A New Tax System (Goods and Services Tax) Act 1999* ("GST Act") are the relevant provisions. To the extent that Division 58 and 105 of the GST Act can both apply, Division 105 prevails.

Representatives of incapacitated entities

Under the GST Act, liquidators, receivers, managers and administrators are all collectively referred to as "representatives of incapacitated entities." Such representatives are personally liable for any GST payable on taxable supplies that are made by a company post appointment. The ATO ranks as an unsecured creditor in respect of pre-appointment liabilities. This means that the ATO is at risk that it will not recover pre-appointment GST liabilities in full. However, if a representative is personally liable for the GST liability that arises post appointment, the ATO is likely to recover its GST liability on post appointment supplies in full.

Who must pay the GST

Whether the GST rules apply to a secured party depends on their role in the particular transaction. If for example, a liquidator is appointed for a company, it is accepted that, if pre-liquidation the company had sold property (being a taxable supply), the liability for the taxable supply rests with the company, not with the liquidator. Any money received post-liquidation in

relation to pre-liquidation sales goes to secured creditors (and statutorily preferred creditors) before anything goes to the ATO. However, if property is sold by a mortgagee who takes possession or by a representative of an incapacitated entity, the mortgagee/representative would need to comply with the relevant GST rules.

Compliance with the GST Rules

The *Tax Laws Amendment (2009 Measures No.5) Act 2009* ("Act") introduced Division 58 of the GST Act, which is concerned with the GST obligations of representatives of incapacitated entities. The Act also amended the definition of "representative" in [section 195-1](#) of the GST Act to include "controller" (within the meaning of [section 9](#) of the *Corporations Act 2001*). A mortgagee who takes possession or control of property of a corporation and sells it pursuant to the power of sale granted under the mortgage deed, falls within paragraph 9(b) of the *Corporations Act* (see definition of "controller").

The GST obligations of mortgagees in possession or control, in these circumstances, would therefore fall for consideration under Division 58 in addition to

Division 105 which addresses the GST implications of mortgagees in possession or control. The two Divisions contain clear differences in terms of registration and reporting requirements. Division 105 of the GST Act allows a mortgagee to report any GST liabilities arising from the sale of a mortgagor's property under the one GST registration. However, the GST Act requires a representative to register separately in relation to each incapacitated entity that it represents. In addition to the differing registration requirements, Division 105 provides that a supply of a mortgagor's property by a mortgagee in possession or control is not a taxable supply in certain circumstances. Division 58 does not provide a similar exclusion.

In response to the inconsistent obligations imposed by Division 58 and 105, the ATO adopted an interpretive approach under which the more specific provisions of

Division 105 would prevail over the general provisions of Division 58 (see [ATO ID 2010/224](#)). Therefore, the ATO allowed mortgagees in possession to continue to report and account for their GST obligations under one single registration as well as providing for the exclusions under Division 105.

Proposed amendment

Further to our [GST Bulletin of 14 March 2012](#), the [Tax Laws Amendment \(2012 Measures No. 4\) Bill 2012](#) ("Bill") proposes to amend the GST Act to expressly provide that Division 105 operates to the exclusion of Division 58 where a mortgagee in possession sells the property of a corporation.

The Bill is currently before the Senate.

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