

PRODUCT RULING - BR Prd 15/03

This is a product ruling made under s 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by the Ministry of Business, Innovation and Employment (the MBIE).

Taxation Laws

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

This Ruling applies in respect of ss 5 and 8 and the definition of "consideration" in s 2(1).

The Arrangement to which this Ruling applies

The Arrangement is the charging of an annual levy (Levy) under s 89 of the Telecommunications Act 2001 (the TA) on liable telecommunication operators by the Minister of Communications and Information Technology (Minister), currently responsible for the administration of the TA.

The Levy was introduced by the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 by substituting the current ss 87 to 92 into the TA.

The Levy is collected by the MBIE (the Ministry responsible for administering the TA for the Minister).

Pursuant to s 90 of the TA, the Levy may be used for the following purposes:

- to pay telecommunications service obligations (TSO) charges:
- to pay for non-urban telecommunications infrastructure development:
- to pay for upgrades to the emergency service calling system:
- any other purpose that the Minister considers will facilitate the supply of certain telecommunications services to groups of end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by the Minister to be affordable to those groups of end-users.

Further details of the Arrangement are set out in the paragraphs below.

Background

1. The New Zealand telecommunications market is regulated by the TA, which provides the regulatory framework for the supply of certain telecommunications services.
2. In 2011, the Telecommunications (TSO, Broadband, and Other Matters) Bill (2011 Bill) was introduced into Parliament and referred to the Commerce Select Committee for consideration. The 2011 Bill introduced the Levy **as a levy that “will be collected from industry participants annually” to “consolidate the statutory mechanisms for industry funding of telecommunications service and sector development obligations”**. The Explanatory Note to the 2011 Bill relevantly stated that:

The Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill (the **Bill**) amends the Telecommunications Act 2001 (the **Act**) to support the **implementation of the Government’s** policy programme for the telecommunications sector. The Bill achieves this intent by providing for amendments to—

- **streamline the administration of TSO instruments:**
- consolidate the statutory mechanisms for industry funding of telecommunications service and sector development obligations;
- **establish a regulatory framework for the enhanced broadband** networks that will be developed under the UFB Initiative and the RBI with the support of Crown funding.

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Overview of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill

Part 1

Part 1 of the Bill contains amendments to Part 3 of the Act, which sets out a legislative framework for the declaration and management of TSO instruments. These instruments are service agreements between the Crown and a service provider for the delivery of telecommunications services that would not otherwise be delivered on a commercial basis or at an affordable price.

The Bill—

- **amends the basis for calculation of the net cost** of deemed TSO instruments, including the Telecommunications Service Obligations (TSO) Deed for Local Residential Telephone Service (the **Local Service TSO**) provided by Telecom, to ensure that the full benefits a provider accrues from provision of the required services are considered when determining whether additional compensation should be paid to the provider; and
- **streamlines the legislative funding mechanisms** for TSO instruments by introducing a new Telecommunications Development Levy (the **TDL**), which will be collected from industry participants annually and be used for the payment of TSO-related compensation, non-urban telecommunications infrastructure development, and upgrades to the emergency services calling system.

3. The amendments to Part 3 of the TA came into force on 1 July 2011. The Levy is payable under s 89 of the TA by liable persons who exceed the minimum telecommunications revenue threshold, as set out in ss 80 and 81 of the TA (meaning they earned more than \$10 million in gross telecommunications revenue in the year preceding the year being considered in calculating the Levy).
4. Section 5 of the TA defines “**liable person**” as:

Liable person means a person who provides a telecommunications service in New Zealand by means of some component of a PTN [public telecommunications network] that is operated by the person
5. “**Minimum telecommunications revenue**” is defined in s 80 of the TA as:

minimum telecommunications revenue means \$10 million, or such other amount, as may be prescribed by regulations made under section 101(1)(a), of gross revenue (as may be determined in accordance with any specifications set by the Commission) that a liable person receives during a financial year for supplying either or both of the following (excluding any amount paid to a liable person by the Crown as compensation for the cost of complying with a TSO instrument that contains a specified amount):

- (a) telecommunications services by means of its PTN;
- (b) telecommunications services by means that rely primarily on the existence of its PTN or any other PTN.

6. Section 81(1) of the TA provides that the Levy is not imposed on all liable persons:

81 Subpart does not apply to certain liable persons

(1) This subpart does not apply to a liable person in respect of a financial year (**financial year A**) if—

- (a) the liable person was not trading in the financial year preceding financial year A; or
- (b) **the liable person's telecommunications revenue for the year** preceding financial year A was less than the minimum telecommunications revenue.

7. The Levy is payable under s 89 of the TA. Pursuant to s 90 of the TA, the Levy may be used for the following purposes:

- to pay TSO charges;
- to pay for non-urban telecommunications infrastructure development;
- to pay for upgrades to the emergency service calling system;
- any other purpose that the Minister considers will facilitate the supply of certain telecommunications services to groups of end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by the Minister to be affordable to those groups of end-users.

8. The Crown will contract a service provider or service providers for goods and services that need to be provided under ss 90(1)(c) and (d) of the TA, rather than provide the goods and services itself.

9. Sections 82 to 88 of the TA set out the annual procedure for determining amounts payable by liable persons to the Crown. The process of charging, collecting and allocating the Levy is summarised in the following paragraphs.

Charging, Collecting and Allocating the Levy

10. At the end of the financial year, liable persons must provide the Commerce Commission (Commission) with information regarding their qualified revenue for the financial year: s 83 of the TA. The Commission prepares a draft liability allocation determination that is publicly notified and open for submissions: s 84 of the TA.

11. Under s 85 of the TA, the amount of the Levy payable by each liable person for the financial year is calculated using the following formula:

$$\frac{a}{b} \times c$$

where—

a is the amount of the liable person's qualified revenue

b is the sum of all liable persons' qualified revenue

c is the telecommunications development levy specified for the relevant year in Schedule 3B of the TA.

12. The Levy is then paid by liable persons into the MBIE's **Crown bank** account.
13. In accordance with s 89(2) of the TA, if the Levy is not paid on or before the 20th working day after the date the determination is publicly notified, it becomes a debt to the Crown recoverable in any court of competent jurisdiction. Interest is payable on any unpaid amount at the 90-day bank bill rate plus 5% for the period any amount is outstanding.
14. Except as provided in s 94L of the TA, the Crown is not required to use any Levy amount within any particular time: s 90(3) of the TA. Under s 94L of the TA, the Crown must pay the TSO provider the amount set out in the final TSO cost calculation determination not later than 30 working days after the date that determination is publicly notified.

How the Taxation Laws apply to the Arrangement

Subject in all respects to the assumption stated above, the Taxation Laws apply to the Arrangement as follows:

- a) **The Levy does not constitute "consideration" (as defined in s 2(1))** for any **"supply" (as defined in s 5)** of goods and services made by the Crown.
- b) The Levy charged to liable telecommunications operators under the TA by the MBIE is not subject to GST under s 8.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 November 2014 and ending on 1 November 2017.

This Ruling is signed by me on the 23 day of October 2015.

Dave Hames

Investigations Manager, Investigations and Advice