QUESTIONS WE'VE BEEN ASKED

GST – Does zero-rating apply to certain services that airport operators supply to international airline operators?

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This Question We've Been Asked (QWBA) discusses the GST treatment of garbage disposal, lighting and security, aircraft parking and terminal services that airport operators supply to international airline operators.

Key provisions

Goods and Services Tax Act 1985 (GST Act) – s 11A(1)(a)

Question

Does zero-rating apply to garbage disposal, lighting and security, aircraft parking and terminal services that airport operators supply to international airline operators?

Answer

No. The services are standard-rated, not zero-rated.

Explanation

1. "GST on services supplied to international aircraft" *Public Information Bulletin* 173 (April 1988): 11 (**the PIB**) states that the following services (**the relevant services**) supplied by local authorities (who own and operate airports) to international aircraft are standard-rated:
   - garbage disposal;
   - lighting and security;
   - aircraft parking; and
   - terminal fees (for terminal services).
2. The PIB considered that the relevant services were standard-rated because they were not zero-rated under the earlier versions of s 11A(1)(a), (h) and (i).
3. This QWBA reviews the PIB's conclusion in light of court cases and changes to the GST Act that have occurred since the publication of the PIB. Most international airports in New Zealand are now owned and operated by private companies with local council shareholdings.

When services can be zero-rated under s 11A(1)(a)

4. A transaction is zero-rated under s 11A(1)(a) where:
   - there is a supply of services;
   - the supply of services is chargeable with tax under s 8; and
   - the services, not being ancillary transport activities such as loading, unloading and handling, are the transport of passengers or goods:
     - from a place outside New Zealand to another place outside New Zealand;

- from a place in New Zealand to a place outside New Zealand; or
- from a place outside New Zealand to a place in New Zealand.

There is a supply of services

5. GST is a transaction-based tax, and the focus is on the supply by a supplier to a recipient in the particular case.[1] The test for determining whether a supply of services is chargeable with GST is what the nature of the supply is.[2]

6. Applying that test requires identifying what the relevant supply is and who the supplier is.[3] To do that, it is necessary to examine the contract between the parties.[4] It is important to determine the legal obligations of the parties and what they have agreed on.[5]

7. The Act therefore is contractually based and is concerned with determining the legal arrangements between the parties. The particular transaction in question must be carefully considered in order to determine the legal character of that transaction.

8. Here, the contractual agreement for the supply of the relevant services is between the airport operators and the international airline operators. In exchange for payment from the international airline operators for the relevant services, the airport operators agree to provide the relevant services.

9. The provision of flights is a different contractual arrangement between the international airline operators and their customers (passengers or owners of transported cargo). Under this separate arrangement, international airline operators contract to fly passengers or goods for which their customers pay consideration by way of a fee. Although international airline operators can pass all or some of the costs for the services from airport operators on to their customers, this does not affect the fact that there is a separate contract.

The supply of services is chargeable with tax under s 8

10. A registered person charges GST of 15% on the supply of goods and services in New Zealand in the course or furtherance of a taxable activity carried on by them, by

[1] *Databank Systems Ltd v CIR* (1989) 11 NZTC 6,093 (CA) at 6,103–6,105.

[2] *Databank* (CA) at 6,093.

[3] *CIR v Databank Systems Ltd* (1990) 12 NZTC 7,227 (PC) at 7,321-7,235.

[4] *Wilson & Horton Ltd v CIR* (1995) 17 NZTC 12,325 (CA) at 328.

[5] *British Railways Board v Customs and Excise Commissioners* [1977] STC 221 (AC); *CIR v Bayly* (1998) 18 NZTC 14,073 (CA); *Television New Zealand Ltd v CIR* (1994) 16 NZTC 11,295 (HC).

reference to the value of that supply, unless the supply is an exempt supply (s 8). However, they charge GST at the rate of 0% if zero-rating provisions apply.

11. The relevant supply is from the airport operators to international airline operators and both parties are GST registered. Airport operators provide the relevant services in the course or furtherance of their taxable activity, which includes the provision of such services.

12. The supply of the relevant services is not an exempt supply under the GST Act. Therefore, the supply of the relevant services is chargeable with tax under s 8. Whether GST is charged at 15% (standard-rated) or at 0% (zero-rated) depends on whether the last requirement of s 11A(1)(a) is satisfied.

The services are the transport of passengers or goods and not ancillary transport activities

13. The relevant services zero-rated under s 11A(1)(a) are the transport of passengers or goods from one place to another, where at least one place is outside New Zealand. This means that only the transport of passengers or goods is zero-rated, not other services.

14. The relevant services will not be zero-rated if they are ancillary transport activities. Ancillary transport activities, such as loading, unloading and handling, are standard-rated. The PIB concluded that the relevant services were standard-rated because they were "ancillary transport activities".

15. Section 11A(1)(a) has undergone changes since the GST Act was enacted in 1985. At first, services had to be "directly in connection with transportation … of passengers or goods" to be zero-rated. In 1988, the wording was intentionally narrowed to require the zero-rated services to "comprise the transport of passengers or goods". From 2000, the wording in s 11A(1)(a) is that the services "are the transport of passengers or goods".

16. The Commissioner considers that the change from "comprise the transport" to "are the transport" does not change the meaning of the provision. The words "comprise" and "are" are essentially synonyms.[6]

[6] *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) defines "comprise" to include "consist of, be made up of; contain", and "are" to include "(when connecting a subject and complement) having a specified state, nature, or role".

Transport

17. The *Concise Oxford English Dictionary* relevantly defines the term "transport" as "a system or means of transporting".

18. In addition to *Case P78* and *Auckland Regional Authority* considered below, court decisions have looked at what constitutes the transport of passengers or goods.[7] They have concluded that the essence of transport is the carriage of a passenger or goods from one point to another.[8] The word "transport" has a wider meaning than a seat on an airliner and can include in-flight catering.[9]

Ancillary

19. The *Concise Oxford English Dictionary* defines "ancillary", which appears in the phrase "ancillary transport activity", as "providing support to the primary activities of an organisation", "additional but less important" and "subsidiary".

20. A number of court cases have considered the meaning of the word "ancillary". They show that the meaning can be broad and the answer to the question of whether one activity is ancillary to another depends on the context.[10]

21. In *Smith's Snackfood Company*, the court concluded the meaning of "ancillary" is "auxiliary", "accessory", "subordinate" or "providing central support to the functioning of a central service". These interpretations are consistent with:

    - dictionary definitions of "ancillary";
    - *Green v Britten* ("subsidiary, subordinate or appurtenant to");[11] and
    - *Minagall v Ingram*[12] (where a relationship was required between the principal matter and an ancillary matter).

22. However, in some cases an ancillary activity may not be subservient to another (*Smith's Snackfood Company*).

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[7] *Case P78* (1992) 14 NZTC 4,523; *Auckland Regional Authority v CIR* (1994) 16 NZTC 11,080 (HC).

[8] *Commissioners of Customs and Excise v Blackpool Pleasure Beach Co* [1974] 1 All ER 1011 (QB); *Quarry Tours Ltd v The Commissioners* [1984] 12 VATTR 238.

[9] *British Airways v Customs & Excise Commissioners* [1990] BTC 5,124 (AC). The court decision cited this case with approval in *Auckland Regional Authority*.

[10] *New South Wales Crime Commission v Ollis* [2006] NSWCA 76, 161 A Crim R 97; *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 470, (2013) 97 ATR 904.

[11] *Green v Britten* [1904] 1 KB 350 (AC).

[12] *Minagall v Ingram* [1968] SASR 237 (SASC).

Case P78

23. The court in *Case P78* considered the earlier versions of s 11A(1)(a). Judge Barber held that landing, aircraft parking, meteorological, control tower and safety services that an airport operator supplied to international airline operators were "directly in connection with transportation" and, therefore, zero-rated. This was because they were an integral part of transportation.[13]

24. Judge Barber considered that the services under consideration were not "ancillary transport activities" because they were not in a similar category to loading, unloading and handling. He considered that "ancillary" in this case meant subservient or subordinate to the provision of transport.[14]

25. Judge Barber also held that the services under consideration "comprise the transport" of passengers or goods and were not ancillary transport activities. This was because without the facility to land and take off, the air service could not occur. He said in passing that terminal services would have "comprised" transportation too.[15]

26. Judge Barber did note that the phrase "comprise the transport" is narrower than "directly in connection with transportation". However, the Commissioner considers that Judge Barber essentially applied the broader "directly in connection with" analysis in coming to the conclusion that the services under consideration "comprise" the transport of passengers or goods.[16]

27. Judge Barber concluded that rubbish disposal did not "comprise" transportation because it was not part of the carrying process and transportation activity.[17]

Auckland Regional Authority

28. In the High Court decision in *Auckland Regional Authority,* Barker J said that the phrase "comprise the transport" in an earlier version of s 11A(1)(a) seems to confer zero-rating only on services that "actually comprise" the transport of passengers or goods. Barker J did not need to decide the point because he was considering the earlier phrase "directly in connection with transportation" on similar facts to *Case P78*.[18]

[13] *Case P78* at 4,531–4,532.

[14] *Case P78* at 4,532.

[15] *Case P78* at 4,532.

[16] *Case P78* at 4,532.

[17] *Case P78* at 4,533.

[18] *Auckland Regional Authority* at 11,083.

29. However, Barker J's comment may have been referring to the acknowledgement in *Case P78* that the carriers or airlines provide "the actual transport of goods and passengers".[19] His comment is also consistent with the conclusion in *Case P78* that rubbish disposal is not part of the carrying process.

30. Barker J considered the meaning of "ancillary transport activity". Contrary to *Case P78*, he concluded that international terminal services[20] were ancillary because they were "secondary or subservient" and were "of the same kind of transport activity as loading, unloading and handling".[21]

31. However, Barker J agreed with *Case P78* that landing and departing were not ancillary transport activities (although this was in the context of considering the "directly in connection with transportation" phrase). He also agreed that rubbish disposal was provided as a separate service but considered that it was, alternatively, an "ancillary transport activity".

Conclusion on s 11A(1)(a)

32. The Commissioner considers that none of the relevant services considered in this QWBA (garbage disposal, lighting and security, aircraft parking and terminal services) is the transport of passengers or goods for the purposes of s 11A(1)(a). This is because the relevant services do not involve the carriage of a passenger or goods from one point to another. Therefore, the Commissioner considers that the relevant services are not zero-rated under s 11A(1)(a).

33. The PIB concluded that the relevant services were standard-rated but for a different reason. The PIB considered the relevant services to be "ancillary transport activities". It is not strictly necessary to reach a conclusion on this point because it is already concluded here that the relevant services are standard-rated. However, the Commissioner considers that the relevant services are, alternatively, ancillary transport activities that are not zero-rated under s 11A(1)(a). This is because the relevant services relate to the provision of essential support to a central service. The relevant services support the supply of transport by international airline operators.

[19] *Case P78* at 4,532.

[20] The terminal services included the use of air bridges, maintenance and cleaning of carousels, gate lounges, storage and distribution areas, and removal of sewage tanks.

[21] *Auckland Regional Authority* at 11,085.

When services can be zero-rated under s 11A(1)(h) and(i)

34. Services are zero-rated under other paragraphs of s 11A(1). These include services that are supplied directly in connection with:

- goods in transit through New Zealand, including stores for aircrafts, provided the goods are not removed from the aircraft while in New Zealand (s 11A(1)(h)); and
- temporarily imported goods (s 11A(1)(i)).

35. The Commissioner considers that the relevant services are not "directly in connection" with goods in transit or temporarily imported. The relevant services are services that airport operators provide to international airline operators. These are not services supplied directly in connection with the goods themselves such as loading, unloading and handling.[22] Therefore, there is no clear and direct relationship between the relevant services and the goods.

36. Further, although a private aircraft can be a temporarily imported good, the Commissioner considers that temporary imports do not include commercial aircraft with goods and passengers that arrive in and depart from New Zealand.

37. The Commissioner therefore considers that s 11A(1)(h) and (i) also does not apply to zero-rate the relevant services. On this basis, the relevant services are subject to GST at the standard-rate of 15%.

[22] *Wilson & Horton Ltd v CIR* (1994) 16 NZTC 11,221 (HC) at 11,224.

References

Legislative references

Goods and Services Tax Act 1985, ss 8, 11A(1)(a), (h) and (i)

Case references

Auckland Regional Authority v CIR (1994) 16 NZTC 11,080 (HC)

British Airways v Customs & Excise Commissioners [1990] BTC 5,124 (AC)

British Railways Board v Customs and Excise Commissioners [1977] STC 221 (AC)

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Other references

Concise Oxford English Dictionary (12th ed, Oxford University Press, New York, 2011)

GST on services supplied to international aircraft *Public Information Bulletin* 173 (April 1988): 11

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