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**THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA**

HOUSE OF REPRESENTATIVES

**Swimming Pools Tax
Refund Bill 1992**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the Treasurer,
the Hon. John Dawkins, M.P.)**

General Outline

The Swimming Pools Tax Refund Bill 1992 will ensure that (following the decision of the High Court in *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 104 ALR 545) any refunds of amounts paid to the Commonwealth as sales tax on swimming pools constructed *in situ* are passed through to pool purchasers.

Financial Impact

2. The proposed changes will not have a direct impact on revenue. The effect of the Bill is not to deny the Commonwealth's liability to refund amounts paid as sales tax on *in situ* swimming pools, but rather to place a condition on the eligibility of pool builders to a refund by requiring that the refund be passed through to pool purchasers. To the extent that this condition is not satisfied there may be a positive revenue impact, but the amount is unquantifiable.

Background

Amendments in 1986 to sales tax treatment of swimming pools

3. The sales tax law was amended in 1986 to overcome an anomaly in the sales tax treatment of swimming pools. Prior to the 1986 amendments above-ground pools and fibre-glass in-ground pools were subject to tax at the rate of 10 per cent while in-ground concrete pools which were constructed *in situ* were free from sales tax. The amendments sought to extend the sales tax law to include pools constructed *in situ* and to impose tax on all swimming pools at the rate of 20 per cent.

High Court decision

4. The High Court ruled in February 1992 that the legislation purporting to impose sales tax on in-ground pools constructed *in situ* is of no effect. The Court found that the amendment does not conform with the requirement in section 55 of the Constitution that laws imposing duties of excise deal with duties of excise only. The *Sales Tax Act (No. 1) 1930* imposes a duty of excise on manufactured goods covered by the assessment provisions of the sales tax law. The amendment has the effect of including *in situ* swimming pools within the scope of the assessment provisions of the sales tax law. However the tax imposed on the pools by Sales Tax Act No. 1 is not a duty of excise. As the Act is already dealing with a duty of excise it cannot, in view of section 55 of the Constitution, validly impose a tax that is not a duty of excise.

The sales tax refund code

5. A sales taxpayer will usually recover tax payable on the sale of goods from the purchaser of the goods by including an amount equal to the tax in the purchase price. If tax has been overpaid the existing sales tax law provides, in effect, for a refund of the amount overpaid provided that the taxpayer has not passed the tax on to the purchaser. A taxpayer who has passed the tax on must first refund that amount to the purchaser before the taxpayer can obtain a refund from the Commissioner of Taxation. The purpose of this requirement is to prevent a taxpayer from receiving a windfall gain.

6. However, the amounts paid by pool builders in relation to *in situ* pools following the 1986 amendments are not tax and it is not clear whether the refund provisions of the sales tax law apply to them. This Bill will ensure, in line with the existing sales tax refund code, that the benefit of any refund payable as a result of the High Court decision goes to the person who bore the 'tax' (usually the pool purchaser). Pool builder 'taxpayers' who have passed the tax on to the purchasers will be prevented from receiving windfall gains. The Bill will also ensure that a pool builder who refunds an amount to a pool purchaser is not out of pocket. Interest will be paid for the period starting when the pool builder makes a refund to the pool purchaser and finishing when the corresponding refund is paid to the pool builder by the Australian Taxation Office.

Explanation of the Bill

Commencement

7. The **Swimming Pools Tax Refund Act 1992** will commence on the day it receives the Royal Assent. It will apply to amounts paid as sales tax on in situ pools following the amendments to the sales tax law which became effective on 20 August 1986 but which were held to be invalid by the High Court on 12 February 1992. *[clause 2]*

General administration of Act

8. The Commissioner of Taxation, referred to as the Commissioner, will have the general administration of the Act. *[clause 8]*

In situ pool refund payments only to be made in certain circumstances

9. The Commonwealth will not be liable to make a refund of an amount paid as sales tax on swimming pools constructed *in situ* unless the Commissioner receives a declaration from the pool builder that the amount paid was not passed on to the pool purchaser, or if an amount was passed on, that that amount has been refunded to the pool purchaser. If the amount refunded to the purchaser is less than the amount paid to the Commissioner, the Commonwealth refund liability will equal the amount the purchaser has received. *[clause 4(1) and 4(2)]*

10. The Act will allow 1 year from the date of Royal Assent for declarations to be lodged. The declarations must be in a form approved by the Commissioner. This is to ensure that any false or misleading statements made in order to obtain a refund to which a taxpayer is not entitled are subject to the penalties provided under the *Taxation Administration Act 1953*. *[clause 4(2)]*

Information and Access

11. To the extent that it may be necessary to gather evidence that a person has obtained a refund under this Bill by making a false or misleading statement in a declaration, the Bill provides the Commissioner with powers to obtain information and to gain reasonable access to records and premises. The powers are identical to those currently exercised by taxation officers dealing with sales tax laws and will only be able to be used by the Commissioner for the purpose of applying the penalties available under the Taxation Administration Act to declarations made in accordance with this Bill.

[clause 9 and 10]

Secrecy

12. Information obtained under this Bill will be protected by secrecy requirements that are identical to those contained in the sales tax law.

[clause 11]

Payments of interest on in situ pool refunds

13. The Commissioner will be liable to pay interest to a pool builder who did not pass the amount paid as sales tax on to the pool purchaser or who, in complying with the requirements of this Bill, refunds to a pool purchaser an amount previously passed on to that purchaser. *[clause 5(1)]*

14. The interest will be payable on the amount of refund a builder is entitled to under this Bill for the period that the builder has been out of pocket. In the case of a builder who did not pass on to the purchaser the amount paid to the Commissioner as sales tax, the Bill will provide for interest to be payable from the day the amount was paid up until the day the Commissioner makes the refund. *[clause 5(2)]*

15. If a builder did pass an amount on to the purchaser and has since refunded some or all of that amount to the purchaser, the interest will be payable on the amount refunded for the period beginning when the builder made the refund and ending when the Commissioner refunds to the builder.

[clause 5(3)]

16. The rate at which interest will be payable is the rate or rates under the *Taxation (Interest on Overpayments) Act 1983* that apply to the period the builder was out of pocket. *[clause 5(4)]*

Interest not payable on amounts paid as sales tax on in situ pools

17. Apart from the circumstances set out in paragraphs 13, 14 15 and 16 above, the Commonwealth will not be liable to pay interest on amounts refunded to pool builders. *[clause 6]*

Application of refund payments and interest against liabilities

18. Any refund or interest payable by the Commissioner in accordance with this Bill may be offset against an amount owed by a pool builder to the Commonwealth. *[clause 7]*



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