

## **INTERPRETATION STATEMENT: IS 18/02**

### **GOODS AND SERVICES TAX – GST TREATMENT OF DISTRIBUTIONS MADE BY A TRADING TRUST TO A BENEFICIARY**

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All legislative references are to the Goods and Services Tax Act 1985 (the Act) unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this Interpretation Statement.

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### **Scope of this statement**

1. This Interpretation Statement considers the GST treatment of a distribution made by a GST-registered trading trust to a beneficiary, where that distribution consists of goods forming part of the trust’s taxable activity.

### **Summary**

2. Where a GST-registered trading trust makes a distribution to a beneficiary for no consideration and that distribution consists of goods forming part of the trust’s taxable activity, it will be an associated supply for GST purposes. This is because the supply is between two associated persons – the trust and the beneficiary.

3. The supply will likely be a taxable supply as it will be made in New Zealand in the course or furtherance of the GST-registered trading trust's taxable activity. However, in certain circumstances the supply could be an exempt supply under s 14.
4. The consideration for the supply is nil. This is because the beneficiary does not pay anything for this distribution of goods. However, GST is payable based on the value of a supply, not necessarily the consideration provided by the recipient. If the beneficiary uses the goods to make taxable supplies (or intends to), the value of the supply will be the consideration paid (ie, nil). Otherwise, the value of the supply will be the open market value of the goods.
5. The time of supply will vary depending on whether the goods vest in the beneficiary with an immediate right to present possession, or with a right to future possession. It also depends on whether the goods supplied can be removed or not.
  - If the distribution vests property in the beneficiary with a right to present possession and the property is to be removed, then the time of supply will be at the time of the removal.
  - If the distribution vests property in the beneficiary with a right to present possession and the property is not to be removed, then the time of supply will be at the same time as the resolution to distribute is made. This is because the property will be immediately available to the beneficiary at that point.
  - If the distribution vests property in the beneficiary with a right to future possession, the time of supply is at the time the beneficiary is permitted to remove the goods. It is unlikely that the beneficiary would be permitted to remove the property until the future date stipulated in the resolution to distribute. If the goods cannot be removed, the time of supply is the future date when those goods are made available.
6. In all cases, it is irrelevant that legal title might not have been transferred to the beneficiary at the time of supply (ie, on removal or when the goods are made available).
7. If there is a delay in the transfer of goods from the trust to the beneficiary, the delay may create a bare trust relationship. This means the trustee will hold the goods as bare trustee.
8. Distributions of goods to beneficiaries may trigger obligations on the trust to either register for or deregister from GST. However, distributions of all of the trust assets or distributions resulting in a substantial and permanent reduction in the size or scale of the trust's taxable activity will not of themselves trigger a liability to register for GST. Distributions of all of the trust's assets are likely to trigger a liability to deregister from GST though.

## **Analysis**

9. This Interpretation Statement considers the GST treatment of a distribution made by a GST-registered trading trust to a beneficiary, where that distribution consists of goods forming part of the trust's taxable activity. To determine the GST treatment of these distributions the following questions need to be considered:
  - Are the trust and the beneficiary "associated persons"?
  - Is there a supply of goods or services?

- If there is a supply, is it a taxable supply?
  - What is the value of the supply?
  - What is the time of supply?
10. The Interpretation Statement will also consider:
- the effects of any delay in making a distribution; and
  - any GST registration and deregistration obligations that might arise as a result of a distribution.
11. Examples are included at the end of this Interpretation Statement to illustrate some of the concepts discussed.

### **Are the trust and the beneficiary “associated persons”?**

12. If the trust and the beneficiary are associated persons, any supply made by the trust to the beneficiary will be an “associated supply” (s 2) and special rules will apply for determining the value and time of that supply.
13. Section 2A defines “associated persons”. Of relevance is s 2A(1)(f), which confirms that a “trustee of a trust” and a beneficiary are associated persons, unless the beneficiary is a charitable or non-profit body.
14. “Unincorporated body” is defined in s 2 and includes “a trustee of a trust”. Section 57(2)(a) explains that where an unincorporated body carries on a taxable activity, the members of that body (the trustees) shall not themselves be registered. Section 57(2)(d) explains that in these circumstances, the registration shall be in the name of the trust.
15. Consequently, it is the Commissioner’s view that the reference to “trustee of a trust” in s 2A can also be read as a reference to the trust. The Commissioner therefore considers that a trust and a beneficiary are associated persons.

### **Is there a supply of goods or services?**

16. Distributions of goods by a trust to a beneficiary are often made for no consideration. The trust does not charge the beneficiary for the distribution and the beneficiary does not make any payment. This raises the issue of whether there is a supply for GST purposes.
17. “Supply” is defined widely in s 5(1) to include “all forms of supply”. The courts interpret the word as meaning “to furnish with or provide”.<sup>1</sup> In *C & E v Oliver* [1980] 1 All ER 353 (QB), a value added tax case concerning a similar definition of “supply”, Griffiths J stated at 354–355:

There is no definition of “supply” in the Act itself, but it is quite clear from the language of the Act that “supply” is a word of the widest import .... **“Supply” is the passing of possession in goods pursuant to an agreement whereunder the supplier agrees to part with and the recipient agrees to take possession. By “possession” is meant, in this context, control over the goods, in the sense of having the immediate facility for their use. This may or may not involve the physical removal of the goods.**

[Emphasis added]

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<sup>1</sup> *Databank Systems Ltd v CIR* (1987) 9 NZTC 6,213 (HC) at 6,223.

18. Therefore, a supply exists where goods are distributed by a GST-registered trading trust to a beneficiary, where the distribution consists of goods forming part of the trust's taxable activity. The trust furnishes or provides the goods to the beneficiary. The trust agrees to part with possession of the goods and the beneficiary agrees to accept them.
19. However, not all supplies by a trust to a beneficiary are distributions. For example, in *The Trustee, Executors and Agency Company New Zealand Ltd v CIR* (1997) 18 NZTC 13,076 the taxpayer trust sold the trust's farmland to a beneficiary. This was not a distribution by the trust to the beneficiary but a sale of the trust's assets to that person. On the facts, this was taken to be an ordinary supply in the course or furtherance of the trust's taxable activity. This transaction was a sale and not a distribution of trust assets.

### **Is the supply a taxable supply?**

20. Where a GST-registered trading trust makes a distribution of goods to a beneficiary there will be supply for GST purposes. It must then be determined whether that supply is a taxable supply.
21. A "taxable supply" is defined in s 2(1) as "a supply of goods and services in New Zealand that is charged with tax under section 8 and includes a supply that section 11, 11A, 11AB or 11B requires to be charged at the rate of 0%".
22. Section 8(1) is the primary charging section:

#### **Imposition of goods and services tax on supply**

- (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15% on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after 1 October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

...

23. For the supply to be a taxable supply, it must be made in New Zealand "in the course or furtherance of a taxable activity". This phrase is not defined in the Act. The courts have held that the phrase "in the course of" includes "things belonging to or arising out of", encompassing "natural incidents" and "things necessarily incidental to" the activity.<sup>2</sup> The courts have also held that a supply will be in the furtherance of the activity, even if it is not in the course of it, if it is made to "help, achieve, or advance" the purpose or object of the taxable activity.<sup>3</sup> The courts have held that a supply of goods that have been exclusively used for private purposes is not a supply in the course or furtherance of a taxable activity.<sup>4</sup>
24. The courts have interpreted the phrase "in the course or furtherance of a taxable activity" widely to cover any supplies made "in connection with" a taxable activity, including the sale of capital assets used in carrying on a taxable activity.<sup>5</sup> In

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<sup>2</sup> *Public Trustee v Henderson & Pollard Ltd* [1956] NZLR 180 (Compensation Court) at 185–186; *Case M129* (1990) 12 NZTC 2,839 at 2,845.

<sup>3</sup> *Case N43* (1991) 13 NZTC 3,361 at 3,366.

<sup>4</sup> *Case P4* (1992) 14 NZTC 4,024 at 4,032. No comment was made on this aspect on appeal (*Newman v CIR* (1994) 16 NZTC 11,229 (HC); *Newman v CIR* (1995) 17 NZTC 12,097 (CA)). See also *Tax Information Bulletin* Vol 5, No 5 (October 1993):8, Questions We've Been Asked "Sale of Land was Part of Taxable Activity" in relation to the sale of land that was part of the taxpayer's wider taxable activity although not part of its main activity.

<sup>5</sup> *Case K55* (1988) 10 NZTC 453; *Hibell v CIR* (1991) 13 NZTC 8,195 (HC).

Case K55, Judge Bathgate stated that there must be a discernible relationship or nexus between the goods supplied and the taxable activity, at 457:<sup>6</sup>

... "In the course or furtherance of" a taxable activity is not an altogether different concept from the income tax situation of "... in gaining or producing," the assessable income. **It may be that to discover whether a supply is in the course or furtherance of a taxable activity some discernible nexus should be apparent between the activity and the supply.** It would not appear inappropriate. As on the application of sec 104 of the *Income Tax Act* it is a question of fact and degree as to whether a supply is in the course or furtherance of a taxable activity carried on by the person concerned. **There must obviously be a discernible relationship between the supply and the activity in the form of a nexus for the supply to be in the course or furtherance of the activity.**

[Emphasis added]

25. When a trustee distributes goods to a beneficiary, the supply will be connected with the trust's taxable activity if the goods distributed formed part of the taxable activity. The fact that the trust claimed an input tax deduction for the goods when acquired is evidence of the connection between the goods and the trust's taxable activity. By distributing the goods to the beneficiary the goods are no longer available to the trust as of right (unless the beneficiary agrees to allow the trust to continue to use the goods). The discernible relationship between the taxable activity and the supply (the distribution) indicates that the supply to the beneficiary will be made in the furtherance (although not necessarily the course) of the taxable activity.
26. The rate of GST (if any) that will apply to a distribution will depend on whether the supply is a taxable supply or an exempt supply. For most supplies in New Zealand by a GST-registered trust to a beneficiary in the course or furtherance of a taxable activity, the rate of GST is 15% unless the compulsory zero-rating provisions or other special rules apply (see [68]). In some circumstances the supply could be an exempt supply under s 14.

### What is the value of the supply?

27. The value of a supply is determined under s 10. Where the supply is for consideration, the value of the supply is determined under s 10(2):
  - (2) Subject to this section, the value of a supply of goods and services shall be such amount as, with the addition of the tax charged, is equal to the aggregate of,—
    - (a) to the extent that the consideration for the supply is consideration in money, the amount of the money;
    - (b) to the extent that the consideration for the supply is not consideration in money,—
      - (i) the open market value of that consideration, if subparagraph (ii) does not apply; or
      - (ii) the value of the consideration agreed by the supplier and the recipient, if subsection (2B) applies.
28. Where the supply is for no consideration, the value of the supply will be nil under s 10(19):

Subject to the foregoing provisions of this section where any supply is made for no consideration, the value of that supply shall be nil.
29. "Consideration" is defined in s 2(1):

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<sup>6</sup> See also *CIR v Dormer & Anor* (1997) 18 NZTC 13,466 (HC) at 13,459, *Hibell, Case U37* (2000) 19 NZTC 9,353 at [38] and *Case V16* (2002) 20 NZTC 10,182 at [58].

**consideration**, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body

30. When a trustee distributes goods forming part of the trust's taxable activity to a beneficiary, the beneficiary is unlikely to be required to pay anything for the property, or to act or forbear to act in response to, or for the inducement of, the supply of the property. Therefore, it is likely that the consideration for the supply (the distribution) will be nil.
31. However, both s 10(2) and s 10(19) are subject to the other provisions in s 10. In particular, s 10 has special rules relating to associated supplies. As mentioned previously from [12], "associated supply" is defined in s 2(1) and includes a supply made between a trust and a beneficiary.
32. The value of an "associated supply" is determined under s 10(3):
  - (3) Subject to subsections (3A), (3AB), (3B), (3C), (3D) and (8), the consideration for a supply is treated as being the open market value of the supply if—
    - (a) the supply is made by a person for no consideration or for a consideration that is less than the open market value of the supply; and
    - (b) the supply is an associated supply; and
    - (c) the supply is not a fringe benefit that the supplier has, or is deemed to have, provided or granted under the FBT rules of the Income Tax Act 2007 to the recipient, being a person employed under a contract of service by the supplier.
33. Where s 10(3) applies, it substitutes the open market value of the supply for the actual consideration.
34. Section 10(3) is subject to exceptions in ss 10(3A)–(3D). Of relevance are ss 10(3A) and 10(3AB):
  - (3A) Subsection (3) does not apply to a supply if—
    - (a) the recipient acquired the supply for the principal purpose of making taxable supplies; and
    - (b) the recipient is entitled to make a deduction under section 20(3) in respect of the supply, or would be entitled to make such a deduction if—
      - (i) the amount of the deduction were determined under section 3A(3)(e) instead of under section 3A(3)(a):
      - (ii) there were consideration for the supply:
      - (iii) the supplier were a registered person who had complied with the requirements of the Act; and
    - (c) the supply is not a supply of financial services to which subsection (3B) applies.
  - (3AB) Subsection (3) does not apply to a supply of goods and services if the recipient—
    - (a) acquires the supply for no consideration; and
    - (b) from the time of the supply, applies the goods and services for the purpose of making taxable supplies.
35. Sections 10(3A) and 10(3AB) apply if the beneficiary uses (or intends to use) the goods to make taxable supplies. In this case (or where one of the other provisions that exclude the operation of s 10(3) applies), the ordinary provisions for valuing the supply of goods and services apply (ss 10(2) and 10(19)). This means the value of the supply will be nil. These rules prevent the beneficiary from obtaining

an input tax deduction on the open market value of the goods when the beneficiary paid nothing for the distribution, being a supply between associated persons.

36. Therefore, if the beneficiary uses or intends to use the goods distributed to make taxable supplies, the value of the supply is nil. Otherwise, the value of the supply is the open market value of the goods.

### **What is the time of supply?**

37. Section 9(1) is the general time of supply rule. The time of supply is the earlier of the time the invoice is issued or the time any payment is received:

#### **9 Time of supply**

- (1) Subject to this Act, for the purposes of this Act a supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier or the recipient or the time any payment is received by the supplier, in respect of that supply.

38. For distributions from a trust to a beneficiary, the general time of supply rule is overridden by the rules for associated supplies. This is because the trustee and the beneficiary are associated persons (s 2A(1)(f)) (see from [12] above). The time of supply rule for associated supplies is at s 9(2)(a):

...

- (2) Notwithstanding anything in subsection (1), a supply of goods and services shall be deemed to take place—
- (a) if the supply is an associated supply,—
- (i) in the case of a supply of goods which are to be removed, at the time of the removal; and
- (ii) in the case of a supply of goods which are not to be removed, at the time when they are made available to the recipient; and

...

provided that this paragraph shall not apply in any case where an invoice is issued, or any payment is made, in respect of that supply, on or before the last day for furnishing the return in relation to the taxable period during which, but for this proviso, that supply would have been made:

...

39. The proviso at the end of s 9(2)(a) is unlikely to apply to a trust distribution made for no consideration. This is because s 24(5)(a) states that a supplier is not required to provide a tax invoice if the consideration for a supply does not exceed \$50.
40. The time of supply for an associated supply will depend on whether the goods can be removed or not. In all cases, it is irrelevant that legal title may not yet have been transferred to the beneficiary at the time the goods are removed or made available.

### ***Time of supply where there is an immediate right to present possession***

41. Where the beneficiary has an immediate right to present possession, the time of supply is at the time of removal of the goods. If the goods cannot be removed, the time of supply is when those goods are made available.

### *Goods can be removed*

42. Under s 9(2)(a)(i), if the distribution vests goods in the beneficiary with an immediate right to present possession, and the goods are to be removed, then the time of supply will be at the time of the removal. An example of goods that may be removed is a car. When the beneficiary takes possession of the car to drive it away, the time of supply will be triggered.

### *Goods cannot be removed*

43. Under s 9(2)(a)(ii), if the property vested in the beneficiary is goods that are not to be removed, then the time of supply will be at the time the goods are made available to the beneficiary. An example of goods that are not to be removed is a building. If a distribution vests property in the beneficiary with an immediate right to present vacant possession, the property will be "made available" to the beneficiary. This means that the time of supply will be at the same time as the resolution to distribute is passed.

### ***Time of supply when there is a right to future possession***

44. Where the beneficiary has a right to future possession, the time of supply is at the time the beneficiary is permitted to remove the goods. It is unlikely that the beneficiary would be permitted to remove the property until the future date stipulated in the resolution to distribute. If the goods cannot be removed, the time of supply is the future date when those goods are made available.

### **Delay in transferring goods – creation of a bare trust relationship**

45. Where a trust resolves to distribute goods to a beneficiary (either with a right to present possession or future possession), there may sometimes be a delay in the transfer of the goods. This delay may create a bare trust relationship. This means the trustee will hold the goods as a bare trustee. *The Laws of New Zealand: Trusts* (online ed, LexisNexis NZ Limited at [120]) defines a "bare trustee" as follows:

**Meaning of "bare trustee".** A "bare trustee" is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has personally no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he or she is bound to convey or transfer the property accordingly when required to do so.<sup>1</sup>

...

1 *Christie v Ovington* (1875) 1 Ch D 279, *Morgan v Swansea Urban Sanitary Authority* (1878) 9 Ch D 582, *Re Docwra* (1885) 29 Ch D 693, *Re Cunningham and Frayling* [1891] 2 Ch 567 at 571 and 572 per Stirling J, *Re Blandy Jenkins' Estate* [1917] 1 Ch 46 (where the earlier authorities were reviewed), and *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79. A bare trustee may originally have had duties in respect of the property which have since ceased (*Christie v Ovington* (1875) 1 Ch D 279 at 281 per Hall V-C) or which have been superseded by a request from the persons entitled to the property to convey it to them (*Morgan v Swansea Urban Sanitary Authority* (1878) 9 Ch D 582 at 585 per Jessel MR). A person who has personally an existing beneficial interest of any kind in the trust property is in no circumstances a bare trustee of it: *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 per Jessel MR.

A bare trustee has no equity in the property subject to the trust, and so has no interest which can be charged: *Motor Vehicle Dealers' Institute Inc v UDC Finance* (1991) Ltd [1994] 1 NZLR 659. See observations on the meaning of "bare trustee" in *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271. Common examples of bare trustees are solicitors' nominee companies and contributory mortgage nominee companies: ...



46. An example might be the transfer of a commercial building which has been vested in the beneficiary by valid resolution of the trustee. If the transfer of legal title to the beneficiary was delayed, it is likely that the trustee holds the building as a bare trustee for the beneficiary during that intervening period.
47. For GST purposes, unless the trustee and the beneficiary agree otherwise, the bare trustee acts as the agent of the beneficiary.<sup>7</sup> This means that:
- supplies by or to a bare trustee are treated as supplies that are made by or to the beneficiary;<sup>8</sup>
  - any activity involving supplies for a property subject to a bare trust is carried out by the beneficiary;<sup>9</sup>
  - when a bare trustee transfers legal title to the beneficiary there is no GST supply.<sup>10</sup>
48. Consequently, when a trust passes a resolution to distribute property to a beneficiary with an immediate right to possession, there will be a supply by the trust to the beneficiary. If, after the distribution, the trustee holds legal title to the property for the beneficiary as bare trustee, there will be no supply for GST purposes when the trustee transfers the legal title to the beneficiary.
49. An example of this can be seen in *Case R1*.<sup>11</sup> The Commissioner successfully argued that the New Zealand resident legal owner of a vessel purchased from overseas sellers held that vessel on bare trust for the taxpayer (the New Zealand resident beneficial owner). The Taxation Review Authority accepted this meant that the transfer of the legal ownership of the vessel to the taxpayer (as the beneficial owner) was not a taxable supply and the taxpayer was not entitled to an input tax deduction. This was because the supply was made overseas and there was no supply between the bare trustee and the taxpayer (as beneficial owner of the vessel).

### **Registration and deregistration obligations**

50. Where a trading trust makes a distribution of all or part of its taxable activity, it may trigger registration or deregistration obligations.

#### **Registration**

51. A trading trust will be liable to register for GST under s 51 if it makes taxable supplies in New Zealand in excess of \$60,000 in a 12-month period.
52. If a trading trust is not liable to be registered for GST and it decides to wind up the trust by making a distribution of all the trust assets to a beneficiary (with a value in excess of \$60,000), this supply will not trigger a liability to register. This is

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<sup>7</sup> QB 16/03: "Goods and Services Tax – GST treatment of bare trusts" *Tax Information Bulletin* Vol 28, No 5 (June 2016):16.

<sup>8</sup> Section 60; *CIR v Campbell Investments & Anor* (2004) 21 NZTC 18,559 (HC); *Case R1* (1994) 16 NZTC 6,001.

<sup>9</sup> QB 16/03: "Goods and Services Tax – GST treatment of bare trusts" *Tax Information Bulletin* Vol 28, No 5 (June 2016):16.

<sup>10</sup> *CIR v Campbell Investments & Anor* (2004) 21 NZTC 18,559 (HC).

<sup>11</sup> *Case R1* (1994) 16 NZTRC 6,001. On appeal, and with new evidence regarding the ownership of the vessel, the Commissioner accepted the legal owner was also the beneficial owner of the vessel. This meant there was, on the facts, no bare trust and the supply to the taxpayer by the legal (and beneficial) owner was a taxable supply: *Union Corporate Services Ltd v CIR* (1997) 18 NZTC 13,151.

because the liability to register is subject to the proviso in s 51(1) and paragraphs (c)–(e). The proviso and s 51(1)(c) state:

...

provided that any such person shall not become liable where the Commissioner is satisfied that that value will exceed that amount in that period solely as a consequence of—

- (c) any ending of, including a premature ending of, or any substantial and permanent reduction in the size or scale of, any taxable activity carried on by that person; or

53. As the distribution of all the trust's assets would result in the ending of the trust's taxable activity, the value of the distribution will not count towards the \$60,000 registration threshold and there will be no liability to register for GST.

### ***Deregistration***

54. If a GST-registered trading trust distributes all the trust's assets to a beneficiary so that the trust ceases to carry on a taxable activity, the trust must inform the Commissioner of this fact within 21 days of the date of cessation (s 52(3)). The trust must also provide the Commissioner with the date on which the trust ceased to carry on the taxable activity and whether it intends to carry on any taxable activity within 12 months from that date (s 52(4)).
55. Following notification, the Commissioner will cancel the trust's GST registration with effect from the last day of the taxable period during which all such taxable activities ceased (or from such other date as may be determined by the Commissioner).

### **Examples**

56. The following examples are included to assist in explaining the application of the law.

#### **Example 1: A distribution of goods by a trading trust to a beneficiary**

57. The Cheery Trading Trust is a GST-registered trust. It carries on a car rental business. The Cheery Trading Trust decides to make a distribution of a car to Benedict, a beneficiary of the Cherry Trading Trust. Benedict has just turned 20 and is about to start university.
58. The distribution of the car to Benedict will be a taxable supply for GST purposes. This is because the car is part of the Trust's taxable activity.
59. The consideration for the supply is nil. This is because Benedict is not paying anything for this distribution. Special value of supply rules apply to this transaction because the supply is an associated supply. As Benedict does not intend to use the goods to make taxable supplies, the value of the supply will be the open market value of the car (s 10(3)) and the Trust will need to account for output tax on this supply.
60. If Benedict was registered for GST and intended to use the car in his business to make taxable supplies, the value of supply will be the consideration (ie, nil) (ss 10(3A) and 10(3AB)). The Trust would therefore not need to account for any output tax on this supply. Similarly, Benedict could not claim any input tax on the car.

61. Special time of supply rules apply to this transaction because the supply is an associated supply. As Benedict has been vested with an immediate right to present possession, the time of supply will be the time Benedict takes possession of the car (s 9(2)(a)). It is irrelevant that legal title in the car might not have been transferred to Benedict at the time of removal.
62. If Benedict has been vested with a right to future possession (ie, when the rental car is returned in two weeks' time), then that future date will be the time of supply.

**Example 2: Winding up a trading trust's taxable activity with all assets being distributed**

63. The Wonderful Trading Trust is a GST-registered trust that carries on a property investment business. It owns three commercial properties. The trustee decides to wind up the Trust's taxable activity and distribute all the Trust's assets to Benicia, the beneficiary. Benicia is registered for GST and intends to carry on a property investment business in her own name.
64. For GST purposes, the Trust makes a supply of the property to Benicia. Because the Trust is distributing all the property that formed part of its taxable activity, s 6(2) applies. Section 6(2) states:

**6(2) Beginning and ending**

Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.

65. Section 6(2) therefore treats the supply of the goods as being carried out in the course or furtherance of the taxable activity since the distribution is made in connection with the ending of a taxable activity. Therefore, the supply by way of distribution is a taxable supply.
66. The value of the supply must be determined under s 10(3) as it is a supply for no consideration. As Benicia intends to use the properties distributed for the purpose of making taxable supplies, the value of the supply is nil.
67. The properties distributed to Benicia are immediately available. This means the time of supply will be at the same time as the resolution to distribute the property is passed. It is irrelevant for GST purposes that it then takes the trustees six weeks for the title to the properties to be registered in Benicia's name.

*Zero-rating*

68. Particular provisions under the Act allow for or require zero-rating in these circumstances. For example, under s 11(1)(m) the supply may be zero-rated if it is the supply of a taxable activity as a going concern and the beneficiary is registered for GST. If the supply consists wholly or partly of land and the beneficiary is registered for GST, s 11(1)(mb) requires the supply to be zero-rated. However, as noted at [66], the value of the supply is nil and so whether the supply is standard-rated or zero-rated will not affect the GST output tax payable by the Trust or the input tax deductible by Benicia.

*De-registration*

69. As the Trust has now ceased to carry on any taxable activities, it must inform the Commissioner of this fact within 21 days of the date of cessation (s 53(3)). Following notification, the Commissioner will cancel the GST registration of the

Trust with effect from the last day of the taxable period during which all such taxable activities ceased (or from such other date as may be determined by the Commissioner).

70. The Trust must provide the Commissioner with the date on which the Trust ceased to carry on the taxable activity and whether it intends to carry on any taxable activity within 12 months from that date (s 52(4)).
71. As the Wonderful Trading Trust has now ceased to carry on a taxable activity, it must file a final GST return for the part of the last taxable period for which it was registered (s 16(4)).

### **Example 3: Creation of a bare trust relationship**

72. The Blissful Trading Trust carries on a property renovation business. It purchases residential properties, renovates them and then sells them for a profit. It currently owns two residential properties. The Trust resolves to distribute one of the properties to Benjamin, a beneficiary of the Blissful Trading Trust. The resolution provides for Benjamin to have immediate possession of the property. The trustees are aware that Benjamin is looking for somewhere to live when he returns from his OE, where he is currently trekking in Nepal.
73. The distribution of the property to Benjamin will be a taxable supply for GST purposes. This is because the property is part of the Blissful Trading Trust's taxable activity.
74. As Benjamin intends to live in the property, the value of the supply will be deemed to be the open market value under s 10(3). For the same reason, the zero-rating provision in s 11(1)(mb) will not apply meaning that the supply will be standard-rated.
75. As the property was vested in Benjamin with immediate possession, the time of supply is at the same time as the resolution to distribute the property is passed. It is irrelevant that this time of supply does not coincide with the date that the legal title passed in the property to Benjamin following his return to New Zealand and signing the transfer documents.
76. As there is a delay in transferring the property to Benjamin, a bare trust arises. This means the trustee of the Blissful Trading Trust will hold the property as a bare trustee. A bare trustee acts as agent for the beneficiary until legal title is subsequently transferred to the beneficiary.
77. When the trustee subsequently transfers legal title to Benjamin there will be no supply, as the supply occurs when the property is made available to Benjamin.

### **Example 4: Goods sold to beneficiary**

78. The Happy Trading Trust carries on the taxable activity of a paper mill. Benny, a beneficiary of the Happy Trading Trust carries on a publishing business. The Happy Trading Trust sells four pallets of paper to Benny for use in his publishing business. Benny pays the Trust market value for the paper.
79. This is not a distribution by the Trust. It is simply an ordinary supply in the course or furtherance of the Trust's taxable activity made at market value. The value of the supply is the open market value, as determined under s 10(3) (as this is still an associated supply for GST purposes).

80. The time of supply rules for associated persons will apply to this transaction. As the four pallets of paper are to be removed, s 9(2)(a)(i) states that the time of supply will be when the paper is removed.

#### **Example 5: Registration**

81. The Joyful Trading Trust owns a commercial property with an annual rent of \$30,000. As this is the only asset owned by the Trust, it is not liable to register for GST under s 51, as it does not make taxable supplies in New Zealand in excess of \$60,000 in a 12-month period.
82. The Trust decides to distribute the commercial property to Benita the beneficiary. The supply is a taxable supply for GST purposes. Benita is not registered for GST and does not carry on a taxable activity. She intends to convert the commercial property into a family home.
83. The distribution by the Trust to Benita is an "associated supply" for GST purposes. This means the value of the supply must be determined under s 10(3). As the property is not going to be used to make taxable supplies, s 10(3A) does not apply. This means the value of the supply for GST purposes must be the open market value, which is \$800,000.
84. While the taxable supply by the Trust is in excess of the \$60,000 registration threshold, it does not trigger a liability to register. This is because the liability to register is subject to the proviso in s 51(1) and paragraphs (c)–(e).
85. As the distribution to Benita has resulted in the ending of taxable activity carried on by the Trust, paragraph (c) applies and therefore the value of the distribution will not count towards the \$60,000 registration threshold.

## References

### Related rulings/statements

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

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

QWBA: "Sale of Land was part of taxable activity" *Tax Information Bulletin* Vol 5, No 5 (October 1993):8

### Subject references

Associated persons, associated supply, bare trust, beneficiaries, consideration, distribution, GST, supply, taxable activity, taxable supply, trustees, trusts, unincorporated body

### Legislative references

Goods and Services Tax Act 1985 – ss 2, 2A, 5, 6, 8, 9, 10, 11, 11A, 11AB, 11B, 14, 16, 24, 51, 52, 53, 57, 60

### Case references

*C & E v Oliver* [1980] 1 All ER 353 (QB)

*CIR v Campbell Investments & Anor* (2004) 21 NZTC 18,559 (HC)

*CIR v Dormer & Anor* (1997) 18 NZTC 13,466 (HC)

*Case K55* (1988) 10 NZTC 453

*Case M129* (1990) 12 NZTC 2,839

*Case N43* (1991) 13 NZTC 3,361

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*Case R1* (1994) 16 NZTC 6,001

*Case U37* (2000) 19 NZTC 9,353

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*Databank Systems Ltd v CIR* (1987) 9 NZTC 6,213 (HC)

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*Newman v CIR* (1995) 17 NZTC 12,097 (CA)

*Public Trustee v Henderson & Pollard Ltd* [1956] NZLR 180 (Compensation Court)

*The Trustee, Executors and Agency Company New Zealand Ltd v CIR* (1997) 18 NZTC 13,076

*Union Corporate Services Ltd v CIR* (1997) 18 NZTC 13,151

### Other references

*The Laws of New Zealand: Trusts* online ed, LexisNexis NZ Limited [120]

## Appendix – Legislation

### 1. Section 2 definition of “associated supply”

**associated supply** means—

- (a) a supply for which the supplier and recipient are associated persons:
- (b) a supply of a right, under an equity security or participatory security, to receive for no consideration, or consideration at other than the open market value, a supply of goods and services that is—
  - (i) not an exempt supply; and
  - (ii) not a supply relating to the control of the issuer of the equity security or participatory security

### 2. Section 2 definition of “unincorporated body”:

**unincorporated body** means an unincorporated body of persons, including a partnership, a joint venture, and the trustees of a trust

### 3. Section 2A provides:

#### **2A(1) [Associated persons defined]**

In this Act, **associated persons** or persons associated with each other are—

- (a) two companies if a group of persons—
  - (i) has voting interests in each of those companies of 50% or more when added together; or
  - (ii) has market value interests in each of those companies of 50% or more when added together and a market value circumstance exists in respect of either company; or
  - (iii) has control of each of those companies by any other means whatsoever:
- (b) a company and a person other than a company if the person has—
  - (i) a voting interest in the company of 25% or more; or
  - (ii) a market value interest in the company of 25% or more and a market value circumstance exists in respect of the company:
- (bb) a person, or a branch or division of the person that is treated as a separate person under section 56B, and another branch or division of the person that is treated as a separate person under section 56B:
- (c) two persons who are—
  - (i) connected by blood relationship:
  - (ii) connected by marriage, civil union or de facto relationship:
  - (iii) connected by adoption:
  - (iv) (*repealed*)
- (cb) a trustee of a trust and another person (person A), if—
  - (i) person A is associated with another person (the relative) under paragraph (c); and
  - (ii) the relative is associated with the trustee under paragraph (f):
- (d) a partnership and a partner in the partnership:
- (e) a partnership and a person if the person is associated with a partner in the partnership:
- (f) a trustee of a trust and a person who has benefited or is eligible to benefit under the trust, except if, in relation to a supply of goods and services,—

- (i) the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes and the supply is made in carrying out these purposes; or
- (ii) the person is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes and the supply enables them to carry out these purposes:
- (g) a trustee of a trust and a settlor of the trust, except if the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic or cultural purposes:
- (h) a trustee of a trust and a trustee of another trust if the same person is a settlor of both trusts, except if, in relation to a supply of goods and services,—
  - (i) either trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes; and
  - (ii) the supply is made in, or enables, the carrying out of the charitable, benevolent, philanthropic, or cultural purposes:
    - (i) a person (person A) and another person (person B) if—
      - (i) person B is associated with a third person (person C) under any one of paragraphs (a) to (h); and
      - (ii) person C is associated with person A under any one of paragraphs (a) to (h).

4. Section 51 provides:

**51 Persons making supplies in course of taxable activity to be registered**

- (1) Subject to this Act, every person who, on or after 1 October 1986, carries on any taxable activity and is not registered, becomes liable to be registered—
  - (a) at the end of any month where the total value of supplies made in New Zealand in that month and the 11 months immediately preceding that month in the course of carrying on all taxable activities has exceeded \$60,000 (or such larger amount as the Governor-General may, from time to time, by Order in Council declare):
 

provided that a person does not become liable to be registered by virtue of this paragraph where the Commissioner is satisfied that the value of those supplies in the period of 12 months beginning on the day after the last day of the period referred to in the said paragraph will not exceed that amount:
  - (b) at the commencement of any month where there are reasonable grounds for believing that the total value of the supplies to be made in New Zealand in that month and the 11 months immediately following that month will exceed the amount specified in paragraph (a):
 

provided that any such person shall not become liable where the Commissioner is satisfied that that value will exceed that amount in that period solely as a consequence of—

    - (c) any ending of, including a premature ending of, or any substantial and permanent reduction in the size or scale of, any taxable activity carried on by that person; or
    - (d) the replacement of any plant or other capital asset used in any taxable activity carried on by that person; or
    - (e) the supply, to persons who are non-residents but are physically present in New Zealand, of telecommunications services that are treated as being supplied in New Zealand under sections 8(6) and 8A.
- (1B) For the purposes of determining under subsection (1) the liability of a unit title body corporate to be registered, the value of a supply of a service made by the body corporate to a member is not included in the total value of supplies made in New Zealand by the body corporate.
- (1C) For the purposes of subsection (1), if the person is a non-resident supplier of remote services to which section 8(3)(c) applies, then in determining whether the person is liable to be registered, the person may use a fair and reasonable method of converting foreign currency amounts into New Zealand currency amounts.



- (2) Every person who, by virtue of subsection (1), becomes liable to be registered shall apply to the Commissioner in the prescribed form for registration under this Act, within 21 days of becoming so liable, and provide the Commissioner with such further particulars as the Commissioner may require for the purpose of registering that person.
- (3) Notwithstanding subsections (1) and (2), every person who satisfies the Commissioner that, on or after 1 October 1986,—
  - (a) that person is carrying on any taxable activity; or
  - (b) that person intends to carry on any taxable activity from a specified date,—
 may apply to the Commissioner in the prescribed form for registration under this Act, and provide the Commissioner with such further particulars as the Commissioner may require for the purpose of registering that person.
- (4) Where any person has—
  - (a) made application for registration pursuant to subsection (2), (3), or section 54B, and the Commissioner is satisfied that that person is eligible to be registered under this Act, that person shall be a registered person for the purposes of this Act with effect from such date as the Commissioner may determine; or
  - (b) not made application for registration pursuant to subsection (2), and the Commissioner is satisfied that that person is liable to be registered under this Act, that person shall be a registered person for the purposes of this Act with effect from the date on which that person first became liable to be registered under this Act:
 

provided that the Commissioner may, having regard to the circumstances of the case, determine that person to be a registered person from such later date as the Commissioner considers equitable.
- (5) Notwithstanding anything in this Act, where any taxable activity is carried on by any non-profit body in branches or divisions, that non-profit body may apply to the Commissioner for any such branch or division to be a separate person for the purposes of this section, and if each such branch or division maintains an independent system of accounting and can be separately identified by reference to the nature of the activities carried on or the location of that branch or division, each such branch or division shall be deemed to be a separate person, and not a part of the non-profit body, and, where any such branch or division is a separate person pursuant to this subsection, any taxable activity carried on by that branch or division shall, to that extent, be deemed not to be carried on by the non-profit body first mentioned in this subsection.
- (5B) A unit title body corporate that is registered under this Act as a result of an application under subsection (3) made on a date (the **application date**) on or after the date of introduction of the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill must be registered with effect from a date after the application date.
- (6) The provisions of this Act relating to the determination of the value of any supply of goods and services shall apply for the purposes of this section, with the modification that no regard shall be had to any tax charged in respect of any such supply.
- (7) An application for registration under this Act purporting to be made by or on behalf of any person shall for all purposes be deemed to have been made by that person or by that person's authority, as the case may be, unless the contrary is proved.

5. Section 52 provides:

**52 Cancellation of registration**

- (1) Subject to this Act, every registered person who carries on any taxable activity shall cease to be liable to be registered where at any time the Commissioner is satisfied that the value of that person's taxable supplies in the period of 12 months then beginning will be not more than the amount specified for the purposes of section 51(1).
- (2) Every person who, by virtue of subsection (1), ceases to be liable to be registered may request the Commissioner to cancel that person's registration, and if the

Commissioner is at any time satisfied, as mentioned in subsection (1), the Commissioner shall cancel that person's registration with effect from the last day of the taxable period during which the Commissioner was so satisfied, or from such other date as may be determined by the Commissioner, and shall notify that person of the date on which the cancellation of the registration takes effect.

- (3) Every registered person who ceases to carry on all taxable activities shall inform the Commissioner of that fact within 21 days of the date of cessation and the Commissioner shall cancel the registration of any such person with effect from the last day of the taxable period during which all such taxable activities ceased, or from such other date as may be determined by the Commissioner:

provided that the Commissioner shall not at any time cancel the registration of any such registered person if there are reasonable grounds for believing that the registered person will carry on any taxable activity at any time within 12 months from that date of cessation.

- (4) Any information provided by a registered person to the Commissioner under subsection (3) must include the date on which the person ceased to carry on all taxable activities and whether or not the person intends to carry on any taxable activity within 12 months from that date.
- (5) Where the Commissioner is satisfied that a registered person is not carrying on a taxable activity the Commissioner may cancel that person's registration with effect from the last day of the taxable period during which the Commissioner was so satisfied, or from such other date as may be determined by the Commissioner, and shall notify that person of the date on which the cancellation of the registration takes effect.
- (5A) Any date determined by the Commissioner for the cancellation of registration under subsection (5) may be retrospective to a date not earlier than—
- (a) the last day of the taxable period during which taxable activity by the person ceased; or
  - (b) the date on which the person was registered under this Act, if the Commissioner is satisfied that the person did not, from that date, carry on any taxable activity.
- (6) [Repealed]
- (7) In subsections (5) and (5A), for a non-resident person who is not registered under section 54B, a taxable activity means a taxable activity carried on in New Zealand.
- (8) If a unit title body corporate is a registered person on the date of introduction of the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill and the registration is later cancelled after an application under subsection (2), the cancellation must take effect on or after the date on which the unit title body corporate applies for cancellation of the registration.
- (9) If a unit title body corporate is registered under this Act with effect from a date (the **registration date**) after the date of introduction of the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill and the registration is later cancelled after an application under subsection (2), the cancellation must take effect on or after the later of—
- (a) the date on which the unit title body corporate applies for cancellation of the registration;
  - (b) the day that is 4 years after the registration date.

6. Section 57(2) provides:

**57 Unincorporated bodies**

- (1) [Repealed]
- (2) Where an unincorporated body that carries on any taxable activity is registered pursuant to this Act,—
- (a) the members of that body shall not themselves be registered or liable to be registered under this Act in relation to the carrying on of that taxable activity; and

- (b) any supply of goods and services made in the course of carrying on that taxable activity shall be deemed for the purposes of this Act to be supplied by that body, and shall be deemed not to be made by any member of that body; and
- (c) any supply of goods and services to, or acquisition of goods by, any member of that body acting in the capacity as a member of that body and in the course of carrying on that taxable activity, not being a supply to which paragraph (b) applies, shall be deemed for the purposes of this Act to be supplied to or acquired by that body, and shall be deemed not to be supplied to or acquired by that member; and
- (d) that registration shall be in the name of the body, or where that body is the trustees of a trust, in the name of the trust; and
- (e) subject to subsections (3) to (3B), any change of members of that body shall have no effect for the purposes of this Act.