

**INTERPRETATION STATEMENT**

# **GST and agency**

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**SCOPE OF THIS STATEMENT**

This Interpretation Statement considers whether a person is acting as an agent or as a principal for the purposes of the Goods and Services Tax Act 1985. It is primarily concerned with how ss 60(1) and (2) apply and identifies features that support an agency relationship existing for a supply. It also explains how the Act can operate to modify an agency relationship.

All legislative references are to the Goods and Services Tax Act 1985 (the Act) unless otherwise stated.

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## Summary

1. “Agency” is not a defined term in the Act and so must take its meaning from the common law. In general terms, an agency relationship is where a person (the agent) is

authorised by another person (the principal) to act on their behalf to create or affect the legal relations between the principal and a third party.

2. The general rule is that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply. Where a person acts as an agent in making a supply to a third party on behalf of a principal, the supply is deemed to be made by that principal and not by the agent (s 60(1)). Conversely, where a registered person makes a taxable supply to an agent who is acting on behalf of a principal for the purposes of that supply, the supply is deemed to be made to the principal and not to the agent (s 60(2)). In both cases, it is the principal and not the agent who must account for GST on these supplies.
3. In some cases, it can be difficult to determine whether a person is acting as an agent or as a principal in relation to a supply. For GST purposes, the nature of a supply is determined by considering the legal rights and obligations entered into between the supplier and the recipient, in light of the surrounding circumstances, including the conduct of the parties. The terminology used by the parties will not be determinative. Where the written documentation is ambiguous, or where there is no written documentation, the surrounding circumstances should be considered.
4. Part 1 of this Interpretation Statement identifies features that support the existence of an agency relationship. Authority and consent are considered essential features of agency. If they are not present, there can be no agency relationship.
5. Of the other features identified below, some strongly support the existence of an agency relationship (for example, the payment of a commission), while others may support an agency relationship existing depending on the circumstances. No one feature will be determinative, and each supply will need to be considered on its facts. It cannot be assumed that because a person has been appointed as an agent for a principal, they will always be acting in that capacity for all supplies made or received.
6. In summary, the Commissioner considers there are two essential features of an agency relationship:
  - **Authority:** the agent must be authorised to act on behalf of the principal to create or affect the legal relations between the principal and a third party, for the relevant supply.
  - **Consent:** the agent and the principal must both have consented to the conferral of such authority on the agent.
7. In determining whether authority and consent are established between the parties as principal and agent, the Commissioner considers the following features strongly support the existence of an agency relationship:
  - **Documentation:** the documentation supports an agency relationship.

- **Payment of a commission:** the agent receives a commission from the principal as remuneration for services.
  - **Ownership of property:** the agent does not obtain a legal interest in any property it obtains as agent.
  - **Assumption of risk:** the principal assumes the risk in a transaction.
  - **Enforceability of contract:** a contract made by the agent with a third party in the exercise of its authority is enforceable by and against the principal.
  - **Liability to pay debt:** the agent is not liable to pay the debts of the principal.
  - **Reimbursement:** the principal reimburses the agent for expenses.
8. The Commissioner considers the following features may, depending on the circumstances, support the existence of an agency relationship:
- **Fiduciary obligations:** fiduciary obligations may be owed by the agent to the principal.
  - **Tax:** the parties account for tax in a way that is consistent with agency.
  - **Control:** the principal has control over the agent.
  - **Use of property:** the agent does not treat the principal's goods as their own asset.
  - **Alteration of property:** the agent does not alter or manipulate property obtained as agent.
  - **Sale price:** the principal sets the sale price of goods.
  - **Notification of sale details:** the agent is required to notify the principal of the price at which the goods were sold and the identity of the customer.
  - **Separate funds:** the agent keeps the principal's money separate from its own.
  - **Appearance:** the agent holds itself out as an agent.
9. This Interpretation Statement also contrasts agency with other legal relationships to better understand the true nature of agency (from [79]).
10. Part 2 of this Interpretation Statement explains how the Act can operate to modify an agency relationship (from [94]). In some cases, the Act may permit (or require) the parties to ignore the agency relationship and the GST consequences that follow. There are also other provisions such as ss 58 and 59 where agency may be relevant.
11. Part 3 of this Interpretation Statement outlines the specific compliance obligations on agents and principals in the Act (from [116]). This includes information about tax invoicing and record-keeping requirements. Part 4 contains worked examples that illustrate how to determine whether a relationship is an agency relationship (from [133]).

12. The Appendix contains summaries of relevant agency cases from New Zealand and overseas (from [182]).

## Part 1 – Analysis

### Legislation

13. The general rule is that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply. Section 60 is the main provision in the Act that deals with agency:

#### 60 Agents and auctioneers

- (1) Subject to this section, for the purposes of this Act, where an agent makes a supply of goods and services for and on behalf of any other person who is the principal of that agent, that supply shall be deemed to be made by that principal and not by that agent:  
  
provided that, where that supply is a taxable supply, that agent, being a registered person, may, notwithstanding anything in this Act, issue a tax invoice or a credit note or a debit note in relation to that supply as if that agent had made a taxable supply, and to the extent that that tax invoice or credit note or debit note relates to that supply, that principal shall not also issue, as the case may be, a tax invoice or a credit note or a debit note.
- (1A) Despite subsection (1), subsection (1AB) applies to an agent who—
  - (a) is resident in New Zealand; and
  - (b) makes supplies of distantly taxable goods or remote services to a person resident in New Zealand for and on behalf of a non-resident principal.
- (1AB) The principal and the agent may agree that the agent, and not the principal, is treated as making the supply in the course and furtherance of a taxable activity carried on by them.
- (1B) Despite subsection (1), when a principal and their agent agree, and record their agreement in a document, either in relation to a particular supply or for a type of supply, that this subsection applies to a supply of goods or services, the supply is treated for the purposes of the Act as 2 separate supplies, being—
  - (a) a supply of goods and services from the principal to the agent; and
  - (b) a supply of those goods and services from the agent to the recipient, treating the agent as if they were the principal for the purpose of the supply.
- (1C) For the purposes of sections 60C and 60D, an operator of a marketplace or a supplier who makes supplies of goods or services to recipients through the marketplace may treat a supply as 2 separate supplies, being—
  - (a) a supply of goods and services from the underlying supplier to the operator of the marketplace; and

- (b) a supply of those goods and services from the operator of the marketplace to the recipient, treating the operator as if they were the underlying supplier of the goods and services.
- (2) Subject to this section, for the purposes of this Act, where any registered person makes a taxable supply of goods and services to an agent who is acting on behalf of another person who is the principal for the purposes of that supply, that supply shall be deemed to be made to that principal and not to that agent:  
  
provided that that agent may nevertheless request that that agent be issued with a tax invoice and that registered person may issue a tax invoice or a credit note or a debit note as if the supply were made to that agent.
- (2B) Despite subsection (2), when a principal and their agent agree, and record their agreement in a document, either in relation to a particular supply or for a type of supply, that this subsection applies to a supply of goods or services, the supply by a person is treated for the purposes of the Act as 2 separate supplies, being—
  - (a) a supply of goods and services from the person to the agent, treating the agent as if they were the principal for the purpose of the supply; and
  - (b) a supply of those goods and services from the agent to the principal.
- (3) Where a tax invoice or a credit note or a debit note in relation to a supply has been issued—
  - (a) by an agent pursuant to subsection (1); or
  - (b) to an agent pursuant to subsection (2),—  
  
the agent shall maintain sufficient records to enable the name and address and registration number (if any) of the principal to be ascertained.
- (4) For the purposes of subsection (5), the expression **auctioneer** means a registered person carrying on a taxable activity which comprises or includes the supply by auction of goods as an auctioneer or agent for or on behalf of another person (hereafter in this section referred to as a **principal**).
- (5) Notwithstanding anything in the foregoing provisions of this section, where the principal and the auctioneer agree to have a supply by auction of any goods, not being a taxable supply, treated as if that supply had been made by that auctioneer and not by that principal, that supply shall be charged with tax as if it were made by that auctioneer in the course or furtherance of that auctioneer's taxable activity and that auctioneer may—
  - (a) recover the amount of tax charged on that supply from that principal as a debt together with the costs of recovery in any court of competent jurisdiction; or
  - (b) retain or deduct the same out of any money in that auctioneer's hands belonging or payable to that principal.
- (6) Notwithstanding anything in subsection (2), where any registered person makes a taxable supply (not being a supply that is charged with tax at the rate of 0% pursuant to section 11, 11A, 11AB or 11B) of goods and services to an agent, being a registered person, who is acting for or on behalf of another person who is the principal for the purposes of that supply, and—

- (a) that principal is a non-resident and is not a registered person; and
- (b) that supply is directly in connection with either the exportation, or the arranging thereof, of goods from New Zealand to any country or place outside New Zealand, or the importation, or the arranging thereof, of goods to New Zealand from any country or place outside New Zealand, including, in either case, the transportation of those goods within New Zealand as part of that exportation or, as the case may be, importation,—

this Act shall, where that agent and that principal agree, have effect as if that supply were made to that agent and not to that principal.

- (7) Despite subsection (1), a supply of goods, being goods to which section 12(1) applies, that have been imported by an agent who is acting for and on behalf of the principal, is treated as being a supply made by the agent and not by the principal if—
  - (a) the principal is a non-resident and is not a registered person; and
  - (b) the agent is a resident and is a registered person at the time the goods are imported; and
  - (c) the principal and agent agree that the supply was made by the agent and not by the principal.

14. The general rule is that where a person acts as an agent in making a supply on behalf of a principal, the supply is deemed to be made by the principal and not by the agent (s 60(1)). Consequently, the principal, not the agent, must account for GST on that supply. Section 60(1) therefore modifies who would ordinarily be the supplier of goods and services under the Act, to reflect the common law of agency.
15. Conversely, where a registered person makes a taxable supply to an agent who is acting on behalf of a principal for the purposes of that supply, the supply is deemed to be made to the principal and not to the agent (s 60(2)).<sup>1</sup>
16. An agent is also unable to claim an input tax deduction on the supply because the agent does not “acquire” the goods or services, as required by the definition of “input tax” in s 3A of the Act (*Case T35* (1997) 18 NZTC 8,235). Only the principal can claim an input tax deduction and only if the goods or services are then used, or available for use, in making taxable supplies (s 20(3C)(a)).
17. The rules in ss 60(1) and 60(2) are relatively straightforward. However, in practice it can sometimes be difficult to determine whether a person is acting as an agent or as a principal in relation to a supply. This Interpretation Statement identifies features that support the existence of an agency relationship.

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<sup>1</sup> The Act contains a number of exceptions to ss 60(1) and 60(2). These are discussed from [94].

## Key definitions

18. "Agency", "agent" and "principal" are not defined in the Act. Therefore, the common law definitions apply. The following is a brief introduction to these key concepts. They will be discussed in more detail later in the statement.

### Definition of "agency"

19. A leading textbook on the law of agency, P Watts & FMB Reynolds, *Bowstead & Reynolds on Agency* (21st ed, Sweet & Maxwell, London, 2018), defines "agency" as follows, at [1-001]:

Agency is a fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

20. "Agency" therefore refers to a legal relationship between an agent and a principal. In general terms, an agency relationship is where a person (the agent) is authorised by another person (the principal) to act on their behalf to create or affect the legal relations between the principal and a third party.

### Definition of "principal"

21. A "principal" is a person who expressly or impliedly gives authority to the agent to act on their behalf to create or affect the principal's legal relations with third parties.

### Definition of "agent"

22. An "agent" is therefore a person who has the authority to create or affect the principal's legal relationships with third parties.

### Misuse of the term "agency" and "agent"

23. Section 60 of the Act is concerned with the legal concept of agency not the commercial or business use of the term.
24. HG Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London 2018) Vol 2, at [31-005] observes that the terms "agent" and "agency" are sometimes used to describe relationships that do not involve "agency" in a legal sense:



**Use of the terms “agent,” “agency”.** It follows from the indications given earlier of the ways in which the notion of the agency can be viewed, and the terms “agent” and “agency” used, that when it falls to be considered whether a person is an agent, and if so of which party to a transaction, it is often true that no simple answer can be given. Some persons who describe themselves or are described by others as agents are not really such in any legal sense of the word, but rather independent merchants, dealers, consultants or intermediaries. ... The substance of the matter prevails over the form and the use of the words “agent” or “agency”, or even a denial that they are applicable, is not conclusive that any particular type of relationship exists.

[footnotes omitted]

25. Consequently, there may be relationships described as “agency”, that are not legal agency relationships at all. Section 60 will not apply to these relationships.

### **Example 1: Distribution agent – not legal agency**

Leigh is the New Zealand distribution agent for Cheetah sports shoes. This means she has the exclusive right to sell Cheetah in New Zealand. Leigh purchases shoes from the Cheetah Corporation in China and sells them in her shoe store. Leigh is not authorised by Cheetah to act on its behalf to create or affect the legal relations between Cheetah and third parties. Leigh is therefore not an agent in the legal sense. She is acting as a purchaser and Cheetah is acting as a vendor. (See *Gannow Engineering Co Ltd v Richardson* [1930] NZLR 361 (SC), discussed further at [199] below.)

### **Example 2: Real estate agent – not legal agency**

Craig decides to sell his house. He appoints Tai, a local real estate agent to market his property and to arrange viewings. Under the terms of their agreement, Tai is appointed as Craig’s real estate agent. However, Tai does not have authority to create or affect the legal relations between Craig and third parties. Tai is therefore not an agent in the legal sense. He is acting as an intermediary and not as an agent. (Discussed further at [81].)

## **Determining the nature of a supply**

26. Whether there is an agency relationship will depend on the nature of the supply.
27. The nature of a supply for GST purposes is determined by considering the legal rights and obligations actually entered into between the supplier and the recipient, in light of

the surrounding circumstances. The terminology used by the parties will not be determinative. (See *Marac Life Assurance Limited v CIR* (1986) 8 NZTC 5,086 (CA); *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA); *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).)

28. Where the written documentation is ambiguous, or where there is no written documentation, it is appropriate to consider the surrounding circumstances (*Masport Ltd v Morrison Industries Ltd* CA 392/92 31 August 1993).
29. Where the parties have not specified what the nature of their relationship is, the courts will consider what a reasonable person would conclude based on the relevant facts (*ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001).
30. It is also necessary to establish the relationship between the parties and in what capacity they are acting. Just because a person is an agent of a principal does not mean they are always acting as agent for that principal for every supply. Each supply (or type of supply) must be examined separately (*CIR v Databank Systems Ltd* (1989) 11 NZTC 6,093 (CA)).
31. Multi-party arrangements that may involve agency present practical difficulties and the agreements between the parties will need to be examined closely (*Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15; *Commissioner of Customs & Excise v Plantiflor* [2002] UKHL 33).

## Features that support the existence of an agency relationship

32. The Commissioner has reviewed the relevant case law from New Zealand and overseas and has identified features that support the existence of an agency relationship.
33. The Commissioner considers that there are two essential features of an agency relationship – authority and consent. Several other features have been identified by the case law as strongly supporting the existence of an agency relationship. There are also several features that may support the existence of an agency relationship, but which may also appear in other legal relationships. All features are discussed in more detail below and case references are provided where relevant. The Appendix to this Interpretation Statement contains a summary of relevant cases from New Zealand and overseas.

## Definition of agency

34. An agency relationship is where a person (the agent) is authorised by another person (the principal) to act on their behalf to create or affect the legal relations between the principal and a third party (*Bowstead & Reynolds on Agency*; *ID Tours New Zealand*

*Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001; *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC)).

## Essential features of an agency relationship

35. The New Zealand case law has identified two essential features of an agency relationship – authority and consent. If these features are not present, there will be no agency relationship.
36. However, even where an agency relationship exists, not all supplies that the agent makes will necessarily be on behalf of the principal. Each supply (or type of supply) must be evaluated separately.

### Authority

37. The agent must be authorised to act on behalf of the principal to create or affect the legal relations between the principal and a third party (*Capital Enterprises; Commerce Commission v Harmony Ltd* [2018] NZHC 1107; *Canada v Merchant Law Group* [2010] FCJ No 990 (FCA); *Glengarry Bingo Assn v Canada* [1999] FCJ No 316 (FCA)). Authority can be express or implied by conduct.
38. The agent's powers cannot extend beyond those of its principal. A principal must be legally capable of undertaking tasks that it delegates to its agent (*Harmony*).

### Consent

39. The agent and the principal must both have consented to the conferral of authority on the agent for the relevant supply. Consent on the part of the principal may be express or implied (*Case R34* (1994) 16 NZTC 6,190; *Capital Enterprises; Harmony; Glengarry Bingo; Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation* [1967] 2 All ER 353 (HL)). The consent may be in writing (such as in a contract) but it does not have to be, unless required by law.
40. Consent can be inferred from conduct even if the parties do not think they are acting as agent and principal and have expressly said they are not (*Case R34* and *Garnac Grain*). The parties will be taken to have consented if they have agreed to what in law amounts to an agency relationship. The terminology used by the parties does not determine whether a relationship is one of agency.<sup>2</sup>

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<sup>2</sup> *The Laws of New Zealand: Agency Part 1* (online ed, accessed 14 December 2020) at [2].

### Example 3: Authority and consent for some supplies and not others

Luke owns and operates a pottery shop. He represents local potters who leave their work with him for sale. Leia makes glazed bowls and leaves them with Luke who agrees to sell them on her behalf. She authorises Luke to act as her agent and both parties consent to this arrangement. There are also several other features that support an agency relationship, including the agency agreement. Luke is therefore acting as agent for Leia for the supply of her glazed bowls.

To keep the shelves looking full and to generate some extra sales, Luke also buys in some ceramic egg cups and butter dishes directly from Leia. He pays Leia for the pieces upfront. In this supply, Luke is not acting as an agent for Leia. Leia is a vendor and Luke is a purchaser. For the purposes of this supply, Luke does not have authority from Leia to act on her behalf to create or affect the legal relations between Leia and third parties. It is important for GST purposes that each supply (or type of supply) is evaluated separately. (See *Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners* [1988] STC 424 (HC).)

### Other features that support the existence of an agency relationship

41. The case law has identified several features that support the existence of an agency relationship. No one feature will be determinative. However, if authority and consent are absent, then the presence of the following features will not be enough to create an agency relationship.
42. The key cases referred to below are summarised in the Appendix.

### Features that strongly support the existence of an agency relationship

43. In determining whether authority and consent are established between parties as principal and agent, the Commissioner considers the following features strongly support the existence of an agency relationship:
  - The documentation supports an agency relationship.
  - The agent receives a commission from the principal as remuneration for services.
  - The agent does not typically obtain a legal interest in any property it obtains as agent.
  - The principal assumes the risk in a transaction.
  - A contract made by the agent with a third party in the exercise of its authority is enforceable by and against the principal.
  - The agent is not liable to pay the debt of the principal.

- The principal reimburses the agent for expenses.
44. While the above features strongly support the existence of an agency relationship, they are not essential features like authority and consent. Some agents obtain a legal interest in property they obtain as agent (see for example, bailment, from [89]). Similarly, a del credere agent will specifically assume risk in a transaction (see [57]). Whether an agency relationship exists depends on the legal arrangements entered into, in light of the surrounding circumstances. This includes the conduct of the parties.

#### **Documentation – the documentation supports an agency relationship**

45. How the parties describe their relationship will be relevant, unless it is shown to be a sham (*Harmony*). The description of the relationship must be given its proper weight in relation to the rest of the agreement and to such other relevant circumstances as evidence of the true character of the relationship (*HMRC v Secret Hotels2 Limited* [2014] UKSC 16).
46. If an agency relationship clearly exists on the facts, a contractual term specifically precluding an agency relationship will not displace that agency (*Case R34; Harmony; Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners* [1988] STC 424 (HC)). Similarly, if an agency relationship does not exist, labelling it as an agency relationship will not have any legal effect.

#### **Payment of a commission – the agent receives a commission**

47. The agent receiving a commission from the principal as remuneration for its services is likely to strongly support the existence of an agency relationship.
48. If the agent's earnings are referred to as a "commission" in the documentation, then this indicates agency (*Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners* [1985] STC 45 (CA)). However, there is "no magic" to the use of this word and the courts will look at whether the term has been misused (*Gannow Engineering Co Ltd v Richardson* [1930] NZLR 361 (SC)).
49. If the commission is accounted for separately, and set at a fixed rate, then this suggests agency (*ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001; *Au Pied du Mont Sainte-Anne Condominiums v Canada* [2004] TCJ No 22 (TCC)).
50. It is not necessary for the level of commission to be set by the principal – the agent can set their own commission (*Secret Hotels2 Limited*).
51. The agent should not make an independent profit from the agency (*Au Pied du Mont Sainte-Anne*). If a person makes a profit on a supply, then this suggests they are not acting as agent.

52. If a person obtains a cash-flow advantage associated with timing differences between the receipt of payments and the obligation to pay the principal, then the relationship is less likely to be one of agency (*Stiassny v North Shore City Council* [2008] NZCA 522).

***Ownership of property – an agent does not typically obtain a legal interest in any property it obtains as agent***

53. An agent does not typically obtain a legal interest in the principal's goods or property (*Case T35; ID Tours*). Title passes from the principal directly to the third party and from the third party directly to the principal.
54. If the principal regards the goods as theirs until sold by the agent and they can take back those goods at any time, then this supports an agency relationship (*Hill and Another*).
55. If title in the goods remains with the principal even after the principal has been paid by the agent, then this suggests agency (*Potter and Another; Customs and Excise Commissioners v Music and Video Exchange Ltd* [1992] STC 220 (HC)).

***Assumption of risk – the principal typically assumes the risk in a transaction***

56. The principal typically assumes the risk in a transaction (*Stiassny; Glengarry Bingo; Potter & Another*).
57. There is a certain category of agent, known as a del credere agent, who specifically assumes risk. A del credere agent promises to indemnify the principal (in exchange for extra commission) if the third party defaults on the payment due under the contract. The del credere agent's responsibility is limited to the failure of the third party to satisfy the contract debt due to insolvency. There is an acceptance at common law that a del credere agent is still an agent in the legal sense because the other features of agency are usually present. This type of agency is not common.

***Enforceability of contract – a contract made by the agent with a third party in the exercise of its authority is enforceable by and against the principal***

58. A contract made with a third party by the agent in the exercise of its authority is enforceable both by and against the principal (*ID Tours*). However, an agent acting for an undisclosed principal<sup>3</sup> may sue and be sued on the contract with the third party (*Harmony*).

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<sup>3</sup> An "undisclosed principal" is a principal whose existence is not known to the third party at the time the agent and the third party enter into a legal relationship. This usually means that the third party believes that the agent is the principal.

***Liability to pay debt – an agent is not liable to pay the debts of its principal***

59. An agent is not liable to pay the debts of its principal (*ID Tours*). The principal is responsible for any debts arising as a result of a contract made between the agent and a third party.

***Reimbursement – the principal reimburses the agent for expenses***

60. A principal typically reimburses the agent for expenses, although this may depend on the terms of the agency (*Glengarry Bingo*).

**Features that may support the existence of an agency relationship**

61. The following features have been identified by the case law as possibly supporting the existence of an agency relationship. However, in some cases, the features may also be consistent with other legal relationships:
- Fiduciary obligations may be owed by the agent to the principal.
  - The parties account for tax in a way that is consistent with agency.
  - The principal has control over the agent.
  - The agent does not treat the principal's goods as their own asset.
  - The agent does not alter or manipulate property obtained as agent.
  - The principal sets the sale price of goods.
  - The agent is required to notify the principal of the price at which the goods were sold and the identity of the customer.
  - The agent keeps the principal's money separate from its own.
  - The agent holds itself out as acting as an agent.

***Fiduciary obligations – fiduciary obligations may be owed by the agent to the principal***

62. An agency relationship is a fiduciary relationship (*Capital Enterprises; Harmony*). This, of itself, is not a particularly helpful feature when trying to determine if an agency relationship exists. There are of course many fiduciary relationships that are not also agency relationships. However, there are specific fiduciary duties owed by agents to principals, which if present, may support a finding of agency. It is important to note that if an agent breaches a fiduciary duty, this will not invalidate a finding of agency.
63. An agent may owe a principal the following fiduciary duties:

- A duty to act in the principal's best interests (*Capital Enterprises; Fenswick International Ltd v GR International Ltd* [2014] NZHC 1119).
- A duty to avoid a conflict between the agent's own interests and those of the principal (*Fenswick*).
- A duty to avoid profiting from the agency relationship (*Fenswick; Westpac Banking Corporation v Savin and Ors* (1986) 1 NZBLC 102,345 (CA)). An agent must not make an improper or secret profit (*Fenswick*).
- A duty of loyalty – this obligation is owed by the agent to the principal and not the other way around (*Westpac*, see also *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26).

### **Tax – the parties account for tax in a way that is consistent with agency**

64. How the parties account for GST might in some cases be a useful indication of how the parties perceive their relationship. It would go towards the assessment of the conduct of the parties. For example, if the "agent" had consistently accounted for GST as a principal, this might suggest that the relationship is not one of agency.
65. However, in *Secret Hotels2* the United Kingdom Supreme Court considered that how the parties accounted for VAT did not help determine whether the relationship was one of agency. In this case, the taxpayer did not account for VAT correctly either as an agent or as a principal.
66. It will depend on the circumstances whether this feature should be given any weight when trying to determine whether an agency relationship exists. It could indicate what the parties thought they were doing or what they were intending to do, which is itself just a factor and not determinative.

### **Control – the principal has control over the agent**

67. The principal's control over the agent is not an essential feature of agency in New Zealand. However, control is a factor from which an agency relationship might be inferred, in combination with other factors (*Harmony, Spearmint Rhino Ventures (UK) Limited v HMRC* [2007] EWHC 613 (Ch)). The degree of control a principal has over an agent will depend on the terms of the agency relationship. However, if the principal has no control over the "agent", then the relationship is unlikely to be one of agency.

### **Use of property – the agent does not treat the principal's goods as their own asset**

68. It is consistent with an agency relationship where the agent does not treat the principal's goods as their own asset (*Glengarry Bingo*).



69. This feature is consistent with the other features of agency, such as the fact that an agent will not alter or manipulate property obtained from the principal or a third party (see [71]). However, in *Case T35* the Taxation Review Authority held that whether the principal's goods or property have been incorporated into the agent's business does not always indicate that there is no agency relationship.
70. In some cases, if the goods or property have been incorporated into the agent's business this will indicate that the agent considers the goods or property to be their own, or to have rights to those goods or property. This is not consistent with a typical agency relationship. However, it may depend on the surrounding circumstances as to whether this is a relevant feature.

***Alteration of property – the agent does not alter or manipulate property obtained as agent***

71. The agent does not typically alter or manipulate property obtained as agent (*Gannow; Merchant Law Group*).
72. However, even if the agent does alter the goods, this will not always be fatal to a finding of agency. In *Music & Video Exchange*, the agent undertook all necessary repairs to the goods before they were sold. The United Kingdom High Court thought this action was inconsistent with agency, but it was not enough to displace the finding of agency given that the risk of doing work on the goods would be one that the agent might regard as worth taking to increase the value of the goods and to increase the commission.

***Sale price – the principal sets the sale price of goods***

73. The principal typically sets the sale price of goods (*Potter & Another*). However, while the United Kingdom High Court in *Music & Video Exchange* noted that it would be unusual if the agent set the sale price of goods, it would not be entirely inconsistent with a finding of agency.

***Notification of sale details – the agent is required to notify the principal of sale details***

74. The agent is usually required to notify the principal of the price at which goods are sold (*Potter and Another*). Similarly, the agent is usually required to reveal the identity of the principal's customers.
75. However, in *Music & Video Exchange* the United Kingdom High Court noted that if the principal is not given any further information about the sale (the date, the price or the identity of the purchaser) this would not necessarily be inconsistent with a finding of agency. The Commissioner considers that while this is not inconsistent with agency, it

would be unusual in an agency relationship for a principal not to have information about the price at which the goods were sold.

***Separate funds – the agent keeps the principal’s money separate from its own***

76. An agent should keep its principal’s money separate from its own. This is the general rule although it may depend on the terms of the agency whether this is required (*Westpac; Merchant Law Group; Stiassny*).

***Appearance – the agent holds itself out as acting as agent***

77. If a person holds themselves out as acting as agent, this might support an agency relationship (*Glengarry Bingo*).
78. If third parties understand the relationship to be one of agency, then this is a factor that might support an agency relationship (*Hill & Another*). This goes to the assessment of the conduct of the parties.

## **Distinguishing agency from other legal relationships**

79. To better understand the nature of agency it can be helpful to distinguish it from other legal relationships. This is important from a GST perspective, as different legal relationships have different GST consequences. In *Customs & Excise Commissioners v Reed Personnel Services Ltd* [1995] BVC 222 (HC), Laws J referred to three typical contractual relationships in three-party arrangements, at 225:

- (1) Where A is contractually obliged to provide services to B, but does so by means of the acts of a third party, C. This may be described as the “vicarious performance” situation.
- (2) Where C as agent for A enters into a contract obliging A to provide services to B. This is the “agency” situation.
- (3) Where A acts no more than as an intermediary between C and B, introducing the two so that C may enter into a contract by which he undertakes to provide services to B. This I will call the “intermediary” situation.

80. Intermediaries and vicarious performance relationships are briefly discussed below. Also discussed are the relationships of trust, bailment, vendor-purchaser and employment.

## Intermediaries

81. An intermediary relationship is where one party facilitates a transaction between two other parties but does not have authority from either of the parties to create or affect their legal relations. For example, an intermediary's role may be to introduce the two parties. A introduces B and C so that B may enter into a contract by which B undertakes to provide services to C. In this case, there is no contractual relationship between A and C or between A and B for the services provided by B to C (see Example 2 at [25]).
82. An intermediary may be distinguished from an agent because it lacks the two key elements of agency – authority and consent. For example, real estate agents typically act as intermediaries.

## Vicarious performance

83. A vicarious performance relationship arises when:
- B has a contractual obligation to provide a good or service to A; and
  - B contracts with C (a third party) for the performance of that obligation; and
  - B remains liable under the terms of the contract with A to provide the good or service and must remedy any breach if the terms of the contract are not satisfied.
84. There is no contractual relationship between A and the substituted C who carries out B's contractual obligations. For example, a building company (B) agrees to build a house for a client (A). B subcontracts an electrician (C) to undertake some electrical work on the project. There is no contractual relationship between the client and the electrician.
85. Agency and vicarious performance are therefore mutually exclusive relationships. In an agency situation, the agent acts in the place of the principal to bind the principal. With vicarious performance, the principal's contractual obligations are performed by a third party. The third party cannot bind the principal (*Case 14/2014 (2014) 26 NZTC 2,024*).

## Other legal relationships

### Trust

86. Agents and trustees both act on behalf of another person: the agent for the principal, and the trustee for the beneficiary or beneficiaries. However, the two relationships have some important differences. For example, an agent does not typically hold title to the principal's property; while a trustee holds legal title to the trust property as principal, not as agent. An agent must act within the authority of the principal. In

contrast, a trustee must carry out the terms of the trust and is not subject to the directions of a beneficiary.

87. However, trustees and agents are not necessarily mutually exclusive. Trustees who hold property on trust may also be agents if they have the power to alter the legal relations of the beneficiaries by, for example, entering into contracts on behalf of the beneficiaries. (See *The Laws of New Zealand: Agency Part 1* (online ed, accessed 14 December 2020), at [5].)
88. In "[QB 16/03](#): Goods and Services Tax – GST treatment of bare trusts" *Tax Information Bulletin* Vol 28, No 5 (June 2016):16, the Commissioner confirmed that the relationship between a beneficiary and a bare trustee acting on the directions of the beneficiary is predominantly an agency relationship. This means any supplies of trust property made by the trustee are deemed to be made by the beneficiary and the taxable activity carried on by the bare trustee is deemed to be carried on by the beneficiary.

## Bailment

89. Bailment is a legal relationship where a bailor transfers property to a bailee for the bailee's own use or to perform some work for the bailor. The bailee takes possession of the property but ownership remains with the bailor. For example, where a person gives a jacket to a drycleaner for cleaning, the drycleaner (the bailee) takes possession of the jacket from the person (the bailor) for the purpose of cleaning. The dry cleaner cannot sell the jacket to someone else.
90. Agency and bailment are not always mutually exclusive. An agent may be a bailee of the principal's goods, for example, in the case of a factor. A factor is an agent who has possession of the principal's goods and has authority to sell those goods in the factor's own name. While the goods are in the factor's possession they are usually acting as a bailee. In addition, a bailee may sometimes be regarded as having agency power to do things that are reasonably incidental to the goods that they hold, for example, to have the goods repaired. (See *The Laws of New Zealand: Agency Part 1* (online ed, accessed 14 December 2020), at [5].)

## Vendor-purchaser

91. In business, the term "agent" is used in many ways. A person might be described as a "selling agent", a "sole agent", a "manufacturer's agent" or a "distribution agent". In most cases these agents will be buying goods from the wholesaler or manufacturer (the vendor) and reselling the goods to their own customers. The person is therefore operating as a purchaser, not as an agent (see Example 1 at [25]). An agent will not purchase goods from the principal; the agent will hold goods for their principal so they can sell them to a third party on behalf of their principal.

## Employees and independent contractors

92. An employment relationship may overlap with agency. An employee may be an agent of their employer if they are authorised by their employer to act on their behalf to create or affect the legal relations between the employer and a third party. For example, an employee is acting as an agent of their employer where the employee is authorised by the employer to enter into an agreement with a third party for the hire of a piece of equipment for use in the business. See Example 4 below.

### Example 4: Employee as agent

Tina is employed by Modern Curtains Co (MCC) as a sales representative. She is asked by MCC to travel to Tauranga to visit clients. As instructed, she pays for all costs including taxis, accommodation and meals on her personal credit card. Tina retains receipts for all her expenses and submits them to the MCC accountant for reimbursement on her return to the office. Tina incurred this expenditure as agent for MCC so the reimbursing payment is not subject to PAYE. MCC can claim input tax deductions for all expenses incurred by Tina. This is even though the invoices are in Tina's name (see [121] for further discussion on invoicing and agency).

93. Similarly, an independent contractor may be an agent of an employer if they are authorised by the employer to act on their behalf to create or affect the legal relations between the employer and a third party<sup>4</sup>.

## Part 2: How the Act can modify the agency relationship

94. The general rule is that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply. Where a person acts as an agent in making a supply to a third party on behalf of a principal, the supply is deemed to be made by the principal and not by the agent (s 60(1)). Conversely, where a registered person makes a taxable supply to an agent who is acting on behalf of a principal for the purposes of that supply, the supply is deemed to be made to the principal and not to the agent (s 60(2)). In both cases, it is the principal and not the agent who must account for GST on these supplies.
95. However, where an agency relationship exists, the Act contains several provisions that permit (or require) the parties to ignore that relationship and the GST consequences

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<sup>4</sup> *Lower Hutt City v Attorney-General* [1965] NZLR 65 (CA).

that follow. These provisions are discussed below. The optional rules are discussed first, followed by the mandatory rules.

96. Sections 58 and 59 are also briefly discussed below because agency may be relevant to their interpretation.

## Modifying the agency relationship – optional

97. Sections 60(1A), 60(1AB), 60(1B), 60(2B), 60(4), 60(5), 60(6) and 60(7) of the Act allow the parties to agree to ignore the agency relationship and the GST consequences that would typically follow.

### Sections 60(1A) and (1AB) – agent treated as making the supply for non-resident principal

98. Sections 60(1A) and (1AB) allow a New Zealand-resident agent acting for a non-resident principal who supplies distantly taxable goods or remote services to New Zealand customers, to agree with the principal to treat the agent as making the supplies. If this option is exercised, the agent must register and return GST on the supplies of the distantly taxable goods or remote services.

#### Example 5: New Zealand-resident agent treated as making a supply of distantly taxable goods

Otto is a New Zealand-resident agent. He sells fitness trackers to customers in New Zealand on behalf of his principal, The Fit Corporation. The Fit Corporation is resident in China. The Fit Corporation has been advised that under the rules for the importation of low-value goods, it will need to register and account for GST in New Zealand. However, for compliance purposes, The Fit Corporation and Otto have agreed that Otto will be treated as making the supplies of goods in New Zealand under ss 60(1A) and (1AB).

Otto is required to register and return GST on supplies made to New Zealand customers and GST-registered businesses. The agency relationship between the parties is effectively ignored. (See "GST on low-value imported goods" *Tax Information Bulletin* Vol 31, No 8 (September 2019):28.)

### Sections 60(1B) and (2B) – splitting an agency supply

99. Where an agent makes a supply to a third party on behalf of a principal, the principal and the agent can agree to treat the supply as two separate supplies:
- a supply of goods and services from the principal to the agent; and

- a supply of those goods and services from the agent to the third party.
100. Section 60(1B) was introduced because some accounting systems automatically issue invoices when goods and services are supplied. For example, the principal's accounting system might issue a tax invoice when goods and services are provided to the agent and the agent's accounting system might also issue a tax invoice when goods and services are provided to the third party. This results in two tax invoices being issued for one supply, which is a breach of s 24(1) of the Act.
101. Under s 60(1B) the principal and the agent must agree that the supply is to be treated as two separate supplies. The agreement must be recorded in a document. The agreement may relate to a particular supply or a type of supply. Two separate invoices can then be issued without contravening the Act. The principal then returns output tax on the tax invoice issued to the agent. Likewise, the agent returns output tax on the tax invoice issued to the third party and can claim input tax being the output tax charged to them by the principal.
102. Section 60(2B) contains the corresponding rules for supplies made to an agent by a third party. The principal and the agent can agree to treat the supply from the third party to the principal as two separate supplies:
- a supply of goods and services from the third party to the agent; and
  - a supply of those goods and services from the agent to the principal.
103. Under both ss 60(1B) and 60(2B), the agent is now treated as making or receiving supplies in their own right.

### Example 6: Splitting an agency supply

Office Co is GST-registered and sells office furniture. It has decided to engage the services of Arnold (an agent) to sell some surplus stock on its behalf. Arnold is also GST-registered. Office Co and Arnold both use the same accounting software, which automatically issues a tax invoice whenever goods and services are provided. To avoid contravening s 24(1) of the Act, the parties agree in writing that the supply of office furniture is to be treated as two separate supplies under s 60(1B). Office Co will need to return output tax on the supply of furniture to Arnold, and Arnold will need to return output tax on the supply of furniture to third parties, but he will also be able to claim an input tax deduction for the output tax charged to him by Office Co.

### Sections 60(4) and 60(5) – auctions and auctioneers

104. An auctioneer is an agent who sells goods on behalf of a principal at auction (s 60(4)). Where an auctioneer sells goods on behalf of many principals, some principals may be

GST-registered and others may not. Section 60(5) allows an auctioneer and a non-registered principal to agree that any non-taxable supplies made by the auctioneer at auction (on behalf of the non-registered principal) should be treated as if they were taxable supplies made by the auctioneer. The auction can then proceed on the basis that GST is charged on the supply and the auctioneer accounts for GST on that sale.

### **Section 60(6) – agent treated as principal when receiving goods on behalf of a non-resident principal for import or export**

105. Where an agent and a non-resident, non-registered principal agree, the agent may be treated as the principal when they receive a supply directly connected with (or with arranging) the importation or exportation of goods. The agent and the third party must both be GST-registered, and the supply received by the agent must be standard-rated.
106. The agent can claim an input tax deduction on supplies made to them, related to the importation or exportation of goods (for example, GST on charges associated with transporting the goods). However, when goods are being imported by the principal, s 60(6) does not enable the agent to claim GST levied on the goods at the border on behalf of the non-resident principal. This is because the agent is not importing the goods, they are simply receiving and arranging delivery of them.
107. If the agent is importing the goods on behalf of the non-resident (and not just receiving or arranging delivering of them) then s 60(7) of the Act may apply instead (see [108]).

### **Section 60(7) – agent treated as principal when importing goods for a non-resident**

108. Where an agent and principal agree, goods imported into New Zealand by a GST-registered agent (acting for an unregistered, non-resident principal) can be treated as being supplied by the agent. The agent will have to account for output tax on the supply in New Zealand, but the agent will also be entitled to an input tax deduction for any import GST paid at the border if the goods are used for taxable purposes.
109. Section 60(7) only applies to agents who actually import goods on behalf of a principal (as part of the agent's taxable activity) and not to agents who merely deliver or distribute those goods. These rules are discussed in more detail in "Importers acting as agents for non-residents" *Tax Information Bulletin* Vol 12, No 12 (December 2000):11.



### **Example 7: Agent treated as principal when importing goods for a non-resident principal**

A non-resident computer company called Floppy Inc decides to test the New Zealand market by sending some of its new computers to New Zealand. Floppy Inc arranges this through a New Zealand-resident, GST-registered agent called Mia. Floppy Inc and Mia enter into an agency agreement. Mia is authorised by Floppy Inc to enter into sales contracts and to sell the computers on its behalf. Floppy Inc is not sure whether it wants to set up in New Zealand and does not want to deal with GST compliance issues.

Mia and Floppy Inc agree under s 60(7) that they will treat Mia as the supplier. This means Mia will have to account for GST on the sale of computers in New Zealand. However, she will also be able to claim an input tax deduction for any import GST.

## **Modifying the agency relationship – mandatory**

### **Sections 60(1C), 60C and 60D – separate supplies of distantly taxable goods and remote services**

110. Section 60(1C) applies to supplies of remote services or distantly taxable goods made by a marketplace or an underlying supplier made through a marketplace. It applies for the purposes of ss 60C and 60D. Section 60(1C) allows the underlying supplier or the marketplace to treat the supply as two separate supplies.
111. Sections 60C and 60D treat the following supplies as being made by the non-resident operator of the marketplace:
  - supplies of remote services made by a New Zealand-resident underlying supplier (the principal) through a non-resident marketplace (the agent) to New Zealand-resident customers; and
  - supplies of remote services or distantly taxable goods made by a GST-registered non-resident underlying supplier (the principal) through a non-resident marketplace (the agent) to New Zealand-resident customers.
112. Sections 60C and 60D effectively override the agency relationship and treat the agent as the principal (subject to ss 60C(2B) and 60C(2C) and s 60D(2)).
113. However, if the non-resident operator of the marketplace (the agent) is treated as the supplier (and therefore as the principal), supplies made through the marketplace would no longer be taxable. This means GST incurred by the underlying supplier in making the supplies would be irrecoverable. To address this, s 60(1C) allows the underlying

supplier or the marketplace to treat the supply as two separate supplies — a supply of goods and services from the underlying supplier to the operator of the marketplace, and a supply of those goods or services from the operator of the marketplace to the recipient. The supply from the underlying supplier to the marketplace can be zero-rated which allows the underlying supplier to recover GST incurred in making the supply. These rules are discussed in more detail in *Tax Information Bulletin* Vol 31, No 8 (September 2019):23–24.

## Other sections where agency may be relevant

### Section 58 – personal representative, liquidator, receiver, etc

114. Section 58 applies where a registered person (known as the incapacitated person) dies, becomes incapacitated, or goes into receivership, liquidation or bankruptcy. In these circumstances, if another person becomes a “specified agent” and conducts a taxable activity on behalf of the incapacitated person, they are deemed to be personally carrying on that taxable activity under s 58(1A). (For further information see “GST – Specified agent for incapacitated persons” *Tax Information Bulletin* Vol 7, No 6 (December 1995):13.)

### Section 59 – liability of agent of absentee principal for returns and tax

115. Similarly, s 59 deems a person who carries on a taxable activity on behalf of an absentee principal to be an agent of the principal for that taxable activity. The agent is required to file GST returns and will be liable for GST charged or levied under the Act.

## Part 3: Compliance obligations

116. The Act imposes specific compliance obligations on agents and principals. The main obligations are outlined below.

### Invoicing, and credit or debit notes

117. When an agent acts on behalf of a GST-registered principal in making a supply of goods and services to a third party, the supply is deemed to be made by the principal and not by the agent. The principal is therefore responsible for complying with its GST obligations, including issuing a tax invoice and any related credit or debit notes (s 24).
118. However, where the supply is a taxable supply, the proviso to s 60(1) allows a GST-registered agent to issue a tax invoice for the supply (or a credit or debit note if required) as if the agent had made the taxable supply. This means the invoice may

contain the name and GST registration of the agent (acting as if they had made the taxable supply). The agent is required to keep a record of the principal's name and address and GST number for the supply (s 60(3)). This is for compliance purposes so that Inland Revenue can identify the principal and ensure that supplies have been accounted for. The principal must return the GST on the invoice. If the agent is not GST-registered it cannot issue a tax invoice (proviso to s 60(1) and s 24(1)).

119. Similar provisions exist where a GST-registered third party makes a taxable supply of goods and services to an agent acting on behalf of a principal. In these circumstances, the supply is deemed to be made to the principal and not to the agent (s 60(2)). The third party will issue the tax invoice to the principal (and any related credit or debit notes if required).
120. However, the proviso to s 60(2) permits a GST-registered third party to issue a tax invoice or a credit or debit note to the agent, as if the supply were made to the agent. (This is the position whether or not the agent is GST-registered). The agent must keep a record of the principal's name, address and GST number for each supply (s 60(3)). The agent is not entitled to an input tax deduction as the supply is not made to the agent and does not relate to goods or services "acquired" by the agent (ss 3A and 20(3)).
121. The principal is entitled to an input tax deduction if the goods and services are used or available for use in making taxable supplies. It will not matter if the principal is not the person named on the tax invoice. The input tax claim will be allowed provided the principal can establish that they are the recipient of the supply. For example, where a taxpayer is claiming expenses incurred by an employee, that claim will only be allowed where the employer can demonstrate that the costs incurred by the employee are in respect of the taxpayer's taxable activity, and the taxpayer has reimbursed the employee for the actual expenses incurred. (see "GST – Tax Invoices" *Tax Information Bulletin* Vol 11, No 9 (October 1999):80 and Example 4 at [92]).

### Example 8: Invoicing

Bob sells second-hand musical equipment in his store. He is registered for GST. Lucy is also a musical equipment trader and is registered for GST. She gives Bob a trombone to sell on her behalf. Ling visits Bob's store and buys the trombone. Bob issues Ling with an invoice. The invoice contains Bob's details as if Bob had made the supply. For this supply, Bob is required to keep a copy of Lucy's name, address and GST number. Lucy cannot also issue Ling with an invoice. Lucy must return the output tax on the invoice issued by Bob.

## Disbursements

122. A registered person that provides services to clients may charge those clients for costs incurred in providing the services. These costs may include:
- payments made as agent for the client; and
  - other costs incurred as principal in order to perform the services for the client.
123. The GST treatment of these costs depends on whether the registered person charges the client for a supply received as agent or as principal.
124. A registered person may act as agent for a client if they receive a taxable supply of goods or services for which the client is legally liable to pay. For example, a law firm may pay court filing fees for their client. If an agency relationship exists, the supply by the court is deemed to be made to the client and not to the law firm (s 60(2)). If the law firm pays for the supply and the client reimburses them, the reimbursement is not consideration for a supply of services by the law firm. The law firm does not account for GST on the supply. If the client is GST registered, it may be able to claim an input tax deduction if the goods or services are going to be used to make taxable supplies. The client must hold a tax invoice to obtain an input tax deduction. It will not matter if the invoice is in the law firm's name (see [121]).
125. The agency rules do not apply where a registered person pays for taxable supplies which it receives as principal, and on-charges those supplies to the client. For example, a law firm may charge a client for secretarial support time or photocopying. Generally, the law firm incurs those costs to enable it to provide legal services. It does not incur those costs as agent for any particular client. If the firm passes the charges on to the client, the Commissioner considers that the charges form part of the total fee for the supply of legal services. The law firm should account for GST output tax on these items in the same manner as the rest of the legal fees (if taxable). A GST-registered client may claim an input tax deduction for the GST paid if the legal services are used or available for use in making taxable supplies.

### Example 9: Disbursements

Property Ltd engages McBeal LLP (a law firm) to provide it with legal services in connection with a commercial property purchase. Property Ltd authorises McBeal to act as its agent in this matter. Property Ltd is purchasing the property for use in its taxable activity. Both McBeal and Property Ltd are registered for GST.

McBeal sends Property Ltd a bill with the following costs:

- legal services supplied in the course of the property conveyance;

- mobile phone charges incurred by the law firm to investigate the terms of a lease of the property; and
- transfer fees paid by McBeal to Land Information New Zealand (LINZ) as agent for Property Ltd

McBeal must charge output tax on the fee for legal services rendered. McBeal is providing these services to Property Limited as a principal. Property Ltd can claim an input tax deduction on this supply.

McBeal must also charge output tax on the on-charged mobile phone charges. These costs were incurred as principal and not as agent for Property Ltd. Property Ltd can claim an input tax deduction on this supply.

McBeal does not account for GST on the transfer and mortgage fees. Property Ltd can claim an input tax deduction for the supply by LINZ. Property Ltd uses the tax invoice issued by LINZ to McBeal to substantiate this claim.

126. For further discussion on disbursements and agency see “Disbursements by professional firms on behalf of clients – GST” *Tax Information Bulletin* Vol 6, No 1 (July 1994):5 and “Funeral expenses paid by funeral directors in connection with funeral arrangements” *Tax Information Bulletin* Vol 13, No 8 (August 2001):9.

## Time of supply

127. The time of supply rules in s 9 of the Act apply to principals and agents. Therefore, a principal must account for GST when the time of supply is triggered. In some cases, the principal might not be aware that an agent has made a sale on the principal's behalf, triggering the time of supply. Agents and principals must ensure they have appropriate systems in place so that the principal is notified of the sale (see [74]) and can account for GST correctly.

## Record-keeping obligations

128. Agents need to ensure they comply with the record-keeping requirements in the Act. Where an agent issues a tax invoice or a credit or debit note (under ss 60(1) or 60(2)), the agent must maintain sufficient records to enable the name, address and registration number (if any) of the principal to be ascertained (s 60(3)).
129. Similarly, where land is supplied to an agent acting for an undisclosed principal, the agent must maintain sufficient records of the undisclosed principal to enable the name, address and registration number (if any) of the principal to be ascertained (s 75(3E)).

130. Principals must also comply with standard record-keeping requirements (s 75).

## Unincorporated bodies and agency

131. Section 57 of the Act provides for an unincorporated body to be registered for GST, despite not being a separate legal entity. This effectively treats an unincorporated body as separate from its members for GST purposes. Unincorporated bodies include partnerships, joint ventures and trustees of a trust (s 2).
132. The Commissioner understands that it is common for an agent (typically a company) to be appointed to represent an unincorporated body, usually for administrative ease. There will be an agreement between the members of the unincorporated body authorising the agent to act on behalf of the unincorporated body. As the unincorporated body is not a separate legal entity it is unable to appoint the agent itself.

### Example 10: Unincorporated bodies

Aussie Innovations Pty Ltd and NZ Entrepreneur Ltd agree to take part in a joint venture in New Zealand to develop an exciting new product. They decide to operate the venture as a joint venture, but to incorporate a company, Agency Co Ltd, to act as agent for the joint venture. The idea is that Agency Co Ltd will enter into the relevant contracts for the joint venture for ease of administration.

Under s 57, the joint venture is treated as an unincorporated body and it is the joint venture that needs to register for GST rather than Aussie Innovations Pty Ltd and NZ Entrepreneur Ltd. However, for agency purposes, each joint venture company needs to appoint Agency Co Ltd as agent for the joint venture, rather than the joint venture purporting to appoint Agency Co Ltd as agent. This is because the common law does not recognise the joint venture as a separate entity (like s 57 effectively does) and it is under common law that the agency relationship arises.

The tax invoice implications will depend on what arrangements Aussie Innovations Pty Ltd and NZ Entrepreneur Ltd enter into with Agency Co Ltd and the GST registration status of both joint venture companies.

## Part 4: Examples

133. The following examples are included to help explain how the law applies.

## Example 11: Art gallery

134. The Wisteria Wall art gallery is preparing to stage an exhibition of young New Zealand artists. The gallery is GST-registered. Several artists have been approached to exhibit their latest works. Dante has recently graduated from art school and is already making a name for himself with his bold sculptures. He has only sold a few works so far and is not registered for GST. Naz will also be exhibiting. She is a more established artist than Dante and her paintings are in high demand. She is GST-registered.
135. Exhibiting artists must enter into an agreement with the gallery. The agreement authorises the gallery to sell the artwork "on behalf of the artist". The agreement records the artist's consent to that arrangement. Other terms and conditions include:
- The gallery is entitled to a 40% commission (plus GST) on all sales.
  - The gallery will provide the artist with a suggested listing price, but the final decision on sale price rests with the artist.
  - Artists must insure their artworks and the gallery accepts no responsibility for any damage that might occur while the artwork is in the exhibition.
  - Artists are required to leave their artwork with the gallery for the duration of the exhibition and can only withdraw it with the agreement of the gallery.
  - When a work is sold to a customer, the gallery issues the customer with an invoice. Whether the invoice includes GST depends on whether the artist is registered for GST or not.
  - The artist is not entitled to any information about the customer.
  - At the end of the exhibition, the gallery will pay the artist by direct credit into the artist's nominated bank account, less the gallery's commission.

### Essential features of agency

136. Based on the terms of the agreement and the surrounding circumstances, there is an agency relationship. The gallery is authorised to act on the artist's behalf to create or affect their legal relations with the third party (the customer), ie, the sale of the artwork. The gallery and artist have consented to this arrangement.

### Other features of agency

137. Other features that support a finding of agency include the fact that the gallery charges a commission rather than obtaining a share of the profits; the artist (as principal) assumes the risk and is required to insure their work while at the

gallery; the gallery accepts no responsibility for damage and the artist sets the sale price for the artwork. The only feature that does not support a finding of agency is that the artist is not entitled to any information regarding the customer, however in *Music & Video Exchange* it was noted that this feature would not be inconsistent with agency. In this case, the gallery does not want to provide the artist with details of the customer in case the artist decides to sell directly to the customer.

### **GST treatment**

138. The gallery is an agent for the purposes of the Act, and s 60 applies.
139. The gallery sells Dante's sculpture for \$1,000. As Dante is not registered for GST, the supply is non-taxable, and no GST is charged. However, as the gallery is GST-registered, it must charge GST on its commission. The commission is for the services of offering the artwork for sale. Dante therefore receives \$540 on the sale, being \$1,000 less the gallery's commission of \$400 (40%) plus GST of \$60.
140. The gallery sells Naz's painting for \$10,000 including GST of \$1304.35. The gallery must charge GST because Naz is GST-registered. Naz must account for this GST in her GST return. The gallery also charges its commission of \$4,000 (40%) plus GST of \$600. Naz therefore receives \$5,400 on the sale. She must return \$1,304.35 of output tax in the relevant GST period based on the time of supply rules, but can claim an input tax deduction of \$600 on the commission.

### **Example 12: Hotel-booking intermediary**

141. Lucy owns and operates a boutique hotel called Lucy's Lodge. She enters into an agreement with a hotel-booking website called ROOM to market her hotel. The agreement describes Lucy as the principal and ROOM as the agent. It records that Lucy "appoints ROOM as her agent and ROOM agrees to act as such".
142. Under the terms of the agreement, Lucy undertakes to provide accommodation to guests who book her hotel through the ROOM website. Guests who book through the site must pay the full amount of the booking to ROOM upfront. When the stay has ended, ROOM pays Lucy for the accommodation, less its commission. The percentage of the commission is set each year by ROOM.
143. The agreement imposes several obligations on Lucy. She is required to honour bookings made through the ROOM website and to keep the hotel clean and



insured. She is also required to give ROOM access to the hotel for inspections. There are no similar obligations imposed on ROOM, not even an obligation to promote the hotel.

144. The Terms of Use on the ROOM website explain that ROOM provides information about the price and availability of hotels and “that any reservations made on this site will be directly with the hotel whose services you are booking”. If a guest makes a change to a booking, they are liable to pay ROOM an administrative charge. If the guest cancels a booking, they will be liable to pay ROOM a cancellation charge. In both cases, the charges are retained by ROOM.
145. If Lucy is unable to honour a booking, ROOM undertakes to try and provide the guest with similar accommodation of equal standard. If unable to do so, ROOM would allow a cancellation free of charge. However, the Terms of Use make it clear that if Lucy does not provide the accommodation the guest would only be able to sue Lucy, and not ROOM.
146. Lucy and ROOM want to know how she should account for GST on the sale of hotel accommodation made via the ROOM website, specifically, whether there is an agency relationship.

#### **Essential features of agency**

147. The agreement between Lucy and ROOM authorises ROOM to offer Lucy’s accommodation to guests and to accept bookings on Lucy’s behalf. Lucy and ROOM have also consented, under the terms of the agreement, to this conferral of authority on ROOM. The essential features of agency are both present.

#### **Other features of agency**

148. The next step is to consider whether there are any other features that support the existence of an agency relationship:
  - The agreement refers to Lucy as the principal and ROOM as the agent, which is relevant unless it is shown to be a sham.
  - The payment of a commission typically indicates an agency relationship. It is not necessary for the commission to be set by the principal.
  - The Terms of Use on the ROOM website confirm that if Lucy breaches the agreement, Lucy and not ROOM could be sued. This factor is consistent with an agency relationship.
  - It could be argued that the fact that ROOM retains the booking change fee and the cancellation fee is inconsistent with agency. However, the United Kingdom Supreme Court in *SecretHotels2* said that such facts merely reflect

the relative bargaining positions of the parties and do not alter the nature of the relationship.

- Similarly, it could be argued that ROOM has more control over Lucy than would typically occur in an agency relationship. Lucy must keep the hotel clean and insured and must make it available for inspections. But there were very few obligations on ROOM. However, control is only a factor from which an agency relationship can be inferred, in combination with other facts. On similar facts, the court in *SecretHotels2* explained that the travel website had built up a substantial business and it was in a much more powerful negotiating position than the hotels. These factors did not overturn the agency relationship.
- The fact that ROOM tries to provide alternative accommodation if Lucy is unable to honour a booking is likely included to protect ROOM's goodwill and is not inconsistent with agency.
- Less consistent with agency is the fact that ROOM may obtain a significant cash-flow advantage because it receives payment from guests upfront but does not have to pay Lucy until the stay has ended.

149. An overall assessment of the agreements and the surrounding circumstances would suggest that an agency relationship exists, and that ROOM is acting as agent for Lucy when it makes a supply of hotel accommodation. Therefore, ROOM is ignored for GST purposes under s 60(1), unless the parties agree otherwise. Lucy must account for GST on the supply to the guest based on the time of supply rules and calculated on the total amount paid by the guest to ROOM, as agent.

### Example 13: Cost-sharing arrangements

150. Lionel (a life coach), Betty (a bookkeeper) and Derrick (a designer) have decided to share an office space and operating expenses. They are sole proprietors and are not in partnership or an unincorporated body for GST purposes. All are GST-registered.

151. Lionel, Betty and Derrick hold a meeting to discuss their needs regarding appropriate office space and furniture. They agree that Betty, as a bookkeeper, will be responsible for making the arrangements and dealing with the shared costs. They agree to this verbally; there is no written agreement.

152. Betty opens a bank account to be used for the shared expenses. Lionel, Betty and Derrick all agree to deposit \$2,000 a month into the account to cover their one-third share of the total estimated operating costs. All operating expenses are paid out of this account. Betty has sole signing authority on the account, and it is not used to pay any other expenses. Betty provides a quarterly report of all deposits and operational costs related to this account.
153. Betty signs a lease for office space, furniture and equipment. She also enters into contracts for all utilities. The vendors, including the landlord, are not aware of the arrangements between the parties when they contract with Betty.
154. Betty receives no payment for setting up the office, paying the bills and preparing the accounts. Is Betty acting as an agent or as a principal and how should the transactions be treated for GST purposes?

#### **Essential features of agency**

155. As there is no written agreement, it is appropriate to have regard to the surrounding circumstances.
156. The verbal agreement and the parties' subsequent actions indicate that Lionel and Derrick gave Betty authority to act on their behalf to create or affect their legal relationships with third parties in relation to the relevant supplies. The parties are viewed as having consented to that arrangement.

#### **Other features of agency**

157. Betty is not paid a commission for her work. Payment of a commission strongly indicates an agency relationship. However, in this case, Betty was also not realising a profit – which would be consistent with acting in her own right, so the Commissioner views this factor as neutral.
158. Betty also obtains title (a one-third share) in the goods and services she obtains as agent (lease of the office space and furniture, utilities). However, it is arguable that she only obtains that interest in her capacity as principal – not as agent. Again, this factor is neutral.
159. Betty does appear to assume some risks in these transactions. By entering into the agreements in her own name, she could be exposed to risk if Lionel and Derrick stop contributing to the bank account. However, if an agency relationship is held to exist, she would be able to sue Lionel and Derrick for defaulting on the agreement. This factor might therefore support the existence of an agency relationship.

160. Factors supporting a finding of agency are the fact that the principals reimburse Betty for the expenses (by way of payment into the account) and there is an element of control by Lionel and Derrick over Betty. They are aware of her activities and are well placed to object if she acts outside the scope of her authority. Betty is also required to prepare quarterly reports of the activities that she has undertaken on their behalf.
161. On balance, the transactions entered into by Betty are made as an agent on behalf of Lionel and Derrick, as well as on Betty's own behalf. She also acts as agent for expenses incurred in setting up the office (office space, furniture, utilities) and its ongoing operating requirements, including the payment of bills.
162. For GST purposes, supplies made to Betty as agent are deemed to be made to Lionel, Derrick and Betty, and not to Betty alone. (See also, *Durham Aged Mineworkers' Homes Association v Customs & Excise Commissioners* [1994] STC 553 (QB) and Revenue Canada's Policy Statement on GST and Agency - GST/HST Policy Statement P-182R.)

#### Example 14: Multi-level marketing arrangement

163. Arabella is a wholesale distributor of "Natural Shine" beauty products. She appoints a dealer called Milo who recruits his friend Luna to host a Natural Shine party for her friends. At the party, samples of Natural Shine are displayed and Luna's friends are encouraged to order the products.
164. The dealer application form describes Milo as an "independent agent" operating his own business. The order form used by Milo explains that the products are Arabella's property until paid for.
165. Although the beauty products are sold to Luna's friends at recommended retail prices, Milo is under no obligation to sell them at those prices or to even inform Arabella of the price the goods are sold at. However, Milo's profits on the products are fixed by reference to the recommended retail prices (Milo is required to pay Arabella 70% of the recommended retail price – which for Nature Shine is \$100. This means Arabella receives \$70). The amount retained by Milo (\$30) is described in the dealer application form as his "commission". Milo is not indemnified against loss nor expressly obligated to account for any profit. For example, if one of Luna's friends fails to pay for their beauty products, the loss falls on Milo, not Arabella.

166. Arabella is assessed for GST on the basis that she sold Natural Shine beauty products through the agency of her dealer Milo. She is therefore assessed on the retail price of the goods (what Milo has sold them for - \$100) rather than on the amount she received (70% of the recommended retail price or \$70). Arabella argues that she is selling the products in her own right and should only be assessed for GST on the 70% she receives.
167. Is Milo acting as agent for Arabella, or is she acting in her own right, selling the products to Milo?

### Essential features of agency

168. The dealer application form and the order form do not contain any express provisions concerning the legal relationship between the parties from which authority and consent might be inferred. Therefore, the surrounding circumstances must be considered to determine whether the relationship is one of agency.

### Other features of agency

169. Payment of a commission strongly supports an agency relationship, and the dealer application form refers to the dealer's profit as "commission". However, there is "no magic" to the use of the word "commission" and it is important to determine whether the term has been misused. In this case, the way the payment process works is that Milo can make a profit on the sale of the products if he chooses to charge more than the recommended retail price. This suggests that he is acting in his own right, rather than as agent for Arabella.
170. Factors that do not support a finding of agency are: Milo can decide on the sale price of the beauty products, Milo is not required to reveal the sale price of the beauty products to Arabella and Milo assumes the risk in the sale transactions.
171. The fact that the products remain the property of Arabella until paid for might support an agency relationship, as a principal typically retains title to property until sold. However, it is also arguable that a clause specifying this would be unnecessary if the goods were being held by Milo as agent.
172. On balance, the sales entered into by Milo are made in his own right and not as agent on behalf of Arabella. Milo purchases the goods from Arabella and resells to his customers. (see *Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners* [1985] STC 45 (CA)).

### GST treatment

173. Arabella needs to account for GST on the amount received from Milo (70% of the recommended retail price, in this case \$70). Milo must account for GST on 100% of the recommended retail price, in this case, \$100). Both are entitled to claim input tax deductions.

### Example 15: Bailment of livestock

174. Bret is a farmer. He bails some livestock to Diane (a neighbouring farmer) for a period of 3 years. Diane agrees to pay Bret a bailment fee for the use of the livestock during this period. Under the terms of their agreement, Diane can sell the livestock to a third party at any time, but at the end of the bailment period she must return to Bret livestock of the same quality and quantity. Diane is responsible for maintaining the herd during this time and must replace any shortfall in livestock. However, she is entitled to any resulting offspring. Is Diane also acting as agent for Bret when she sells the livestock or is she selling in her own right?

#### Essential features of agency

175. The bailment agreement does not contain any express provisions concerning agency. Therefore, the surrounding circumstances must be considered to determine whether the bailment relationship is also one of agency.

#### Other features of agency

176. Diane is not paid a commission – instead she pays Bret a bailment fee for the use of the livestock. She gets the use of the livestock, which will be beneficial for her farming business, and any resulting offspring become her property. She therefore stands to make an independent profit from the arrangement, which is not consistent with agency.
177. Diane obtains possession of Brett's livestock under the agreement. The agreement also permits her to sell the livestock, provided she returns the same quality and quantity of livestock to Brett at the end of the bailment period. That she can sell the livestock to a third party suggests that she has ownership of the livestock as well. (This is unusual in a bailment, but is a common feature of livestock bailments, see for example *Harding and Ors v CIR* (1976) 2 NZTC 61,145 (SC).)

178. Diane also assumes the risk in this transaction, which is not consistent with agency. If the livestock die during the bailment period Diane must replace them with livestock of the same quality and quantity.
179. Another factor inconsistent with agency is that an agent does not treat the principal's goods as their own assets. In this example, Diane is treating Bret's livestock as her own assets and has incorporated them into her business.
180. When Diane sells the livestock to third parties, she sets the sale price herself without consulting Bret and she is under no obligation to notify him of the sale. The proceeds from the sale are not kept separate but are incorporated back into Diane's business. All these factors are inconsistent with agency.
181. In conclusion, the surrounding circumstances do not support a finding of agency.

## References

### Case References

- Au Pied du Mont Sainte-Anne Condominiums v Canada* [2004] TCJ No 22 (TCC)
- Canada v Merchant Law Group* [2010] FCJ No 990 (FCA)
- Case R34* (1994) 16 NZTC 6,190
- Case T35* (1997) 18 NZTC 8,235
- Case 14/2014* (2014) 26 NZTC 2,024
- Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA)
- CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC)
- CIR v Databank Systems Ltd* (1989) 11 NZTC 6,093 (CA)
- CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA)
- Commerce Commission v Harmony Ltd* [2018] NZHC 1107
- Commissioner of Customs & Excise v Plantiflor* [2002] UKHL 33
- Customs and Excise Commissioners v Music and Video Exchange Ltd* [1992] STC 220 (HC)
- Customs & Excise Commissioners v Reed Personnel Services Ltd* [1995] BVC 222 (HC)
- Durham Aged Mineworkers' Homes Association v Customs & Excise Commissioners* [1994] STC 553 (QB)

*Estate Realities Ltd v Wignall* [1992] 2 NZLR 615 (HC)

*Fenswick International Ltd v GR International Ltd* [2014] NZHC 1119

*Fraser-Ramsay (New Zealand) (Limited) v De Renzy* (1912) 32 NZLR 553 (SC)

*Gannow Engineering Co Ltd v Richardson* [1930] NZLR 361 (SC)

*Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation* [1967] 2 All ER 353 (HL)

*Glengarry Bingo Assn v Canada* [1999] FCJ No 316 (FCA)

*Harding and Ors v CIR* (1976) 2 NZTC 61,145 (SC)

*Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners* [1988] STC 424 (HC)

*HMRC v Secret Hotels2 Limited* [2014] UKSC 16

*ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001

*Lower Hutt City v Attorney-General* [1965] NZLR 65 (CA)

*Marac Life Assurance Limited v CIR* (1986) 8 NZTC 5,086 (CA)

*Masport Ltd v Morrison Industries Ltd* CA 392/92 31 August 1993

*Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26

*Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners* [1985] STC 45 (CA)

*Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15

*Spearmint Rhino Ventures (UK) Limited v HMRC* [2007] EWHC 613 (Ch)

*Stiassny v North Shore City Council* [2008] NZCA 522

*CIR v Suzuki NZ Ltd* (2000) 19 NZTC 15,819 (HC)

*Suzuki NZ Ltd v CIR* (2001) 20 NZTC 17,096 (CA)

*Westpac Banking Corporation v Savin and Ors* (1986) 1 NZBLC 102,345 (CA)

*Zhong v Wang* [2006] NZCA 242

## Legislative References

Goods and Services Tax Act 1985 – s 3A, s 20(3C)(a), s 24(1), s 58, s 59, s 60(1), s 60(1A), s 60(1AB), s 60(1B), s 60(1C), s 60(2), s 60(3), s 60(4), s 60(5), s 60(6), s 60(7), s 60C, s 60D, s 75, s 75(3E)



## Related Rulings/Statements

"Disbursements by professional firms on behalf of clients – GST" *Tax Information Bulletin* Vol 6, No 1 (July 1994):5.

"GST – Specified agent for incapacitated persons" *Tax Information Bulletin* Vol 7, No 6 (December 1995):13.

"GST – Tax Invoices" *Tax Information Bulletin* Vol 11, No 9 (October 1999):80

"Importers acting as agents for non-residents" *Tax Information Bulletin* Vol 12, No 12 (December 2000):11

"Funeral expenses paid by funeral directors in connection with funeral arrangements" *Tax Information Bulletin* Vol 13, No 8 (August 2001):9.)

"[QB 16/03](#): Goods and Services Tax – GST treatment of bare trusts" *Tax Information Bulletin* Vol 28, No 5 (June 2016):16

"GST on low-value imported goods" *Tax Information Bulletin* Vol 31, No 8 (September 2019):28

## Other references

HG Beale (ed), *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London 2018) Vol 2

P Watts & FMB Reynolds, *Bowstead & Reynolds on Agency* (21st ed, Sweet & Maxwell, London, 2018)

*The Laws of New Zealand: Agency Part 1* (online ed, accessed 14 December 2020)

*Revenue Canada's Policy Statement on GST and Agency - GST/HST Policy Statement P-182R*

## About this document

Interpretation Statements set out the Commissioner's view of the taxation laws for specific situations when a binding public ruling is not appropriate.

## Appendix: Case summaries

182. The following cases have been referred to in this Interpretation Statement and are summarised below.

### New Zealand

#### GST cases

183. Section 60 of the Act has been considered by the New Zealand courts on several occasions. The most significant cases are discussed below.

#### Case R34

184. In *Case R34* (1994) 16 NZTC 6,190 the taxpayer imported vehicles from its overseas parent company (MC). MC provided a warranty that the vehicles were free of defects. The taxpayer distributed the vehicles to dealers in New Zealand, with the warranty. The dealers sold the vehicles to customers and passed on the warranty. The issue was whether the dealers acted as agent for the taxpayer when they provided the customers with the warranty. The dealer agreement between the parties specifically stated that dealers were not to refer to themselves as the taxpayer's agents.

185. The TRA found that although the customer takes title from the dealer, the warranty to the customer is given by the dealer as agent for the taxpayer. It was clear from the agreement that the taxpayer had authorised dealers to conclude warranty contracts with customers and to perform work under the terms of the warranty, on its behalf. These contractual obligations outweighed the terms of the same agreement that attempted to deny an agency relationship.

186. . Therefore, there was an agency relationship between the parties, even though the agreement specifically precluded it. The TRA noted that agency can only be established by the consent of the principal and the agent and they will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it.<sup>5</sup>

187. This case was subsequently appealed to the High Court<sup>6</sup> and Court of Appeal<sup>7</sup>. Both courts confirmed the TRA's conclusions on agency, without analysing the issue further.

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<sup>5</sup> From *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation* [1967] 2 All ER 353 (HL) discussed at [216].

<sup>6</sup> *CIR v Suzuki NZ Ltd* (2000) 19 NZTC 15,819 (HC).

<sup>7</sup> *Suzuki NZ Ltd v CIR* (2001) 20 NZTC 17,096 (CA).

## Case T35

188. In *Case T35* (1997) 18 NZTC 8,235 the taxpayer operated a storage facility for parts that it imported from an offshore manufacturer. The parts were provided free of charge to those customers who required replacement parts. The taxpayer charged the manufacturer a fee for storage and for providing the parts to customers. The manufacturer did not invoice the taxpayer for the parts and the taxpayer did not take legal title. The taxpayer paid the GST imposed by Customs and claimed an input tax deduction. The claim was disallowed. The issue was whether the taxpayer was holding the parts as agent or as principal.
189. The TRA held the taxpayer was not entitled to an input tax deduction as it did not acquire or own the parts in terms of the definition of "input tax".<sup>8</sup> The taxpayer held the parts as agent for the manufacturer. Therefore, the supply to customers was made by the manufacturer and not the taxpayer.
190. The TRA found that the parts were clearly incorporated into the taxpayer's business. However, this did not prevent it from finding an agency relationship. It was considered of greater significance that the taxpayer did not acquire title to the goods, nor did it pay for them.

## CIR v Capital Enterprises Ltd

191. The taxpayer in *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC) sold a commercial property to an unregistered purchaser. The purchaser advised the taxpayer that they were acting as agent for their property company (which was GST-registered) so the supply could be zero-rated as a going concern. The Commissioner argued that the purchaser was acting as a principal and not as an agent and therefore the supply must be standard-rated.
192. The High Court found there was no agency relationship. The purchaser was acting in their own best commercial interests and not to effect the instructions of the property company. The taxpayer was therefore liable for output tax on the sale as the purchaser was not registered so the sale could not be zero-rated.
193. In reaching this decision, the High Court endorsed the definition of agency from *Bowstead & Reynolds* (at [19] above).

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<sup>8</sup> The definition of "input tax" was subsequently amended by s 85 of the Taxation (GST & Miscellaneous Provisions) Act 2000 to allow importers acting as agents for non-resident principals to claim input tax on goods they import on behalf of their principal.

## **ID Tours New Zealand Limited v CIR**

194. In *ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001 the taxpayer made supplies of tourism advisory services (acquired from local suppliers) to overseas tour operators. The taxpayer argued it was acting as agent for the overseas operators so the supplies could be zero-rated under s 11A(1)(k). The Commissioner argued the taxpayer was acting as principal so the supplies must be standard-rated under s 8(2B).
195. The High Court held that the taxpayer was acting as principal, not as agent. There was nothing in the contracts to indicate that the payment the taxpayer received from the overseas operators was consideration paid by the overseas operator to the local supplier. The court concluded the taxpayer entered into two separate contractual relationships – one with the local supplier, and one with the overseas operator. The taxpayer was therefore liable for GST on the full consideration received from the overseas operator.
196. The court also confirmed that a contract made with a third party by an agent in the exercise of his or her authority is enforceable both by and against the principal. An agent is therefore not legally obligated to pay the debts of its principal. Taking this into account, the court asked what would happen if a local supplier was not paid. Who would they have a claim against for breach of contract? The court considered that any claim would likely be made against the taxpayer not the overseas operator.
197. It was also considered significant that when the taxpayer invoiced the overseas operators they did not distinguish between their fee and the cost of the tourism services nor did they state how their fee was calculated. Presumably this was significant because an agent might typically invoice a principal separately for their services.

## **General law cases**

198. Agency issues arise frequently in a commercial law context. Some significant New Zealand cases are discussed below.

## **Gannow Engineering Co Ltd v Richardson**

199. In *Gannow Engineering Co Ltd v Richardson* [1930] NZLR 361 (SC), Gannow granted Richardson the sole selling rights for Gannow's machines. Under the agreement, Richardson had to buy the machines from Gannow. He then received a "commission", deducted from the purchase price of the machines. Gannow did not specify a retail price for the machines, so Richardson sold them for more than what he had purchased them for. Gannow sued Richardson for this profit, arguing that as an agent Richardson

had a duty to hand over any profits to his principal. Richardson argued he sold the machines in his own right, not as agent.

200. The court held the relationship was one of vendor and purchaser and not of agent and principal. Myers CJ observed that while “commission” is a term primarily used to denote the remuneration of an agent, there is “no magic” in its use. In this case, it appears to have been misused, as the real meaning was “discount” or “rebate”. Myers CJ also held that the phrase “sole selling rights” was a neutral expression, consistent with either of the contentions.
201. The court identified some further factors that pointed against a finding of agency. For example, the fact that the agreement contained no provision as to the terms on which Richardson was to sell the machines, nor a provision that required payments to be made by the customers from Richardson and not by Richardson himself. It was also considered significant that in some cases, Richardson altered the machines. In these cases, Richardson supplied not only the machine, but other parts obtained from third parties. The parts were required to install the machine, and the total price included the price for these parts and Richardson’s own charges for engineering services. (For a similar decision see *Fraser-Ramsay (New Zealand) (Limited) v De Renzy* (1912) 32 NZLR 553 (SC).)

### **Westpac Banking Corporation v Savin**

202. In *Westpac Banking Corporation v Savin and Ors* (1986) 1 NZBLC 102,345 (CA), Aqua sold boats on behalf of customers. The sales proceeds were paid into its overdrawn trading account, with the bank’s knowledge. Aqua went into liquidation before it paid its customers. The customers argued Aqua had breached its duty as agent to keep the sales proceeds separate from its own and they were therefore entitled to their money.
203. The Court of Appeal explained the general rule that if a principal entrusts property to an agent to be sold, the property remains the principal’s property until the sale. The moment the money is received it is the principal’s property. Whether the agent must keep the money separate from their own depends on the terms of the agency. In this case, the court held that Aqua was not entitled to pay the sale proceeds into its account.
204. The court noted that as well as the duty to keep a principal’s money separate, an agent owes fiduciary duties of loyalty and fidelity to its principal. It follows that the agent must not, without the informed consent of the principal, stand to receive any benefit other than their professional remuneration. Aqua applied the sale proceeds in discharge of its personal indebtedness to the bank. That was of immediate fiduciary benefit to it. It did so without obtaining the informed consent of its principal and was therefore in breach of these duties. As the bank had constructive notice of the breach

it had to account to the customers for their property. (See also *Estate Realities Ltd v Wignall* [1992] 2 NZLR 615 (HC) and *Zhong v Wang* [2006] NZCA 242.)

### **Stiassny v North Shore City Council**

205. In *Stiassny v North Shore City Council* [2008] NZCA 522 the Council operated a weekly rubbish collection. To recover the costs of this service, it required users to purchase branded rubbish bags. The Council entered into a contract with CPL, where CPL agreed to supply and distribute the bags to retailers at a set price. The price was made up of the Council's collection fee, plus CPL's fee. The Council then invoiced CPL for the collection fee. CPL went into receivership and the receiver asked the court whether CPL held the collection fee as agent for the Council.
206. The contractual arrangements were not clear. Some clauses were consistent with agency. For example, the contract for the sale of bags was described as being "on behalf" of the Council. Title and risk passed to the Council on delivery of the bags to the retailer by CPL and the bulk of the price paid by the retailer comprised the Council's fee.
207. However, other factors were consistent with a debtor-creditor arrangement. For example, the contract stated that nothing in this agreement shall create agency between the parties. There was also no indication that the parties intended for CPL to keep the retailer payments in a separate account. In addition, CPL took the risk of a retailer defaulting and CPL had the cash-flow advantage associated with timing differences between the receipt of retailer payments and the obligation to pay the Council.
208. The Court of Appeal held that the critical issue in these circumstances was whether CPL was required to keep the funds in a separate account. If CPL was required to keep the funds in a separate account, the relationship would be one of agency. As the contract did not require this, the relationship was held to be that of debtor-creditor.

### **Fenswick International Ltd v GR International Ltd**

209. In *Fenswick International Ltd v GR International Ltd* [2014] NZHC 1119, Mr Jenkins purchased a block of land. A neighbouring block of land was subsequently put on the market. Mr Jenkins advised Mr Parsons to purchase it. Mr Parsons sent the funds to Mr Jenkins to purchase it for him. Mr Jenkins did not disclose to Mr Parsons that he had already purchased the land and was selling it to Mr Parsons at a \$400,000 profit. Mr Parsons later discovered this, and alleged Mr Jenkins had breached his fiduciary duties because he was acting as Mr Parson's agent.
210. The court noted that agency attracts two main fiduciary duties: the duty to avoid a conflict between the agent's own interests and those of the principal; and the duty to

avoid profiting from the agency. Cooper J held that Mr Jenkins was acting as Mr Parson's agent and he had a duty to tell Mr Parsons the price at which the property was acquired. By failing to do this, Mr Parsons had breached his fiduciary duties.

### **Commerce Commission v Harmoney Ltd**

211. *Commerce Commission v Harmoney Ltd* [2018] NZHC 1107 concerned a peer-to-peer lending service operated by Harmoney. Harmoney made loans to borrowers, funded by third-party investors. When a loan was funded, Harmoney would transfer the funds to a bank account operated by its sister company HITL. HITL entered into the credit contracts with the borrowers on behalf of the investors. Harmoney then charged the borrowers a fee for arranging the loan. The Commerce Commission argued that the fee was an unreasonable credit fee and was therefore in breach of the relevant consumer legislation.
212. One of the issues for the court was whether Harmoney was a creditor. The Commission argued Harmoney was a creditor because it controlled HITL. Harmoney argued HITL was the creditor and Harmoney only acted as HITL's agent.
213. The High Court found that Harmoney was an undisclosed principal (and therefore a creditor) and HITL was Harmoney's agent. On the agency issue, the court endorsed the definition of agency from *Bowstead & Reynolds on Agency* and confirmed that authority and consent are essential features of agency.
214. The High Court then identified the following features of an agency relationship:
  - Agency is a fiduciary relationship.
  - An agent's powers cannot extend beyond those of its principal.
  - A principal must be legally capable of undertaking those tasks that it delegates to its agent.
  - How the parties describe their relationship will be relevant, unless it is shown to be a sham. However, the courts will ultimately have to weigh this up against other relevant circumstances such as evidence of the true character of the relationship.
  - The extent to which the principal controls its agent is not necessarily determinative. Control is not an essential feature of agency, but a factor from which an agency relationship might be inferred, in combination with other factors.
  - Where there is an undisclosed principal, the agent may also be sued by the third party.

## Overseas cases

215. Relevant decisions from the United Kingdom and Canada are discussed below with a focus on decisions that have arisen in a GST or VAT context. These decisions are useful because they illustrate how agency issues can arise. This is not a comprehensive review of the case law in those jurisdictions, but it is intended to identify further agency features that would be applicable in a New Zealand context.

## United Kingdom

### Garnac Grain Co v HMF Faure

216. In *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation* [1967] 2 All ER 353 (HL), four companies entered into a chain of successive contracts for the sale of lard. Each sale was at a higher price than the last, with the first sellers (A) also acting as the last purchasers (this fact was not disclosed to the second and third companies in the chain). The contracts could not be fulfilled due to the financial collapse of (A). The second buyers (B) could not recover against (A). They therefore tried to rescind their contract with the third buyers (C) on the grounds that (C) acted as undisclosed agent for (A). The issue for the House of Lords was whether there was an agency relationship between (A) and (C).
217. Lord Pearson explained that consent is necessary to establish an agency relationship, at 358:

The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *Re Megevand, Ex p. Delhasse* (7). The consent must, however, have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important. As to the content of the relationship, the question to be asked is: "what is it that the supposed agent is alleged to have done on behalf of the supposed principal?"

218. The House of Lords held there was no agency relationship because (A) had not consented to (C) acting on its behalf. Based on the contractual arrangements between the parties, the parties were buying and selling in their own right.



## **Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners**

219. In *Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners* [1985] STC 45 (CA) the taxpayers were distributors of Tupperware. Distributors appointed dealers and then dealers recruited people to hold Tupperware parties where orders were taken from members of the public. The contracts between the parties described the dealers as “independent agents” and explained that the goods were the distributors’ property until payment was made. Although the goods were usually sold at retail prices, the dealers were under no obligation to do this or to even tell the distributors the price the goods had been sold at. However, dealers’ profits were fixed by reference to the retail price (dealers were required to pay the distributors 70% of the retail price).
220. The Commissioners argued that the taxpayers sold the goods as principals through the agency of their dealers. The taxpayers were therefore assessed on the retail price of the goods rather than on the amount they received (70% of the retail price). The taxpayers argued they were selling in their own right and should only be assessed for VAT on the 70%.
221. The court held that the relationship between the distributors and the dealers was a buyer and seller relationship rather than an agency relationship. In reaching this decision, Donaldson MR noted that the only factor which pointed towards agency was that the dealer referred to their gross earnings as a “commission”. The fact that the dealership application form referred to the remuneration or profit of the dealer as earnings and the fact that earnings are derived from sales, were considered neutral factors.
222. However, several factors pointed away from agency:
- The dealer was not required to reveal the identity of the customers.
  - The dealer had complete freedom to decide on the selling price.
  - The dealer was not required to notify the distributor of the price at which the goods were sold.
  - The clause providing that the goods remained the property of the distributor until paid would be unnecessary if the goods were held by an agent.
  - No objection was raised regarding dealers ordering stock in anticipation of a price rise. This amounted to raising their “commission” without the consent of their principals or alternatively to making a secret profit.
  - The dealers were responsible for bad debts.

## Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners

223. The taxpayers in *Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners* [1988] STC 424 (HC) were pottery retailers. They acquired pottery directly from the makers. The agreement between the parties stated that the order was placed by the taxpayers as agent for the makers and any remittances made by the taxpayers to the makers prior to sale represented prepayment deposits. The Commissioners argued that the taxpayers acquired pottery as principal and assessed them for VAT on the retail price of the goods. The taxpayers argued they were acting as agent for the makers so only had to pay VAT on their commission.
224. The High Court held that the taxpayers acted as agent for the makers and not as principal. The court identified the following factors as supportive of agency:
- The reference to the taxpayers “selling on behalf of” the makers in the contracts was considered neutral. However, the court thought it significant that the taxpayers could “retain the discretion to buy in at the net supplier price”. This only had meaning in the context of an agency relationship.
  - The makers understood their relationship with the taxpayers was one of agency.
  - The makers regarded the pottery they submitted as theirs until it was sold.
  - On occasion, some of the makers took back work if it remained unsold.
225. The Commissioners argued that the makers expected to be paid before the pottery was sold and that this did not support a finding of agency. The court concluded this was a subjective expectation and it was not enough to override the agency relationship.

## Customs and Excise Commissioners v Music and Video Exchange Ltd

226. The taxpayer in *Customs and Excise Commissioners v Music and Video Exchange Ltd* [1992] STC 220 (HC) sold second-hand musical equipment. Owners were given a valuation based on the anticipated sale price of the equipment. If the owner accepted the valuation, the parties would enter into a written agreement. The agreement provided that the goods were accepted for sale on the owner's behalf by the company acting as agent. If the equipment fetched a higher price than the valuation, the owner would pay the taxpayer a fee, calculated as the difference between the valuation price and the sale price.
227. The Commissioners argued that while the terms of the agreement supported a finding of agency, the conduct of the parties supported the conclusion that the taxpayer sold the equipment to the buyers as principal. The taxpayer argued it was acting as agent for the owners and should only pay VAT on its fee and not on the total sale price of the goods.

228. The High Court held that the agreement between the owner and the taxpayer was a contract of agency. None of the evidence was strong enough to displace the clear words of the contract. The following facts supported a finding of agency:
- The contract was consistent only with the relationship of principal and agent.
  - Title in the goods remained with the owners even after the taxpayer had been paid.
  - The taxpayer had the right to vary the price at which he sold the goods to buyers without the consent of the owner. This clause would be unnecessary if the taxpayer had already acquired title in the goods.
  - The taxpayer had a right to claim a handling charge.
  - Once the owner had been paid, they played no further part in the transaction.
  - The taxpayer gave a guarantee to the buyer.
  - The buyer was given no information about the owner.
  - The taxpayer could repair the goods before they were sold. This was considered inconsistent with agency but not enough to displace the finding of agency. The risk of doing work on the goods would be one that the taxpayer might regard as worth taking to increase the value of the goods.
  - The court also found the following factors were not typically found in an agency relationship, but were nevertheless “not inconsistent” with agency:
    - The taxpayer could decide the price to be accepted from the buyer and may decide to accept less than the valuation already paid to the owner.
    - Once a sale had taken place, the owner was given no information about it – nor did they learn the size of the taxpayer’s commission.
    - The taxpayer in practice assumed responsibility for damage or loss of the goods while in the shop. This was consistent with a sale but not inconsistent with agency.

### **Commissioners of Customs and Excise v Plantiflor Limited**

229. In *Commissioners of Customs and Excise v Plantiflor Ltd* [2002] UKHL 33 the taxpayer sold plant bulbs by mail order. It arranged delivery of the goods via Parcelforce. The taxpayer issued an invoice to the customer which included a £1.63 postage charge. VAT was not charged on this amount as under the VAT legislation public postal services were exempt. The taxpayer argued it was acting as agent for the customers in its dealings with Parcelforce and it was Parcelforce who provided the postal services to the customer. The Commissioners disagreed.

230. The House of Lords held that the contract between the taxpayer and Parcelforce established no link between Parcelforce and the customer. There was nothing in the agreement to indicate an agency relationship. Parcelforce agreed to deliver parcels for the taxpayer and the taxpayer was liable to pay the charge. Parcelforce therefore made two separate supplies. One was a supply to the taxpayer of the service of delivering the goods ordered. The other was a supply to the customer of the service of delivery.

### **Spearmint Rhino Ventures (UK) Limited v HMRC**

231. In *Spearmint Rhino Ventures (UK) Limited v HMRC* [2007] EWHC 613 (Ch), the taxpayer was a gentleman's club. Dancers could be engaged to perform private dances for customers at the club. The dances were arranged between the customers and the dancers. The customers paid the dancers directly, not the club. The dancers entered into an agreement with the club. Under this agreement, the dancers paid the club a sum of money which entitled them to enter the club and dance.
232. The issue was whether the services were supplied by the club or by the dancers. The Commissioners argued that the services were supplied by the club to the customer via the dancers (who acted as agents for the club). Therefore, the club must account for VAT on those services. The club argued that the services were provided by the dancers.
233. The High Court held there was no agency relationship. The documents did not suggest the dancers were vested with any authority to act on behalf of the club. However, the court observed that the documents are not the entire story. The true relationship between the parties is to be gleaned from the overall effect of the documents, coupled with any other relevant facts.
234. Of crucial significance was the fact that while the fees were agreed by the club, the entire fee was kept by the dancers. That the dancers were obliged to pay a fee to the club did not mean they negotiated the dance on behalf of the club. The dancers negotiated on their own behalf.
235. The Commissioners had focused on the control the club had over the dancers. The dancers' conduct was closely controlled, and their fees were set by the club. The court noted that control does not create agency, although it might be consistent with it. The court held that while the club benefited from the dancers' activities and controlled their activities to an extent, these facts did not undermine a finding of agency. The court also attributed no real significance to the fact that advertising material for the club referred to the dancers as "our dancers".

## HMRC v Secret Hotels2 Limited

236. In *HMRC v Secret Hotels2 Limited* [2014] UKSC 16, the taxpayer marketed holiday accommodation through a website. Hoteliers who wanted to be marketed on the site entered into an agreement with the taxpayer. The agreement described the hotelier as the principal and the taxpayer as its agent. Customers could book a hotel room directly with the hotelier through the website but had to pay the taxpayer directly. The taxpayer would then pay a lesser sum to the hotelier. The margin between what was received from the customer and what was paid to the hotelier was described as the taxpayer's commission.
237. The Commissioners assessed the taxpayer for VAT on the gross consideration it received from guests on the basis that it acquired the accommodation from the hotelier as principal and then supplied it to the customer. The taxpayer argued the hotelier supplied the accommodation to the customer and it was only acting as agent. The Supreme Court found for the taxpayer and agreed the taxpayer was acting as agent for the hoteliers and not as a principal.
238. The court noted that the agreement between the taxpayer and the hoteliers described their relationship as one of agency. However, the court observed that when deciding on the categorisation of a relationship the label the parties have used to describe their relationship cannot be conclusive and may often be of little weight. The correct approach was to interpret the agreement with regard to the words used, the provisions of the agreement as a whole, the surrounding circumstances and commercial common sense.
239. The Commissioners argued that the documentation between the parties did not support a finding of agency. For example:
- the taxpayer was able to set its own commission;
  - the hoteliers were required to compensate the taxpayer for its losses if they did not provide the accommodation they had agreed to provide;
  - the hoteliers were required to honour bookings, allow inspections by the taxpayer and keep the hotel clean and insured (the Commissioners argued these provisions indicated that the taxpayer's interest was wider than that of mere agent); and
  - the agreement was very one-sided in that it contained no express obligations on the taxpayer, not even an obligation to promote the hotels.
240. The court was not persuaded by the Commissioners arguments and noted that they reflected the fact that the taxpayer had a substantial business and had substantial goodwill in the market which it wished to protect. The taxpayer was therefore in a much more powerful negotiating position than the hoteliers. The court also concluded that there is no reason why an agent should not be able to fix their own commission.

241. The court also reviewed the taxpayer's website and noted that it emphasised that the taxpayer was acting as agent. The Commissioners argued that some aspects of the website were inconsistent with agency. For example, if a customer cancelled the booking a cancellation fee was retained by the taxpayer and not passed on to the hotelier; and if the hotelier was unable to provide the room as booked, the taxpayer agreed to try and find similar accommodation, or would permit the customer to cancel free of charge. Again, the court considered that these terms simply reflected the relative bargaining power of the taxpayer and did not undermine a finding of agency.
242. Having concluded that the documentation supported a finding of agency, the court went on to consider whether the characterisations in the documentation represented the economic reality. The Commissioners raised several factors that they believed undermined the agency agreement. The court was not persuaded. For example:
- The taxpayer dealt with customers in its own name on the website. The court said this was not inconsistent with agency.
  - The taxpayer dealt with customer complaints and compensation in its own name. This was contrary to the agreement between the taxpayer and the hoteliers but was not significant and was not inconsistent with agency.
  - In relation to VAT, the taxpayer dealt with the hoteliers in a manner inconsistent with agency. It did not provide the hoteliers with invoices for its commission (or even notify them of the amount), making it impossible for the hoteliers to account for VAT. It also failed to account for VAT correctly as an agent (or as principal). The court did not think this was a strong point.
  - The hoteliers would invoice the taxpayer for the net sum (the gross sum, minus their commission). The court concluded that, on their own, the invoices could not change the nature of the contractual arrangements between the parties.
  - The taxpayer often reserved blocks of rooms and paid the net sum in advance. The court considered this factor to be consistent with agency.

## Canada

### Glengarry Bingo Assn v Canada

243. In *Glengarry Bingo Assn v Canada* [1999] FCJ No 316 (FCA), the taxpayer ran bingo events for its members. It leased a hall, hired staff and purchased bingo equipment. After each event, the member paid the taxpayer. The taxpayer returned GST on the rent and bingo cards but not on the equipment or staff. It argued that for those supplies it was acting as an agent for its members. The Minister of National Revenue (the Minister) assessed the taxpayer for GST on those supplies and the taxpayer appealed.

244. The court held that the taxpayer was acting as principal and not as agent for its members when it supplied equipment and staff. The taxpayer entered into the employment contract with the staff: it hired and paid them; it prepared their schedules; and identified their duties. It did not hold itself out to the staff that it was acting as agent. The court explained that “it is well established that risk is a significant factor in determining whether an agency relationship exists” and in this case the members were “insulated from the activities of the taxpayer”. Regarding the equipment, the taxpayer owned the equipment and rented it to members. There was no evidence that the taxpayer held itself out as agent or that the members were at risk concerning any of the taxpayer’s obligations for the equipment.
245. The court noted there was no provision in the agreement that the taxpayer would act as agent. It held funds and reimbursed its members, but this alone is not determinative of agency. Furthermore, the taxpayer did not keep the funds received for expenses in a separate account and its financial statements treated the funds as the taxpayer’s property. This suggested the taxpayer treated the money as an asset and was not holding it as an agent.

### **Au Pied du Mont Sainte-Anne Condominiums v Canada**

246. In *Au Pied du Mont Sainte-Anne Condominiums v Canada* [2004] TCJ No 22 (TCC), the taxpayer operated a resort. The condominium company also entrusted the taxpayer with some management tasks, such as negotiating contracts and hiring staff. The taxpayer did not account for GST on these services as it argued it was acting as agent for the company. The Minister disputed this.
247. The court concluded that in this case there was no agency relationship. Based on the agreements, the taxpayer did not have the authority to commit and bind the company. It was not enough for the taxpayer to negotiate an agreement; the agreement must commit and bind the principal.
248. The court noted there were some indications of an agency relationship: the taxpayer did not realise profits, the management fees were set at a fixed rate (like a commission), and the taxpayer was required to act with prudence and diligence. However, this was not enough to overcome the lack of authority.

### **Canada v Merchant Law Group**

249. In *Canada v Merchant Law Group* [2010] FCJ No 990 (FCA), the taxpayer (a law firm) acquired goods and services from third-party suppliers. The taxpayer argued the goods and services were disbursements that it incurred as agent for its clients and did not need to account for GST. The Minister argued the disbursements were consideration for the supply of legal services and were therefore taxable.

250. The court held there was no agency relationship. The taxpayer did not possess the authority to affect their client's legal position and therefore the clients were not bound by the third-party contracts. The court said it did not follow that because the solicitor-client relationship was generally one of agency, all financial obligations incurred by a lawyer while providing legal services were incurred as agent. The disbursements were therefore taxable supplies.
251. The taxpayer argued that the disbursements were paid for by monies held in trust by the taxpayer and that this indicated agency. The court agreed that this feature was an indicator of agency, but without authority it was insufficient to create an agency relationship.