

INTERPRETATION STATEMENT: IS 18/07

GOODS AND SERVICES TAX – ZERO-RATING OF SERVICES RELATED TO LAND

All legislative references are to the Goods and Services Tax Act 1985 (GSTA) 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 concerns 1 April 2017 amendments to the GSTA. The amendments relate to the circumstances in which services related to land can be zero-rated under s 11A(1)(e) and (k).

Summary

2. Section 11A(1)(e) and (k) sets out circumstances in which land-related services can be zero-rated. As amended, s 11A(1)(k) provides that services supplied to non-residents who are outside New Zealand at the time the services are performed are eligible for zero-rating if they are not:
 - (a) directly in connection with land in New Zealand; or
 - (b) in connection with land in New Zealand and intended to enable or assist a change in the physical condition, ownership or other legal status of that land.
3. A corresponding rule in s 11A(1)(e) applies for services supplied in relation to land outside New Zealand.
4. **This item sets out the Commissioner's interpretation of these provisions.**

Introduction

5. Before 1 April 2017, s 11A(1)(e) and (k) provided that services related to land could be zero-rated in two situations. These services could be zero-rated where:
 - (a) **"the services are supplied directly in connection with land situated outside New Zealand or any improvement to the land"; or**
 - (b) the services are supplied to a non-resident who is outside New Zealand at the **time the services are performed and where the services are not "supplied directly in connection with ... land situated in New Zealand or any improvement to the land".**
6. Therefore, before 1 April 2017, the provisions asked whether the supply of services **was "directly in connection" with land. The supply was zero-rated only if the services were:**
 - (a) directly in connection with land outside New Zealand (para (e)); or
 - (b) not directly in connection with land in New Zealand and the recipient of the services was a non-resident and outside New Zealand at the time the services were performed (para (k)).
7. Section 11A(1)(e) and (k) was amended by the Taxation (Annual Rates for 2016–17, Closely Held Companies, and Remedial Matters) Act 2017 with effect from 1 April 2017. This Act added a new test that broadened the variety of services zero-rated by para (e) and excluded from zero-rating by para (k). In each case, the relevant services now also include services that are:

supplied in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement.
8. In other words, the provisions are no longer **limited to services supplied "directly in connection" with land. Instead, services "in connection with land" are either**

included as zero-rated under para (e) or excluded from being zero-rated under para (k) if the services “are intended to enable or assist a change in the physical condition, or ownership or other legal status” of the land.

9. The commentary on the Taxation (Annual Rates for 2016-17, Closely Held Companies, and Remedial Matters) Bill summarised the background to the changes (at p 72):

New Zealand’s GST system is based on the destination principle, under which supplies of goods and services are taxed in the jurisdiction where the goods and services are consumed. This means services supplied to non-residents who are outside New Zealand will generally be zero-rated, as the services will be regarded as consumed overseas.

An exception is when the service supplied is so closely connected with land that the location of the land is the most appropriate place of taxation. Services supplied to non-residents who are outside New Zealand are not zero-rated when the services are directly in connection with land situated in New Zealand. Similarly, services that are supplied directly in connection with land situated outside New Zealand will be zero-rated (charged with GST at 0%).

10. This item discusses phrases used in s 11A(1)(e) and (k) both before those provisions were amended on 1 April 2017 (the prior provisions) and after (the amended provisions).

Analysis

11. The amended provisions are as follows:

11A Zero-rating of services

- (1) A supply of services that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:

...

- (e) the services are supplied directly in connection with land situated outside New Zealand, or with an improvement to such land, or are supplied in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement; or

...

- (k) subject to subsection (2), the services are supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed, not being services which are—

- (i) supplied directly in connection with land situated in New Zealand, or with an improvement to such land, or are supplied in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement; or

...

12. Common terms and phrases are used in both paras (e) and (k) of s 11A(1). Much of the analysis that follows, therefore, applies to both provisions. However, the issues that arise under s 11A(1)(e) are essentially covered by the discussion of s 11A(1)(k). Therefore, the analysis focuses on para (k) and notes how any conclusions apply to para (e).

13. The analysis and examples in this item are structured in the following way:

- (a) The item first discusses **the meaning of “non-resident” and the situations in which a non-resident will be regarded as “outside New Zealand at the time**

the services are performed". These two preliminary elements are required by s 11A(1)(k) for that provision to apply.

- (b) The item then considers **the types of interests that are "land" in the** amended provisions. The item discusses this because services will be subject to the amended provisions only if they are directly in connection with land or in connection with land and intended to enable or assist certain changes to "land".
- (c) The item then considers whether the services can be regarded as **"directly in connection" with land**. This test from the prior provisions is retained in the amended provisions.
- (d) For services that do not meet the **"directly in connection" with land** test, the item goes on to consider the application of the remainder of the amended provisions. This discussion covers:
 - (i) whether services are "in connection with" land, as that test is the starting point for the application of the amended provisions;
 - (ii) whether services enable or assist a relevant change to land and the types of services and the types of changes to land that are covered by the amended provisions;
 - (iii) the circumstances in which services can be regarded as having been **"intended" to enable or assist such changes**.
- (e) Finally, the item briefly discusses ss 22 and 54B. Section 22 allows for input tax deductions to be claimed for pre-incorporation expenses. Section 54B allows some non-residents to register and claim input tax deductions for GST paid. Both ss 22 and 54B may provide input tax deductions where services are standard-rated under the amended provisions.

Section 11A(1)(k) – are **the services supplied to a "non-resident"** who is **"outside New Zealand at the time the services are performed"**?

"Non-resident"

- 14. For services to be zero-rated under s 11A(1)(k), they must be supplied to a person **who is "non-resident"**.
- 15. The term non-resident is defined in s 2 to mean **"a person to the extent that the person is not resident in New Zealand"**. Section 2 defines **"resident" to mean** resident in accordance with the income tax residency test in ss YD 1 and YD 2 (excluding s YD 2(2)) of the Income Tax Act 2007 (see the appendix). For individuals, the test depends on being present in New Zealand for a certain number of days or having a permanent place of abode in New Zealand. For companies, the test depends on **the company's place of incorporation, head office, centre of management and director control**. For more information on "residence" under the Income Tax Act 2007, see "IS 16/03: Tax residence", *Tax Information Bulletin* Vol 28, No 10 (October 2016): 2.
- 16. However, there are three modifications to the income tax residency tests. These modifications are in paras (a) to (c) of the definition of resident in the GSTA.
- 17. Paragraphs (b) and (c) of the definition relate to unincorporated bodies and the effect of the day count tests in the income tax residency tests. Paragraph (a) is particularly relevant in the context of supplies of land-related services. It provides that for GST purposes:

...a person shall be deemed to be resident in New Zealand to the extent that that person carries on, in New Zealand, any taxable activity or any other activity, while having any fixed or permanent place in New Zealand relating to that taxable activity or other activity...

Taxable activity or other activity

18. For para (a) of the definition of resident to apply, the person must carry on a **"taxable activity or other activity"**. The **person's** taxable activity or other activity must also be carried on in New Zealand while the person has a **"fixed or permanent place" in New Zealand** relating to that taxable activity or other activity.
19. **The term "taxable activity" is defined in s 6.** The definition refers to an activity that is carried on continuously or regularly involving or intending to involve the making of taxable supplies. Notably, however, s 6(3) excludes certain activities from being taxable activities. Examples of excluded activities are activities that involve making exempt supplies (s 6(3)(d)) and hobbies (s 6(3)(a) and (aa)).
20. Paragraph (a) in the definition of **"resident"** also includes **"other" activities** in its scope. The terms **"activity" and "other activity"** are not defined in the GSTA.
21. **The word "activity" is very broad. It may refer to "a course of conduct or series of acts which a person has chosen to undertake or become engaged in":** *Newman v CIR* (1994) 16 NZTC 11,229 (HC). Similarly, the Court of Appeal in *CIR v Bayly* (1998) 18 NZTC 14,073 said (at 14,078):

In its standard dictionary usage, "activity" is "the state of being active; the exertion of energy, action" (*Oxford English Dictionary*). In the context of ss 6 and 8 [of the GSTA] it points to the combination of tasks undertaken, or course of conduct pursued by the registered person and whether or not it amounted to a business, trade or profession in the ordinary sense.
22. Both *Newman* and *Bayly* discuss **the meaning of "activity" in the context of the s 6 definition of "taxable activity"**. The Commissioner's view is that **"activity" in "other activity" will bear the same meaning.**
23. **The inclusion of "other activity" in para (a) in addition to "taxable activity" was intended to expand the variety of activities that could result in residency under the GSTA.** The legislative history confirms that **"other activity" was included in para (a) to ensure supplies do not qualify for zero-rating where those supplies are made to non-residents whose activities involve the making of exempt supplies in New Zealand.** An example is supplies made to a financial institution that is non-resident for income tax purposes (and thus may be non-resident for GST purposes but for the inclusion of para (a)).
24. However, the Commissioner's view is that **"other activity" is not limited to activities that involve the making of exempt supplies.** **The word "other" implies that Parliament intended that a wide variety of activities would be covered by para (a).**

Fixed or permanent place

25. For para (a) in the definition of **"resident"** to apply, a person must also have a **"fixed or permanent place" in New Zealand.** The expression **"fixed or permanent place" is not defined in the GSTA.**
26. In the context of the provision, **it is the place that must be "fixed" or "permanent"**. The ordinary meaning of the word **"place" indicates a physical location or a link to a particular geographical point.**

27. The ordinary meaning of the words **"fixed"** and **"permanent"** indicates that the physical location must be lasting, unchanging and not temporary. An element of permanence is necessary, so a transient activity will not meet the test. However, ownership of the physical location is not necessary. Having a fixed or permanent place merely requires the person to have that place permanently at their disposal or be able to use that place on a permanent basis.
28. In the context of a supply of land-related services, it is necessary to consider whether the recipient has a **"fixed or permanent place"** and, therefore, whether the recipient might be a resident for GST purposes, at the time the services are supplied.
29. The Commissioner notes that a similar concept of **"fixed establishment"** is used in the Income Tax Act 2007, and the phrase **"permanent establishment"** is used in New Zealand's double tax treaties. Case law has discussed the meanings of these phrases, and the concepts likely overlap with the concept of a **"fixed or permanent place"**.
30. However, the Commissioner's view is that the **"fixed establishment"** and **"permanent establishment"** concepts are not equivalent to **"fixed or permanent place"** under the GSTA. The ordinary meaning of the word **"establishment"** is arguably a stronger term than **"place"**, so **"place"** may be wider in its scope. Also, tax treaties often define a **"permanent establishment"** to include or exclude specific types of establishments. In contrast, the GSTA definition is general in its terms.

Relating to

31. Paragraph (a) also requires the person to have a fixed or permanent place **"relating to" the taxable activity or other activity.**
32. Case law has considered the words **"relating to"** as well as the similar phrases **"in relation to"** and **"in respect of"**. The courts have said that the words **"in respect of or in relation to"** are **"words of the widest import"**: *Shell New Zealand Ltd v CIR* (1994) 16 NZTC 11,303.
33. In *New Zealand Forest Research Ltd v CIR* (1998) 18 NZTC 13,928, the High Court stated that the starting point in interpreting the meaning of **"relating to"** is to consider the ordinary and natural meaning of the phrase, in the context of the particular provision in which it is used.
34. The ordinary meaning of **"relating"** is a connection between things: *Concise Oxford English Dictionary*. This suggests that a degree of connection is required between the fixed or permanent place and the relevant activity.
35. The context of the provision does not appear to require a departure from the ordinary meaning of **"relating to"**. The provision is part of the definition of **"resident"** in the GSTA, which affects both the imposition of GST on supplies under s 8, and whether supplies can be zero-rated under the zero-rating provisions. In general, these provisions are intended to give effect to the destination principle, under which supplies of goods and services are taxed in the jurisdiction where the goods and services are consumed. Requiring a connection between a person's activity in New Zealand and a fixed or permanent place in New Zealand before they are considered resident for GST purposes (and subject to GST at the standard rate) appears to be consistent with that purpose.

Example 1: Rental property owner resident for GST purposes

James, a non-resident for income tax purposes, owns a residential rental property in Wellington that he purchased in 2015. The property has been tenanted since James purchased it, with the tenants paying a weekly rent. On purchasing the property, James engaged a property manager to take care of day-to-day matters in relation to the property and the tenancy.

James's residential rental activity is not a taxable activity under ss 6(3)(d) and 14. However, it will still be an "other activity" in terms of the s 2 definition of "resident". This is because renting out a residential property on an ongoing basis is "a course of conduct or series of acts which a person has chosen to undertake or become engaged in" (Newman). Also, the phrase "other activity" in the s 2 definition of resident was intended to capture activities that would otherwise be exempt. Further, the rental activity is carried on from a fixed or permanent place, being the rental property.

This means James is treated as being a New Zealand resident for GST purposes to the extent of his rental activity.

To the extent that

36. For GST purposes, a person is deemed to be resident in New Zealand **"to the extent that"** the person carries on, in New Zealand any taxable activity or any other activity while having any fixed or permanent place in New Zealand relating to that taxable activity or other activity.
37. **Similarly, the definition of "non-resident" in s 2 states that non-resident "means a person to the extent that the person is not resident in New Zealand" (emphasis added).**
38. **The use of the phrase "to the extent that" implies that a** single legal person can, for the purposes of the GSTA, be both resident and non-resident. In the context of supplies of services, zero-rating applies only where goods are supplied to a non-resident. This means it may be necessary for a supplier to consider the extent to which the recipient is a resident or non-resident and whether the supply of services has been made to the recipient in their resident or non-resident capacity.

Example 2: A person may be both resident and non-resident

This example follows on from example 1. James is happy with his Wellington rental property. In 2017, he decides to look into acquiring a second property, but this time in Auckland. The property is to be used as premises for a coffee roastery business. As a foreign owner of the coffee business, James plans to hire a manager and staff to run the activity in New Zealand.

James has not yet settled on a property, but thinks three industrial areas in Auckland present good buying opportunities. He phones a property valuation firm to ask it to provide him with general valuation reports in relation to the three areas.

Although James is a resident for GST purposes under para (a) of the definition of **"resident" in s 2, he is resident only "to the extent that" he carries on, in** New Zealand, a relevant activity, while having any fixed or permanent place in New Zealand relating to that activity.

Any Auckland coffee roasting activity will constitute a separate activity from **James's Wellington rental property activity. Since James has not yet acquired a** property in respect of the coffee roasting activity, he cannot be said to have a fixed or permanent place in New Zealand relating to the coffee roasting activity. Therefore, to the extent of the coffee roasting activity, James will be a non-resident for the purposes of the GSTA.

Since the valuation services supplied to James relate to his potential coffee roasting activities, those services are supplied to him in his non-resident capacity.

Whether general market valuation services can be zero-rated under s 11A(1)(k) is considered in example 18.

"Outside New Zealand at the time the services are performed"

39. Section 11A(1)(k) allows services to be zero-rated only when the non-resident recipient is **"outside New Zealand" at the time the services are performed**. However, two rules in s 11A provide that certain limited presences in New Zealand are treated as **"outside New Zealand" for the purposes** of the provision.
40. The first rule, in s 11A(3), relates to non-resident companies and unincorporated bodies. It provides that a non-resident company or unincorporated body will be treated as **"outside New Zealand" if it has:**
- (a) a minor presence in New Zealand; or
 - (b) **for presences that are more than "minor", a presence that is not "effectively connected" with the supply** (where the ordinary meaning of "effectively connected" and the legislative history suggest a presence will not be effectively connected with a supply, if the presence cannot be regarded as actually or implicitly connected with the supply).
41. The second rule, in s 11A(3B), relates to natural persons. It provides that a natural person will be treated as outside New Zealand if they have:
- (a) a minor presence in New Zealand; and
 - (b) **that minor presence is not "directly in connection with" the supply of services** ("directly in connection with" is described from [51] and has the same meaning in the context of the rule for individuals in s 11A(3B), meaning, in general, that the presence is not directly related to the supply).
42. **A person's presence in New Zealand will be "minor" if it is a presence** of short duration. Whether any given presence is minor will be a question of fact and depend on the circumstances of the particular case.

Example 3: Individual outside New Zealand

This example follows on from example 2. Unbeknownst to the valuer, James was attending a three-day origami convention in Queenstown when the valuation services were provided to him. James had arrived in Queenstown the night before the convention and flew out on the evening the convention closed.

Although James was physically present in New Zealand at the time the services were performed, s 11A(3B) treats his presence as being **"outside New Zealand"** for the purposes of s 11A(1)(k). This is because the short duration of James's trip to New Zealand means it was a **"minor presence"**, and his **"minor presence"** was not directly in connection with the supply of services by the valuer because it was unrelated to his activities.

Example 4: Company outside New Zealand

C&C Pty Ltd is an Australian company that is non-resident for GST purposes. C&C is a leading producer of chalk and cheese in Australia. C&C also has a branch in New Zealand. The New Zealand operation focuses solely on chalk sales to schools and universities. C&C has a small office in Auckland, where two chalk sales staff are employed.

With whiteboards gaining in popularity, C&C's chalk sales are declining. C&C decides to investigate the possibility of extending its cheese business into New Zealand. To do so, C&C needs to consider acquiring New Zealand land to establish a cheese manufacturing plant.

C&C does not have a particular piece of land in mind, so commissions a report from a New Zealand valuation firm to establish the general prices of vacant commercially zoned land in several suitable regions in New Zealand.

Since C&C has a permanent office in Auckland, its presence in New Zealand is **not short in duration. Therefore, C&C does not have a "minor presence" in** New Zealand. However, under s 11A(3), C&C will still be regarded as being outside New Zealand at the time the valuation services were performed. This is **because the services the valuation firm supplied are not "effectively connected" with C&C's presence in New Zealand. The services relate to C&C's possible expansion of its cheese business, but C&C's presence relates solely to its chalk sales operations.**

What is **"land" for the purposes of s 11A(1)(e) and (k)**?

43. Paragraphs (e) and (k) of s 11A(1) apply to services intended to enable or assist a **relevant change to "land" or "improvements"**.
44. **The term "land" is defined in the GSTA** only for the purposes of the compulsory zero-rating (CZR) of land rules. The Commissioner considers that in the context of s 11A(1)(e) and (k), **"land" has a wide meaning and includes both physical land and legal and equitable estates in land.**
45. However, **the reference to "land" does not include a shareholder's interest in a land-owning company.** This is because a **land-owning company's shareholders** have no interest, legal or equitable, in the land owned by the company (*R v McCurdy* [1983] NZLR 551 (CA)). Therefore, services that are intended to enable or assist a change in the ownership of a **land-owning company's shares will not be** regarded as enabling or assisting a change in the ownership of "land".
46. For completeness, the Commissioner notes that **"land" does not include a licence to occupy land or other purely contractual right relating to land.** However, even **though such a contractual right itself may not be "land", it may still be able to be described as "directly in connection with" land** – see para [69] below.
47. **The term "improvement" is not defined in the GSTA.** Based on case law, improvements to land include any work or operations done to land that enhance the value of that land (*Case L43* (1989) 11 NZTC 1,262; *Morrison v Federal Commissioner of Land Tax* (1914) 17 CLR 498 (HCA)).
48. Work done to a building may be improvements to land to the extent that it involves adding fixtures or making structural changes to the building. This is because, legally, a building and its fixtures are considered part of the land to which they are attached. This long-standing principle of land law is summarised in *Hinde, McMorland & Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis, Wellington, accessed 3 August 2018) at [6.036]:

whatever is affixed to the soil, belongs to the soil. Thus buildings erected on land and items permanently attached to the buildings become fixtures and a part of the land itself.

Are the services “directly in connection with” land?

49. Under the prior provisions, services related to land could be zero-rated where the services were supplied:
- (a) “directly in connection with” land or improvements situated outside New Zealand; or
 - (b) to a non-resident who was outside New Zealand at the time the services were performed and where the services were not supplied “directly in connection with” land or improvements in New Zealand.
50. Under the prior provisions, a critical question was whether the services were “directly in connection with” land. **That test has been retained in the amended provisions.** Therefore, a supplier will still need to consider whether the services **meet the “directly in connection with” test** to determine whether the supply is zero-rated.

How the courts have interpreted “directly in connection with” land

51. Several cases discuss the phrase “directly in connection with” in the GST context. In particular, the phrase was considered in *Wilson & Horton Ltd v CIR* (1994) 16 NZTC 11,221 (HC), appealed as *Wilson & Horton Ltd v CIR* (1995) 17 NZTC 12,325 (CA), *Case S88* (1996) 17 NZTC 7,551 appealed as *CIR v Suzuki NZ Ltd* (2000) 19 NZTC 15,819 (HC) and *CIR v Suzuki NZ Ltd* (2001) 20 NZTC 17,096 (CA)), and *Malololailai Interval Holidays NZ Ltd v CIR* (1997) 18 NZTC 13,137 (HC). These cases illustrate how the phrase is to be interpreted in the context of s 11A(1)(k)(i).
52. In *Wilson & Horton* (HC), the issue was whether the supply of advertising space in a newspaper was “directly in connection with” the goods advertised. In the High Court, Hillyer J considered that the goods that were the subject of the advertising were not “directly in connection with” land or moveable personal property situated in New Zealand. Hillyer J said (at 11,224):
- The supply of space and the services rendered by Wilson & Horton are directly connected with the advertising but not with the goods advertised. The goods are, as it were, at least one step removed from the services supplied by the newspaper proprietor. [Emphasis added]
53. Hillyer J noted an example where services would and would not be directly in connection with goods (at 11,224):
- One example given by counsel was the painting of a vessel. That service would be directly in connection with the vessel, but services rendered to the passengers and crew of a vessel would not be rendered directly in connection with the vessel.
54. *Wilson & Horton* was appealed to the Court of Appeal. **On appeal, the High Court’s conclusion that the services were not directly in connection with the advertised goods was accepted by both parties as correct.** That **aspect of the High Court’s judgment** was not addressed by the Court of Appeal.
55. The legislation was amended to overturn the result in *Wilson & Horton*. **The amendment was based on the Court of Appeal’s interpretation of the phrase “for and to”, which was previously contained in s 11(2)(e) (now s 11A(1)(k)).** However, **the phrase “directly in connection with” was retained in the provision.** This

arguably **suggests that the “one step removed” test applied by the High Court in *Wilson & Horton* reflects the intention of the legislation.**

56. Before **the Court of Appeal’s decision in *Wilson & Horton***, a series of cases had commenced relating to the zero-rating of services supplied under certain vehicle warranty contracts: *Case S88* and *CIR v Suzuki NZ Ltd* (HC) and (CA) (collectively, the *Suzuki* cases).
57. In the *Suzuki* cases, a non-resident manufacturer (SMC), from whom an importer (SNZ) purchased vehicles, provided a service warranty to SNZ under which it agreed to reimburse SNZ for certain repairs. SNZ on-sold the vehicles to a dealer, which in turn sold the vehicles to the public. The warranty given by SNZ was wider than the warranty SNZ received from SMC. **If SNZ was required to reimburse the dealer for the cost of repairs covered by SNZ’s warranty and the particular repairs were also within SMC’s warranty, SNZ would claim reimbursement from SMC.**
58. In each of the *Suzuki* cases, the Commissioner argued, and the court agreed, that SNZ supplied vehicle repair services to SMC in return for the reimbursement payment. The issue was, therefore, whether the payment SNZ received from SMC was for services supplied **“directly in connection with ... moveable personal property”** (that is, the vehicles) in New Zealand.
59. On that issue, in *Case S88* Judge Barber said (at 7,558):

There is a direct relationship or connection between the service of the repairs and the vehicle. **Accordingly, the said “proviso” to s 11(2)(e)** [relating to services directly in connection with moveable personal property in New Zealand] must apply to the facts of this case and prevent the objectors from relying on the zero-rating provisions of the s 11(2)(e). The repair service could not be performed but for the existence of the vehicle. The repairs were carried out for the objector (and others) which was carrying them out for MC (and others). The objector was not merely arranging for the repairs to be carried out, but was responsible under warranty to make the repairs — as was MC. That activity, or supply, meets the statutory nexus between goods and the service. The service is the actual repair of vehicles even though that work was performed by a contractor — usually the dealer.
60. *Case S88* was appealed to the High Court, where McGechan J said (at 15,830):

I have no doubt that repair services were carried out directly in connection with moveable personal property situated in New Zealand at the time the services were performed. Quite simply, they were repairs carried out on cars within New Zealand. **The situation equates to “painting the ship”.** The nexus could not be closer.
61. And on appeal to the Court of Appeal, Blanchard J said (at 17,103):

The repair services were obviously supplied in relation to goods, namely motor vehicles, which were situated in New Zealand. The supply of repairs could hardly be more directly connected with the motor vehicles.
62. *Malololailai Interval Holidays* involved a Fijian timeshare operation in which New Zealand purchasers bought a one-week per year licence to occupy an accommodation unit at a Fijian resort. The resort land was owned by an individual, but under a series of leases was leased to a Vanuatu company, referred to as MIH(V). A New **Zealand company, MIH(NZ), acted as MIH(V)’s agent and entered** into the timeshare agreements with purchasers. MIH(NZ) had made an agreement with another New Zealand company, AHL, under which AHL marketed the timeshares to purchasers. AHL was essentially responsible for concluding the timeshare agreements on behalf of MIH(NZ), including determining the sale price.

63. The issue was whether **AHL's marketing services were "directly in connection with land" outside New Zealand**. If so, the services would be zero-rated under s 11(2)(b) (now s 11A(1)(e)).

64. Neazor J approached the issue by considering the transactions or supplies, and cited the Court of Appeal judgment in *Wilson & Horton* where Richardson J had said (at 13,146):

[Section 8(1), the definitions of 'taxable activity' in s 6(1)(a) and of 'supplier' and 'recipient' in s 2 and ss 9(1) and 10(2)] are directed to the contractual arrangements between the supplier and the recipient of the supply. In keeping with the general statutory scheme in that respect s 11, providing for zero rating of supply transactions where the stated overseas element is present, follows that same pattern. It follows that where, as in the presently material s 11(2)(e), **the provision refers to 'services ... supplied ... to a person'** the statutory dictionary applies and the phrase refers to the contractual position and so to the person who has provided the consideration. [Emphasis added]

65. Neazor J went on to say (at 13,146):

I would regard the contractual transaction between MIH(NZ) and the **purchaser of an interval holiday as within the descriptive words "directly in connection with land or any improvement thereto"**, although that determination is not essential to this decision, but when attention is paid to the services supplied by AHL to MIH(NZ) [I] consider that those services are not within the statutory description. What AHL does is to advertise and promote interval holidays for MIH(NZ) and negotiate the contract for individual holidays (including the consideration for that contract between the purchaser and MIH(NZ)) up to the point where the contract is effected between those two parties.

The services provided by AHL are not directly in connection with the land or the improvements. The transaction of those considered which would be in that category is the transaction between MIH(NZ) and the purchaser. The transaction between AHL and MIH(NZ) is one which brings about the transaction which has direct effect, but in my view is of a kind to which Hillyer J's words may properly be applied — it is one step removed from the direct transaction.

If one of the analogies referred to needs to be chosen I would take that of the publication of advertisements in the *Wilson & Horton* case. The newspaper **proprietor's services facilitated or opened the way to the transactions between vendor and purchaser**, and that in my view is what [the marketing company AHL] did, although it was more closely involved in the transaction to which the statutory words apply than the publisher of an advertisement would be. Nevertheless the transaction having direct effect was not that of the publisher, or in this case of the sales agent. [Emphasis added]

66. Neazor J considered that the transaction between MIH(NZ) and the purchaser of an interval holiday was **"directly in connection with" land outside New Zealand**. However, he said that the marketing services supplied by AHL (although essential to bring together MIH(NZ) and the purchaser and closely related to the sale and purchase transaction) **were not "directly in connection with" the land**. This was **because the marketing services transaction did not have a "direct effect" on land in the same way that the transaction between MIH(NZ) and the purchaser did**.

67. *Malololailai* also confirms that the recipient of a service need not acquire a legal interest in land before the service can be **"directly in connection with" the land**. Neazor J commented (at 13,143):

It is not in my view necessary to consider the first point of [the] argument further than that, because the issue is not whether the purchaser acquires land or an interest in land, but whether the services provided by the marketer on behalf of the **objector are "directly in connection with land", which may involve much less than acquiring an interest in the land**. By way of example, the provision of gardening services would surely come within the statutory words.

68. For completeness, **the phrase "directly in connection with" was also** considered in *Auckland Regional Authority v CIR* (1994) 16 NZTC 11,080 (HC) and *Case T54* (1998) 18 NZTC 8,410. However, those decisions are not directly on point in the context of services related to land.

Directly in connection: summary of principles

69. The courts have generally interpreted **the phrase "directly in connection with"** narrowly. The following principles are derived from cases in relation to whether a service is directly in connection with property:
- (a) **The inclusion of the word "directly" in s 11A(1)(k) indicates that a close connection is required before a service is "directly in connection with" land** (*Malololailai*).
 - (b) Services may bring about or facilitate a transaction that has direct effect but, **they are not services that are "directly in connection with" land** or an improvement to such land if they are one step removed from the transaction that has direct effect (*Malololailai, Wilson & Horton*).
 - (c) Services that involve a direct physical effect on land, such as repairs or gardening, will almost certainly be supplied directly in connection with land (*Malololailai, Wilson & Horton*).
 - (d) Where a supply of services does not involve a direct physical effect on land, the courts may consider whether the supply of services has a direct legal effect on land. If the supply of services has a direct legal effect on land, such as a licence to occupy, the supply is likely to be directly in connection with land (*Malololailai*).
 - (e) The recipient does not need to own, be entitled to use or have possession of the particular property for services to be directly in connection with that property (*Suzuki*).
 - (f) It is not necessary that the supplier carries out the services personally for the supply to be directly in connection with land. It is possible for the supplier to act through an agent as happened in the *Suzuki* cases where it was the dealers that physically carried out the repairs.
 - (g) Given the cases suggest that the test is one of fact and degree, a person does not physically need to go onto the land for their services to be directly in connection with land. Equally, the fact that a person does physically go onto the land while providing their services does not necessarily mean that those services will be directly in connection with land.
70. The examples from para [133] show how some of these principles will apply in practice.

Are the services "in connection with" land?

71. The new test expands the scope of the services covered to include services that are **not only "directly in connection with" land, but are also "in connection with" land** and of a certain nature (discussed further from [78]).
72. In *Case E84* (1982) 5 NZTC 59,441 at 59,446, Judge Bathgate discussed the **meaning of the phrase "in connection with" in the context of the Income Tax Act 1976:**

It is a matter of degree whether, on the interpretation of a particular statute, there is **a sufficient relationship between subject and object to come within the words "in**

connection with" or not. It is clear that no hard and fast rule can be or should **be applied to the interpretation of the words "in connection with"**. Each case depends on its own facts and the particular statute under consideration.

...

Its proper interpretation depends on the context in which the phrase is used. It may mean **"substantial relation in a practical business sense"**, or it may have a far more restricted meaning, depending on its context ... [Emphasis added]

73. Judge Bathgate considered that it is a question of fact and degree and impression whether a sufficient relationship **exists between two things for them to be "in connection with" each other**. He held that the evaluation of whether two things are **"in connection with" each other requires a common sense assessment of the factual situation**.
74. In *Malololailai*, Neazor J referred to *Case E84* and said (at 13,144):
- A good deal of the debate in that case about whether a narrow or wide interpretation of the statutory phrase was appropriate might have been seen as unnecessary if the **word "directly" had been used, as it is in s 11 of the Goods and Services Tax Act 1985**.
75. These comments highlight **the difference in meaning between "directly in connection with" and "in connection with"**. The word **"directly"** in s 11 is intended to **narrow the scope of what might be considered to be "in connection with" the land** and *Malololailai* confirms that the relevant services must have a direct physical or legal effect on the land.
76. In the context of s 11A(1)(e) and (k), the discussion at [51] to [69] notes that services that do not have a direct physical or legal effect on land are unlikely to be **"directly in connection with" that land**. But given the new test does not require a **"direct" connection**, a much wider variety of services will fall within the amended provisions. For instance, services that have only an indirect physical or legal effect – perhaps because they only facilitate a transaction that has a direct effect on land – are now captured.
77. However, it is important to note that not all services that meet **the "in connection with" land test** will meet the new test. The new test also requires the services to be **"intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement"**.

Are the services intended to enable or assist a relevant change to land?

"Change" generally

78. For the new test **to apply, services must be intended to enable or assist a "change" to land that is of a relevant type**. The relevant types of changes covered by the new test are changes in the physical condition, ownership or other legal status of the land.
79. **The word "change" is not defined in the GSTA. The ordinary meaning of the word "change", in its noun form, is defined in the *Oxford English Dictionary* (online ed, accessed 3 August 2018):**
- An act or process through which something becomes different.
80. In the context of the new test, the ordinary meaning, therefore, suggests that a **"change" will involve an "act or process" where the physical condition, ownership or other legal status of the land "becomes different"**. As explained at paras [109] to

[119], a “change” of this sort only needs to be intended by the recipient, even if it does not result.

81. In some instances, services might relate to a specific piece of land in New Zealand, but might not be capable of being described as being intended to cause the physical condition, ownership or **other legal status to “change”** in the way described above. **The Commissioner’s view is that these** services will not be covered by the new test.

Example 5: Inherited land

Poppy, who lives in the United Kingdom and is not a New Zealand tax resident, inherits some New Zealand land from a relative. The land is a vacant lot. Following the inheritance, Poppy engages a New Zealand law firm to advise her on the legal obligations associated with owning the specific lot of inherited land in New Zealand (for example, rates and insurance) and what restrictions (if any) apply to the use or uses to which the land may be put.

The services supplied to Poppy do not relate to the change in ownership of the **land on inheritance. The law firm’s advice is about the implications of holding land unchanged, not about changing the land’s physical form, ownership or other legal status.**

Since the new test is directed at services that “change” the land in a relevant way, the services are not subject to the new wording and may be zero-rated.

A change in the physical condition of land

82. **A change in the “physical condition” of land is the first kind of change covered by the new test.**
83. Services that have a direct effect on the physical condition of land are generally captured under the **“directly in connection” test**. Two examples of such services are construction work and earthworks. Where the relevant land is New Zealand land, this means the services are standard-rated.
84. However, before the amendments, services that did not have a direct physical effect on land were not always captured, even if they, for instance, facilitated services that had a direct physical effect. The amendments provide that generally these kinds of services are now also standard-rated. Examples of typical services that enable or assist a change in the physical condition of land are:
- (a) architectural services;
 - (b) engineering;
 - (c) construction supervision.

A change in the ownership or other legal status of land

85. Another relevant change is a change in the ownership of land. The word **“ownership” is not defined in the GSTA. The *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011) defines “own”:**

Own ... v. 1 possess; have. ...

86. The ***Butterworth’s New Zealand Law Dictionary* (6th ed, LexisNexis, Wellington, 2005) defines “ownership” as:**

The right to the exclusive enjoyment of a thing. Ownership may be absolute, in which case the owner may freely use or dispose of his or her property, or restricted,

as in the case of joint ownership. Beneficial ownership is the right of enjoyment of property, as distinguished from legal ownership.

87. Therefore, **to “own” an item of property, the ordinary meaning is that a person must possess or have the exclusive enjoyment of that item of property.** Ownership can be absolute or restricted.
88. **Case law suggests that “ownership” generally refers to legal rights unless the context demands otherwise.** In *Bellinz Pty Ltd v FCT* (1998) 98 ATC 4,399 the Australian Federal Court said (at 4,411):
- Ultimately ownership consists of *rights* over property. Accordingly, unless the legal or natural meaning is displaced by the context in which the issue of ownership arises a legal or jurisprudential, rather than a commercial or popular, analysis of these rights is required. [Emphasis in original]
89. As above, **“ownership” is context specific but is likely to refer to a legal concept involving exclusive enjoyment of property.** However, the provisions do not refer to **“ownership” in isolation.** Section 11A(1)(e) and (k) uses a composite phrase **“ownership or other legal status”.**
90. **The phrases “legal status” and “other legal status” are not defined in the GSTA nor are they used in any other provision.** But in the context of the new test, the phrase used is **“ownership or other legal status”.** This implies **“ownership” is a subset of “legal status”.** It also implies that the term **“other legal status” must cover a wider variety of legal statuses than ownership.**
91. The *Oxford English Dictionary* (online edition, accessed 3 August 2018) defines the words **“legal” and “status” as:**
- legal, adj.
1 Relating to the law.
status, n.
2 The situation at a particular time during a process.
92. **Based on the ordinary meaning, the phrase “other legal status” refers to a status arising under the law.** When considering the ways in which status is granted under the law, it is useful to go back to the context of the amended provisions to see that **the phrase “ownership or other legal status” refers to “land or improvements to land”.** Therefore, the context is that the amended provisions are concerned with legal status as it relates to land and improvements.
93. The Commentary to the Taxation (Annual Rates for 2016–17, Closely Held Companies, and Remedial Matters) Bill provides some assistance in determining the meaning of **“ownership or other legal status”** (at 71):
- The inclusion of services intended to **“enable or assist a change in the ... ownership or other legal status of the land”** is expected to apply to a variety of professional services such as legal or real estate agents’ services as part of a land transaction, where the ultimate outcome is to change the legal nature of the land but the services do not involve any physical change or connection to the land.
94. That commentary states that a **“variety of professional services”** and services that **change the “legal nature” of the land are intended to be covered** by the new test.
95. **The concepts of “legal status” and “legal nature” appear to refer to interests in land that a person might have and that are recognised in law.** A limited number of interests in land give **rise to “legal statuses”.** These statuses may be created in different ways, take a variety of different forms, and arise under common law or statutory rules. For instance, the legal status of land may depend on whether the

land is subject to an interest such as a lease, a life interest, an easement or a mortgage.

96. Some interests may be able (or required) to be registered against the title to the land and some may not. As an example, a short-term lease as defined in s 207 of the Property Law Act 2007 is not able to be registered but gives rise to an interest in land (*Hinde McMorland & Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis, Wellington, accessed 3 August 2018) at [11.038]). Therefore, the ability to be registered will not be determinative of the existence of an interest in land and so a **"legal status" for the purposes of the** new test.
97. Legal interests can be contrasted with interests such as licences. A licence is generally accepted as being a personal right against the licensor (see, for instance, *Hinde McMorland & Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis, Wellington, accessed 3 August 2018) at [18.001]). It is not a right in the land that can be enforced against a third party, nor is it one that can be registered against the title. In that sense, **the Commissioner's view is that** the grant of a licence does not **change the "legal status" or "legal nature" of land.**
98. Changes in equitable interests in land can also give rise to changes in the ownership or other legal status of land. This means services that, for instance, **enable or assist the sale of an equitable interest in a property purchased "off the plans" may enable or assist a relevant change to land.**
99. Certain services relating to changes to land-owning trusts are similarly covered by the amended provisions.
100. In the context of a beneficial interest in land, the entitlements of a beneficiary stem from the terms of the trust deed and the exercise of discretions by the trustees. As a result, **the nature of a beneficiary's interest in trust property varies accordingly.**
101. Although each situation will depend on the terms of the trust deed, the **Commissioner's view is that in the context of a land-owning discretionary trust, a discretionary beneficiary is unlikely to have an interest in "land" for the purposes of** the provisions. This is because, generally, a discretionary beneficiary has no more **than a hope that the trustee's discretion will be** exercised in his or her favour (*Law of Trusts* (LexisNexis, Wellington, 2018) at [4.68], citing *Re Munro's Settlement Trusts* [1963] 1 All ER 209 (Ch)). This means services that, for instance, add or remove individual beneficiaries to or from a land-owning discretionary trust are unlikely to enable or assist a change in the ownership or other legal status of land.
102. Where the trust relationship means **a beneficiary has an interest in the trust's land,** as may be the case for a fixed trust, services that alter the interests of beneficiaries may enable or assist a change in the ownership or other legal status of land.
103. Where services involve trust deed changes that are intended to enable or assist changes in a legal interest in land, they will enable or assist a change in the ownership or other legal status of land. For instance, services that are intended to change the trustees of a land-owning trust will result in a change in the person holding a legal interest in that land. Therefore, the services are intended to enable or assist a change in the ownership or other legal status of land.
104. Where the trust deed changes do not involve any changes in **trustees' or beneficiaries' interests,** the services are unlikely to enable or assist a change in the ownership or other legal status of land. Typical services falling into this category might be changes to the administrative provisions of the deed (for instance, provisions regarding trust meetings).

105. Consequently, **the Commissioner's view is that the phrase "a change in ownership or other legal status of land" is referring to two different things:**

- (a) changes in ownership of any estate or interest in land, including legal and equitable interests; and
- (b) other changes in the legal status of any estate or interest in land, such as granting a lease, a life interest or an easement or registering a mortgage as security against the title to land, but excluding changes in personal or contractual rights such as licences.

106. The following are examples of services that enable or assist a change in the ownership or other legal status of land:

- (a) Typical services provided by a lawyer or real estate agent in a sale and purchase of real estate. This will be the case whether the sale is of a legal interest in land or an equitable interest in land (such as where the sale is of **an interest in a property that was purchased "off the plans"**).
- (b) Services involved in arranging a lease of land.
- (c) Legal services relating to transactions involving the mortgage of land.
- (d) Services provided to alter the trustees of a trust where the trust property includes land.
- (e) Services provided to alter the beneficiaries of a fixed trust where the trust property includes land.
- (f) Services provided to create, alter or remove an easement that grants certain rights **in relation to a person's land**. For example, services provided to a landowner to assist them in obtaining an easement so they can lay a drain across their **neighbour's** land.
- (g) Services that are intended to procure a change relating to land in terms of a district plan or regional plan made under the Resource Management Act 1991.
- (h) Accounting and tax services supplied as part of a land transaction where those services can be said to be intended by the recipient to enable or assist a change in the ownership or other legal status of land. This could be where:
 - (i) accounting or tax advice is required as a formal condition of the sale agreement; or,
 - (ii) the accounting or tax advice can be regarded as being intended to enable or assist a relevant change such as where the advice assists the recipient in their choice of business structure in the context of a land purchase. The specific facts will need to be considered in each case.

107. The following are examples of services that are unlikely to enable or assist a change in the ownership or other legal status of land:

- (a) Services provided to change the shareholders of a land-owning company.
- (b) Services provided to alter a **discretionary trust's** beneficiaries where the trust property includes land.
- (c) General year-end accounting and tax services, such as the preparation of accounts or tax returns for a property for a non-resident client.

- (d) Accounting and tax services supplied following the conclusion of a land transaction. For instance, where those services assist a client with making the correct accounting entries to record the past transaction in their accounting records. Or where the accounting or tax advice is advice as to how the accounting or tax rules applied to a past transaction.

*Services that **"enable or assist" a relevant change***

108. The amended provisions cover services in connection with specific land only where **the services are intended to "enable or assist" certain changes to that land. Services that "enable or assist" a relevant change will be services intended to help or make possible a relevant change.** In some cases, services may be in connection with specific land and relate to a change in the physical condition, ownership or other legal status of the land, but may not "enable or assist" such a change.

*Example 6: Services where there is a lack of intention to **"enable or assist" a relevant change***

Bev, a non-resident, owns a vacant section of land in New Zealand. Bev's land is adjacent to another vacant section owned by T-Shirts Ltd. Bev discovers that T-Shirts is proposing to build a t-shirt factory on its land. The factory development of T-Shirts is expected to carry some risk of degrading the quality of Bev's land.

Bev engages a New Zealand law firm to advise on her right to object to the proposed factory development by T-Shirts.

Although the law firm's services arguably relate to a change in the physical condition of a specific piece of land in New Zealand, the services cannot be said to be intended to "enable or assist" that change. The services are not intended by Bev to help or make possible the proposed development of the factory.

*What is the **"intended" purpose of the services**?*

109. Where services are "in connection with land", it is also necessary to determine what the services are intended to achieve. This is because services are captured by the new test in the amended provisions only **if they are "intended" to enable or assist** certain changes to land.
110. In the context of s 6(1)(a), the Taxation Review Authority in *Case N27* (1991) 13 NZTC 3,229 followed the Court of Appeal's reasoning in *Grieve v CIR* (1984) 6 NZTC 61,682 in finding that a person's intention is a subjective matter, but that the person's stated intention can be tested against objective evidence. The Commissioner's view is that a similar approach is required in the new test. The "intended" purpose of the services is, therefore, determined by considering the recipient's subjective intention against the wider factual circumstances.
111. The amended provisions do not explicitly state whose intention is to be tested. However, in the context of the amended provisions, **the Commissioner's view is that the recipient's intention is relevant.**
112. The evidence that suppliers should hold **to establish the recipient's** intention will depend on the nature and context of the services. Since the test is subjective (but tested objectively), in some cases it may be useful for the supplier to obtain some form of statement from the recipient. However, it may not be necessary to obtain a statement in all cases, such as where the documentary evidence is clear as to what the services were intended to do.

113. If the recipient refuses to or does not provide the required information about their intention for the services acquired, it is recommended the supplier standard-rates the transaction, unless the supplier is confident that zero-rating is the correct GST treatment of the supply. By standard rating the supply in this situation the supplier ensures that any GST payable for the supply is accounted for by the supplier at the appropriate time. If it is subsequently found that the supply should have been zero-rated, then the GST paid can be corrected.

Example 7: Keeping evidence to show whether services enable or assist a relevant change

Frank is a non-resident owner of a Rotorua residential property. Frank has not owned the property long and does not have any plans for the property.

However, Frank's friend recently sold a property on the same street for more than she had expected. Frank wonders whether his property may also have gained in value.

Frank emails Valerie, a valuer, and asks her to produce a valuation report for his property. He outlines the situation above in the email. Valerie carries out the valuation and sends Frank the valuation report.

The services will be zero-rated under s 11A(1)(k). When Valerie invoices Frank, **she wonders what evidence she will need to show Frank's intention. There is no reason for Valerie to think that Frank's intention is anything other than as he has stated in his email.** In the absence of any reason to think otherwise, Valerie retains a copy of the email as evidence of Frank's intention.

Forming an intention

114. **Since a person's intention is a subjective matter (but objectively tested), the Commissioner's view is that services** will not be zero-rated by s 11A(1)(e) or standard-rated (by being excluded from zero-rating) by s 11A(1)(k) until the recipient has formed a subjective intention that the services supplied are to enable or assist a relevant change.
115. In terms of whether such **an intention has been formed, the recipient's stated intention** will be important evidence. However, consistent with the approach to **ascertaining a person's intention described above, stated intentions can be tested** against relevant objective evidence.
116. Whether the recipient has formed the requisite intention with respect to the services is particularly relevant where the services might be preliminary to services intended to enable or assist a relevant change. Services that are preliminary to services intended to enable or assist a relevant change may not be captured by the amended provisions.

Example 8: Decision not to make an offer

Braxton Ltd is a non-resident for GST purposes and a potential bidder in a competitive tender situation in relation to a specific piece of New Zealand land. Braxton is undecided whether it will make an offer in the tender, as it seems a land covenant may cause problems with the land. Braxton suspects the covenant could prevent it from carrying on certain activities on the land.

Braxton, therefore, engages a New Zealand law firm to assist with some preliminary investigative work (including advising on the covenant, Overseas **Investment Office and Resource Management Act 1993 issues**). **The law firm's advice is that the covenant is highly restrictive and will prevent Braxton from using the land in the way that it would like.**

Because of the advice, Braxton decides not to make an offer.

The law firm bills its clients monthly. It takes about four months for Braxton to carry out the investigative work in relation to the possible purchase before deciding that it will not make an offer. Therefore, by the time the decision is **made, the law firm has sent four months' worth of tax invoices to Braxton** in respect of the services it has supplied.

The supplies will be zero-rated under s 11A(1)(k). This is because Braxton had not yet formed a relevant intention in accordance with the amended provisions; that is, an intention that the services are to enable or assist a change in the ownership of the land.

Example 9: Decision to make an offer

This example follows on from example 8. Braxton Ltd decides, in principle, to make an offer to purchase a different parcel of land. However, before submitting the offer, Braxton requires assistance from the New Zealand law firm to prepare the tender documents. Braxton also decides that to formulate the precise terms of its offer, it needs further information from a New Zealand engineering expert.

The services the law firm and the engineering expert supply will be standard-rated under s 11A(1)(k). This is because Braxton has formed a relevant intention, so the services can be said to be intended to enable or assist a change in the ownership of the land. These services will be standard-rated irrespective of whether the tender is successful.

Example 10: Indistinct intention

A New Zealand law firm is engaged to advise Atticus Ltd, a non-resident company, about a proposed acquisition of a New Zealand business, where the transaction could be completed by way of either a share sale or an asset sale. The assets of the target business are predominantly land.

Atticus engages the law firm to provide legal services for the acquisition. The legal services include conducting due diligence regarding the assets (including the land), negotiating and drafting the asset sale agreement, attending to settlement, and providing legal and tax advice about the structure to be used to hold the assets and operate the business.

The decision whether the transaction is to be implemented through a share sale or an asset sale will be made after due diligence and at least one round of commercial negotiations.

The law firm bills its clients monthly. It takes about four months for Atticus to carry out due diligence in relation to the purchase before deciding that it intends to acquire the assets of the New Zealand business rather than the shares. Therefore, by the time the decision is made that the assets will be acquired, the **law firm has sent four months' worth of invoices to Atticus** for the services it has supplied.

The supplies will be zero-rated under s 11A(1)(k). Atticus had not yet formed a relevant intention in accordance with the amended provisions; that is, an intention that the services are to enable or assist a change in the ownership of the land. As explained in [45], in the context of the provisions, a change in the ownership of a land-owning company is not equivalent to a change in the ownership of land.

After Atticus has decided to purchase the assets of the New Zealand business, **the law firm's services will be standard-rated.**

Frustrated intention

117. Assuming all other requirements in the new test are met, where a person has formed a relevant intention under the new test, the services will be zero-rated by s 11A(1)(e) or standard-rated by s 11A(1)(k).
118. This is important because sometimes services may have been intended to enable or assist a relevant change to the land, but that change may not eventuate. An

example of this might be where a tender is submitted for the purchase of the land, but the tender is unsuccessful.

119. Provided that the recipient intended that the services would enable or assist a relevant change, the new test will apply. The relevant change to the land does not need to occur in fact or as a result of the provision of the services.

Example 11: Frustrated intention

This example follows on from example 9. Six months earlier, Atticus Ltd had identified a different piece of New Zealand land that it considered an attractive investment opportunity.

Atticus decided in principle to proceed with a tender offer on the land. Atticus engaged the same New Zealand law firm to advise on the offer and help it to prepare the offer documents. The law firm also assisted Atticus with Overseas Investment Office and Resource Management Act 1993 issues.

Atticus made a bid, but it was unsuccessful.

The law firm's services will not be zero-rated under s 11A(1)(k). This is because **the law firm's services are in connection with land and Atticus intended that the law firm's services would enable or assist a change in the ownership of the land, even though that did not occur.**

Multiple intentions

120. Sometimes the services may have more than one intended result. A question arises as to which intention is relevant. For instance, a New Zealand supplier may supply a variety of services in undertaking an assignment for a non-resident. Some of these services may be intended **to enable or assist a change in "ownership ... of the land" (as those words are used in s 11A(1)(k))** and some may be intended to enable or assist a change in the ownership of property other than land.
121. The first step is to consider whether there is a single supply of services or multiple supplies of services. **The Commissioner's view about** how that issue should be analysed is set out in "IS 17/03: Goods and services tax – single supply or multiple supplies", *Tax Information Bulletin* Vol 29, No 4 (May 2017): 102. IS 17/03 states **that the transaction should be considered from the recipient's point of view to determine whether there is a "single composite supply" or separate supplies of** different elements.
122. If the services that enable or assist a change in ownership of the land can be severed from the other services on a reasonable basis, the approach described in IS 17/03 is to apply zero- or standard-rating to each supply as appropriate. If the supply of services cannot be severed on a reasonable basis, there is a single composite supply.
123. Section 5(14) can separate zero- and standard-rated elements of a single **composite supply into multiple supplies. However, the Commissioner's view in** IS 17/03 is that there will be a separation under s 5(14) only where the relevant zero-rating provision (that is, a provision of s 11A) allows for apportionment. IS 17/03 follows the **Commissioner's view** on the zero-rating of part of a supply in "IS 08/01: GST – Role of section 5(14) of the Goods and Services Tax Act 1985 in regard to the zero-rating of part of a supply", *Tax Information Bulletin* Vol 20, No 5 (June 2008): 8.
124. The words of s 11A(1)(e) and (k) do not contemplate apportionment. Because of this, the **Commissioner's view is that the correct approach from IS 17/03** is that the

GST treatment of the supply will follow the dominant element of the supply. If there is no dominant element (for example, the supply is made up of several equally important elements that are integral to each other), the GST treatment will be determined by the overall characteristics of the single composite supply.

125. For a more detailed discussion on how to treat single or multiple supplies, suppliers should consult IS 17/03.

Example 12: Services intended to enable or assist a change of ownership of land and non-land assets

Paul's Water Storage Ltd, a non-resident company, has decided to expand into New Zealand by acquiring the business assets of Felix's Tanks Ltd, a New Zealand tank-manufacturing company. The asset acquisition includes land, plant and machinery, business contracts, goodwill, an inventory of tanks, and intellectual property.

Paul's Water Storage engages a New Zealand legal firm to provide legal services for the acquisition. Such legal services include negotiating and drafting the asset sale agreement, attending to settlement, and providing legal and tax advice regarding the structure to be used to hold the assets and operate the business.

"IS 17/03: Goods and services tax – single supply or multiple supplies", Tax Information Bulletin Vol 29, No 4 (May 2017): 102 requires the law firm to consider the supply of services from the recipient's point of view to determine whether there is a "single composite supply" of services or separate supplies of different elements. From the perspective of Paul's Water Storage, the recipient of the legal services, it wants all of the legal services required to enable it to purchase the business. On this basis, the services are not able to be severed into separate supplies on a reasonable basis. Additionally, s 5(14) will not separate the supply into zero- and standard-rated components because s 11A(1)(k) does not contain words of apportionment.

For the purposes of this example, assume that the value of the land is 20% of the total value of the business, and that this also reflects a reasonable apportionment of the supply of services.

Following "IS 17/03, whether the entire supply is zero- or standard-rated, therefore, turns on whether the dominant element of the supply is services that enable or assist a relevant change to land. In this example, an apportionment on a reasonable basis suggests only 20% of the services relate to land and the remaining 80% of the services relate to the acquisition of non-land assets. Since the dominant element in the supply is not land-related services, the supply of services will be zero-rated.

"BR Pub 15/03: Goods and services tax - legal services provided to non-residents relating to transactions involving land in New Zealand"

126. **Before the new test, the Commissioner issued "Public Ruling BR Pub 15/03: GST – legal services provided to non-residents relating to transactions involving land in New Zealand", Tax Information Bulletin Vol 27, No 3 (April 2015): 4.** The public ruling applies to the prior provisions that have been retained in the new test. **The ruling concludes that certain legal services are not "directly in connection with" land or improvements to land; rather they are one step removed from the transaction that has a direct effect on the land or are ancillary to that transaction.**

127. Following the enactment of the amended provisions, the legal services described in BR Pub 15/03 will generally be standard-rated under s 11A(1)(k) because the legal services will enable or assist a relevant change in the land. Suppliers will no longer be able to rely on the ruling because s 91G of the Tax Administration Act 1994 provides that:

[a] binding ruling does not apply from the date a taxation law is repealed or amended to the extent that the repeal or amendment changes the way the taxation law applies in the ruling.

When can a non-resident claim input tax deductions?

128. For completeness, two other provisions in the GSTA may allow for input tax deductions.
129. The first provision is s 54B, which allows some non-resident suppliers to register for GST and claim input tax deductions for GST they have been charged. Section 54B is intended to ensure only final consumers are subject to GST. It may be relevant if a non-resident has been charged GST on a supply of land-related services because those services cannot be zero-rated under s 11A(1)(k).
130. To register under s 54B, the non-resident must be registered for a consumption tax in their home country or, if their home country does not have a consumption tax, must be carrying on a taxable activity and be making a sufficient level of supplies that would render them liable to be registered under the New Zealand GSTA. If s 54B applies, the non-resident can register for GST and claim input tax deductions for the GST imposed on land-related services.
131. The second provision is s 22, which relates to pre-incorporation costs. Some non-residents might receive land-related services on behalf of a company that is yet to be formed. This might occur where a non-resident intends to incorporate a New Zealand subsidiary to hold the land. If the non-resident were to do this, s 22 might become relevant and allow the New Zealand subsidiary an input tax deduction for GST charged under s 11A(1)(k). For that to happen:
 - (a) the non-resident would need to become a "member" of the New Zealand subsidiary (s 22(a));
 - (b) the non-resident would need to be reimbursed by the New Zealand subsidiary for the whole amount of the consideration paid for the services (s 22(a));
 - (c) the New Zealand subsidiary would need to acquire the services only for the purpose of its taxable activity (s 22(b));
 - (d) the supply of the services by the non-resident to the New Zealand subsidiary cannot be a taxable supply (this seems unlikely to occur in practice) (s 22(c))
 - (e) the acquisition of the goods and services would need to occur within the six months before the New Zealand subsidiary was incorporated (s 22(d)); and
 - (f) sufficient records would need to be held (s 22(e)).
132. Assuming the above requirements are met, s 22 would deem the recipient of the supplies to be the New Zealand subsidiary. It would also deem the time of supply to be during the period in which the reimbursement was made. That would allow the New Zealand subsidiary to claim an input tax deduction (provided it is registered).

Further examples

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

Examples

Example 13: Gardening services

Dave, a non-resident for income tax purposes, owns a residential property in Wellington that he purchased in 2016. Dave intends to retire to New Zealand in **about five years' time. Since Dave acquired the property it has been vacant.** Dave does not own any other properties in New Zealand. He lives permanently overseas and rarely visits New Zealand.

Dave engages Graham to carry out maintenance work on the property. Graham visits the property every three weeks to mow the lawns and tend to the gardens.

Dave is a non-resident for GST purposes. This is because, although the residential property might be a fixed or permanent place in New Zealand, Dave has left the property vacant. Because the property has been left vacant, Dave is not carrying on a taxable activity or any other activity in New Zealand.

Since Dave is a non-resident who is outside New Zealand, s 11A(1)(k) can apply to **zero-rate the services, unless the services are "directly in connection" with land, or "in connection with ... land ... and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land".**

The lawn-mowing and gardening services Graham provides are directly in connection with land as they have a direct physical effect on the land. Therefore, they will not qualify for zero-rating under s 11A(1)(k).

Example 14: Valuation services

This example follows on from example 13. After one year of ownership of the Wellington property, Dave decides to get the property valued as he is interested to know its market value. Dave does not intend to use the valuation for any purpose other than to inform himself of the value of the property. Dave **engages Rich's Consultants Ltd, a property consultancy firm, to provide him with the valuation.**

The valuation services can be zero-rated. This is because the valuation services **are not "directly in connection with" land, since they do not have a direct legal or physical effect on land.** The services are not covered by the new test because they are not intended to enable or assist a relevant change to the land.

Example 15: Surveying services

This example follows on from example 14. **Dave's Wellington house is on a relatively large section.** The house is at the front of the section, and there is an access way to the rear of the land. **The valuation from Rich's Consultants Ltd,** tells Dave that the value of his property has increased. Dave decides that, instead of keeping the whole section, an option might be to subdivide the land and sell the back section. He thinks that on his retirement he is unlikely to need all the land. However, he is still undecided about the subdivision. Dave wants to make sure that having neighbours close by will not interfere with his lifestyle.

Dave asks Rich's Consultants to investigate the possibility of a subdivision. He asks Rich's Consultants to survey the land and determine the boundaries for a subdivision.

The surveying services can be zero-rated. This is because the surveying **services are not "directly in connection with" land, since they do not have a direct legal or physical effect on the land.** Since Dave has not yet decided to proceed with any subdivision or sale of the back section, the surveying services **are not "intended" to enable or assist a relevant change under the new test.**

Example 16: Developing the property

This example follows on from example 15. Dave decides to go ahead with the subdivision. To maximise the value of the property, he thinks it would be best to build a house on the back section and then sell the house and land together. Dave hires an architect to draw up plans for a house. He also hires a building company to undertake the earthworks and construction work, and a construction supervisor to oversee the development.

The architecture services and the supervisory services are not directly in connection with land. This is because, unlike the earthworks and the construction work, they do not have a direct legal or physical effect on the land. However, the architecture and supervisory services are in connection with land and intended to enable or assist a change in the physical condition of the land, so must be standard-rated.

The earthworks and construction work are directly in connection with land as they have a direct physical effect on land, so they must be standard-rated.

Example 17: Real estate agent and lawyer's services

This example follows on from example 16. Dave hires a real estate agent to market the house and land on his behalf. The real estate agent carries out the advertising and negotiation and receives a commission on the sale of the property. Dave also engages a lawyer to take care of the legal aspects of the sale.

The services the real estate agent supplies are not directly in connection with land, because the services do not have a direct legal or physical effect on land. The same conclusion applies to the legal services. However, both the **real estate agent's services and the legal services are in connection with land** and are intended to enable or assist a change in the ownership of the land, so they must be standard-rated.

Example 18: Services relating to a transfer of an equitable interest in land

Paris is a non-resident who lives in Sydney. Paris enters into an agreement for **sale and purchase 'off the plans' for an apartment in a block to be developed** in Auckland. The agreement for sale and purchase is conditional and will not become unconditional until the block receives a code compliance certificate, which is not expected to happen for another 12 months.

For some time, Paris has also had her eye **on her 'dream home' in Sydney**. Three months later, Paris discovers that the property in Sydney has been listed for sale. However, the asking price is such that Paris cannot afford to buy both properties.

Paris decides that she cannot forego the opportunity to buy her dream home and decides to sell her interest in the Auckland apartment to another buyer who will complete the transaction. To sell her interest, Paris engages an Auckland-based real estate agent to market her interest in the property. She also engages a lawyer to advise her on the legal aspects of the transaction.

Paris's interest in the apartment is an equitable interest in the land. Paris no longer intends to complete the purchase of the apartment and gain legal title. Paris now intends only to acquire and dispose of the equitable interest. Therefore, the services the real estate agent and lawyer supplied are in connection with land and intended to enable or assist a change in the legal status of the land.

The Commissioner's view is that the new test applies to services intended to enable or assist a change in an equitable interest in land. The services the real estate agent and lawyer supplied will, therefore, be standard-rated under s 11A(1)(k).

Example 19: valuation services for multiple properties

Sarah, a non-resident living outside New Zealand, is interested in purchasing a rental property in New Zealand.

To understand the market prices in various regions, Sarah asks a valuer to provide her with general reports outlining the prevailing values of four-bedroom properties in certain suburbs of Auckland, Wellington and Christchurch.

Since the services do not relate to specific land in New Zealand, the services the valuer supplies are not directly in connection with land nor are they intended to enable or assist a relevant change to land. Therefore, the services can be zero-rated.

Sarah finds 10 properties of interest to her on the internet. To understand the market prices for those properties, Sarah orders computer-generated valuation reports for each of the 10 properties from a website. She pays a fee to the website for the reports.

The valuation services supplied to Sarah in relation to the 10 properties relate to specific land in New Zealand but do not have a direct legal or physical effect **on the land. The valuation services are, therefore, not "directly in connection with" land. The valuation services do not meet the new test since the services** cannot be said to be intended by Sarah to enable or assist a relevant change to any particular property. Therefore, the services can be zero-rated.

Table on GST treatment of particular services relating to specific land in New Zealand

134. The GST treatment depends on whether the services are directly in connection with land, or are in connection with land and are intended to enable or assist a change in the physical condition or ownership or other legal status of the land (relevant intended change). A relevant intended change is not needed for services directly in connection with land. However, sometimes both the "directly in connection with land" alternative and the "in connection with land" with the relevant intended change alternative will be satisfied.
135. The following table provides examples of particular services relating to specific land in New Zealand and the GST treatment of the services under s 11A(1)(k). The table gives examples for services provided to a person who is a non-resident for GST purposes and who is outside New Zealand at the time the services are performed. The table is not intended to be exhaustive.

Examples of services relating to the physical condition or ownership or other legal status of land in New Zealand	Intended to enable or assist a change to the land	GST treatment	Relevant example in this item
Accounting services - intended to enable or assist a change to the land	Yes	Standard-rated	
Accounting services - not intended to enable or assist a change to the land	No	Zero-rated	
Advertising services for a land transaction	Yes	Standard-rated	
Architectural services for specific land	Yes	Standard-rated	Example 15
Construction on specific land	Yes	Standard-rated	Example 15
Construction supervision for specific land	Yes	Standard-rated	Example 15
Earthworks on specific land	Yes	Standard-rated	Example 15
Engineering for specific land	Yes	Standard-rated	Example 8

Examples of services relating to the physical condition or ownership or other legal status of land in New Zealand	Intended to enable or assist a change to the land	GST treatment	Relevant example in this item
Gardening on specific land	Yes	Standard-rated	Example 12
Legal services for a land transaction	Yes	Standard-rated	Examples 8, 10, 11, 16 and 17
Legal services – not intended to enable or assist a change to the land	No	Zero-rated	Examples 5, 6, 7 and 9
Property management for specific land	Yes	Standard-rated	
Real estate services for a land transaction	Yes	Standard-rated	Examples 16 and 17
Surveying of specific land	Yes	Standard-rated	
Surveying – not intended to enable or assist a change to the land	No	Zero-rated	Example 14
Valuation services for specific land	Yes	Standard-rated	
Valuation services – not intended to enable or assist a change to the land	No	Zero-rated	Example 13
Valuation services for the general market	No	Zero-rated	Example 18
Valuation services for part of the market	No	Zero-rated	Example 18

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Subject references

goods and services tax
GST
land
services
zero-rating

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Appendix – Legislation

Goods and Services Tax Act 1985

1. Section 11A(1)(e) and (k) provides:

- (1) A supply of services that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
...
 - (e) the services are supplied directly in connection with land situated outside New Zealand, or with an improvement to such land, or are supplied in connection with such land or improvement and are intended to enable or assist a change in the

physical condition, or ownership or other legal status, of the land or improvement; or

...

- (k) subject to subsection (2), the services are supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed, not being services which are—
- (i) supplied directly in connection with land situated in New Zealand, or with an improvement to such land, or are supplied in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement; or
 - (ii) supplied directly in connection with moveable personal property, other than choses in action or goods to which paragraph (h) or (i) applies, situated in New Zealand at the time the services are performed; or
 - (iii) the acceptance of an obligation to refrain from carrying on a taxable activity, to the extent to which the activity would have occurred within New Zealand; or

2. **The definition of “non-resident” in s 2 provides:**

non-resident means a person to the extent that the person is not resident in New Zealand

3. **The definition of “resident” in s 2 provides:**

resident means resident as determined in accordance with sections YD 1 and YD 2 (excluding section YD 2(2)) of the Income Tax Act 2007:

provided that, notwithstanding anything in those sections,—

- (a) a person shall be deemed to be resident in New Zealand to the extent that that person carries on, in New Zealand, any taxable activity or any other activity, while having any fixed or permanent place in New Zealand relating to that taxable activity or other activity;
- (b) a person who is an unincorporated body is deemed to be resident in New Zealand if the body has its centre of administrative management in New Zealand;
- (c) the effect of the rules in section YD 1(4) and (6) of that Act are ignored in determining the residence or non-residence of a natural person, and residence is treated as—
 - (i) starting on the day immediately following the relevant day that triggers residence under section YD 1(3) of that Act; or
 - (ii) ending on the day immediately following the relevant day that triggers non-residence under section YD 1(5) of that Act

Income Tax Act 2007

4. **Section YD 1 provides:**

YD 1 Residence of natural persons

What this section does

- (1) This section contains the rules for determining when a person who is not a company is a New Zealand resident for the purposes of this Act.

Permanent place of abode in New Zealand

- (2) Despite anything else in this section, a person is a New Zealand resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere.

183 days in New Zealand

- (3) A person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.

Person treated as resident from first of 183 days

- (4) If subsection (3) applies, the person is treated as resident from the first of the 183 days until the person is treated under subsection (5) as ceasing to be a New Zealand resident.

Ending residence: 325 days outside New Zealand

- (5) A person treated as a New Zealand resident only under subsection (3) stops being a New Zealand resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period.

Person treated as non-resident from first of 325 days

- (6) The person is treated as not resident from the first of the 325 days until they are treated again as resident under this section.

Government servants

- (7) Despite subsection (5), a person who is personally absent from New Zealand in the service, in any capacity, of the New Zealand Government is treated as a New Zealand resident during the absence.

Presence for part-days

- (8) For the purposes of this section, a person personally present in New Zealand for part of a day is treated as—
- (a) present in New Zealand for the whole day; and
 - (b) not absent from New Zealand for any part of the day.

...

Treatment of non-resident seasonal workers

- (11) Despite subsection (3), a non-resident seasonal worker is treated for the duration of their employment under the recognised seasonal employer (RSE) instructions as a non-resident.

5. Section YD 2 provides:

YD 2 Residence of companies

Four bases for residence

- (1) A company is a New Zealand resident for the purposes of this Act if—
- (a) it is incorporated in New Zealand;
 - (b) its head office is in New Zealand;
 - (c) its centre of management is in New Zealand;
 - (d) its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.

International tax rules

- (2) Despite subsection (1), for the purpose of the international tax rules, a company is treated as remaining resident in New Zealand if it becomes a foreign company but is resident in New Zealand again within 183 days afterwards.

Cook Islands National Superannuation Fund trustee

- (3) Despite subsection (1), the trustee of the Cook Islands National Superannuation Fund, established by the Cook Islands National Superannuation Fund Deed under the Cook Islands National Superannuation Scheme Act 2000 (Cook Islands), is not a New Zealand resident.