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Stephen Howlin
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Dear Stephen

Tier 2 GST Settlements

This letter is to address the additional matters foreshadowed in our email to you dated 15 June 2009 and follows on from our letter of 23 June 2009.

Settling on a Net basis

We consider it quite clear that there is no impediment to your office settling this issue on a net basis. We strongly submit that there can be no real suggestion that doing so is in some way taking a position on GST that creates a more advantageous income tax outcome. The fact that income tax is not an impediment to a net settlement is evident given that in the absence of a net settlement approach:

- (a) an effective tax deduction on the net arises under your "Example 1" approach;
- (b) our letter of 23 June clearly shows that there is a logical flaw in the income tax conclusion under your "Example 2" approach; and
- (c) our strong conviction that whichever way the matter is addressed (net or gross), income tax deductibility of the net 2.5% outgoing is the appropriate outcome under the income tax legislation.

As a matter of practical reality, settling on a net basis would serve primarily to alleviate significant practical problems, some of which arise as a direct consequence of ATO delays.

The only realistic objection to settling on a net basis is in our view the question of whether doing so would disadvantage parties in a position to benefit from RITCs at the Trust level, where those parties are different to the Taxpayer at the Corporate Entity level. We consider that this issue can be very simply addressed by taking the uncontroversial step of involving the Trusts in the settlement (see below). If the Trustee has no objection to settling a Deed under which it stipulates that it has no entitlement to claim an RITC, then we submit that your office should have no objection either.

On a technical basis, we submit that you should take into account that the wording of Division 72 gives the Commissioner significant leeway in relation to the determination of market value. This should allow ample discretion for the formulation of a settlement amount that utilises a net amount of settlement that equates to the 1A =1B amount.

It should also be borne in mind that it is by no means free from doubt that Division 72 in fact has any application in light of the extended meaning of creditable purpose that arises in relation to supplies made to parties entitled to claim an RITC. That is, entitlement at the Trust level to an RITC clearly points to the non application of Division 72, given that the GST Act itself then deems the supply to have been made for a wholly creditable purpose (refer Section 70-10 of the GST Act). Division 72 cannot apply in the presence of a wholly creditable purpose.

Should this issue proceed to litigation, this argument clearly presents a risk to your position given your office has conceded that an RITC is clearly available to the associated trust. A net settlement approach is therefore consistent with the uncertainty that a Court might ultimately conclude there is a failure of Division 72 and only some marginal level of input taxation.

Involvement of Trusts

The current approach of your office adopts the position that the Corporate Entity will guarantee the GST related actions of the Trusts, whether or not the Corporate Entity is in fact in a position to have any influence over the behaviour of the Trustee.

We submit that a much more sensible approach would be to have the relevant Trustee made a party to the Settlement Deed, such that if the Trustee agrees, the settlement of the GST liability of the Corporate Entity would simply reflect the net outcome we seek. The Deed could then contemplate the Trustee's own acknowledgement that it has no entitlement to claim a further RITC.

In the event that a Trust has in fact been wound up, then this mechanism need not be used since the risk of additional RITC claims by the Trust should not exist.

Administrative Burden

The net approach also overcomes the burden of prior year amendments (particularly for the Trustee) as previously raised with you.

Industry Wide Payment Arrangements

The delays from your office in relation to the income tax issue have directly coincided with an undeniable and material deterioration in the financial position of our members. We therefore request advice from you as to what you are prepared to do in relation to industry wide payment arrangements in relation to the ultimate Tier 2 settlement amounts.

We look forward to your response to the above at your earliest convenience.

Yours sincerely.

Patrick Tuttle
Deputy Chairman
Australian Securitisation Forum, Inc.