Inland Revenue
Te Tari Taake

ADVERTISING SPACE AND ADVERTISING TIME SUPPLIED TO NON-RESIDENTS – GST TREATMENT

PUBLIC RULING - BR Pub 00/06

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 96/10, published in *Tax Information Bulletin* Vol 8, No 8 (November 1996), but its period of application is from 1 December 1999 to 30 November 2004. Some formatting changes have also been made. BR Pub 96/10 applied up until 30 November 1999.

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Laws

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

This Ruling applies in respect of section 11(2)(e).

The Arrangement to which this Ruling applies

The Arrangement is the contractual supply of advertising space in a publication, or the supply of advertising time on radio or television (or other broadcasting service), by a GST registered person for and to a non-resident person who is outside New Zealand at the time the services are performed.

For the purposes of this Ruling the supply of advertising space or advertising time means the service of communicating an advertising message, and includes all steps involved in providing this service by the supplier of the advertising space or time.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The contractually supplied service of providing advertising space in a publication or advertising time on radio or television (or other broadcasting service), for and to a non-resident who is outside New Zealand at the time the service is performed, is not supplied "directly in connection with" any land (or improvement thereto) or moveable personal property situated in New Zealand. Section 11(2)(e) will apply to zero-rate the supply of services, provided that all the other requirements of section 11(2)(e) are satisfied.

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The period for which this Ruling applies

This Ruling will apply for the period from 1 December 1999 to 30 November 2004.

This Ruling is signed by me on the 17th day of July 2000.

John Mora
Assistant General Manager (Adjudication & Rulings)

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COMMENTARY ON PUBLIC RULING BR Pub 00/06

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 00/06 ("this Ruling").

The subject matter covered in this Ruling was previously dealt with by BR Pub 96/10 that appeared in TIB Vol 8, No 8 (November 1996), at page 13. This Ruling applies for the period from 1 December 1999 to 30 November 2004.

Background

In July 1994, the High Court delivered its judgment in *Wilson & Horton v CIR* (1994) 16 NZTC 11,221. The case dealt with the circumstances in which a newspaper publisher should account for GST on the services of placing advertisements for non-resident clients. The High Court held that:

- To qualify for zero-rating under section 11(2)(e), services must be provided "contractually to" and "beneficially for" a non-resident person. If a New Zealand resident receives the benefit of the advertising services, the services are not zero-rated; and

- The provision of advertising space and related services is not supplied directly in connection with the subject matter of the advertisements.

Wilson & Horton appealed this decision to the Court of Appeal (*Wilson & Horton* v *CIR* (1995) 17 NZTC 12,325). The Court of Appeal held in favour of the taxpayer, and concluded that the supply of advertising space in New Zealand by Wilson & Horton to non-resident clients is zero-rated under section 11(2)(e), irrespective of whether a New Zealand resident also benefits from the supply. The Commissioner did not appeal this decision.

Legislation

Section 11(2)(e) zero-rates a supply of services when:

> The services are supplied for and to a person who is not resident in New Zealand and who is outside New Zealand at the time the services are performed, not being services which are supplied directly in connection with -
>
> (i) Land or any improvement thereto situated inside New Zealand; or
>
> (ii) Moveable personal property (other than choses in action, and other than goods to which paragraph (ca) of this subsection applies) situated inside New Zealand at the time the services are performed; -

Sections 11(2A) and 11(2B) deal with services that are supplied to non-residents but are received by persons in New Zealand. The sections state:

(2A) Subsection (2)(e) does not apply to a supply of services under an agreement that is entered into, whether directly or indirectly, with a person (person A) who is not resident in New Zealand if-

(a) The performance of the services is, or it is reasonably foreseeable at the time the agreement is entered into that the performance of the services will be, received in New Zealand by another person (person B), including-
    (i) An employee of person A; or
    (ii) If person A is a company, a director of the company; and
(b) It is reasonably foreseeable, at the time the agreement is entered into, that person B will not receive the performance of the services in thecourse of making taxable or exempt supplies.

(2B) For the purpose of subsection (2)(e) and (2fa), 'outside New Zealand', for a company or an unincorporated body that is not resident, includes a minor presence in New Zealand, or a presence that is not effectively connected with the supply.

Section 60 sets out the GST agency provisions. Section 60(2) states:

Subject to this section, for the purposes of this Act, where any registered person makes a taxable supply of goods and services to an agent who is acting on behalf of another person who is the principal for the purposes of that supply, that supply shall be deemed to be made to that principal and not to that agent:…

Court of Appeal decision

The Court of Appeal held that the supply of the publication of advertisements by Wilson & Horton to non-resident clients qualified for zero-rating under section 11(2)(e), irrespective of whether a New Zealand resident obtains a benefit from the supply.

"For and to"

The Court of Appeal rejected the High Court's interpretation of "for" in section 11(2)(e), as meaning "beneficially for". The Court of Appeal questioned whether this "benefit" test was workable. The Court noted that many parties may potentially benefit from an advertisement placed by a non-resident, and that it was unlikely that the legislature would have intended a wide group of possible beneficiaries of a service to determine the GST treatment of the service.

In discussing the "for and to" wording in section 11(2)(e), the Court of Appeal examined the possible meanings of "for" that may have been intended by the legislature, and rejected the Commissioner's interpretation of "for" as meaning "beneficially for". The Court concluded that "for" in section 11(2)(e) was used for emphasis only. Justice Richardson noted that legislative drafters often convey emphasis through the use of a combination of words and said that (at 12,330):

I am inclined to think that the framers of s11(2)(e) employed both expressions to convey emphasis and perhaps to bring out the intent that the contract must be genuine and so the services must be supplied under that contract to and for the other contracting party.

As a matter of statutory interpretation, the Court said that section 11(2)(e) would have been worded quite differently if the intent had been to preclude zero-rating, unless a

non-resident recipient of a supply was the only person who could benefit from the services supplied.

Justice Penlington considered that this result was consistent with one of the underlying themes of zero-rating - the preservation of New Zealand's competitiveness in world trade. It was also recognised that if advertised merchandise is sold in New Zealand, GST will be imposed on the sale at that time.

"Directly in connection with"

The Court of Appeal did not discuss whether the supply was made directly in connection with land or moveable personal property in New Zealand for the purposes of section 11(2)(e). The High Court had accepted that the supply of advertising space in a newspaper was not "directly in connection with" the subject matter of the advertising. During the Court of Appeal hearing, the potential argument that the services are supplied directly in connection with the newspapers themselves was also raised.

However, the Court of Appeal did not allow the Commissioner to introduce this new line of reasoning, as it would have changed the basis upon which the assessment was made and objected to. The publishing industry has asked the Commissioner to clarify the application of the "directly in connection with" exclusion in section 11(2)(e) in this context.

Application of the Legislation

The key features of section 11(2)(e) are the phrases "for and to" and "directly in connection with".

"For and to"

The Commissioner accepts the Court of Appeal's interpretation of "for and to" in *Wilson & Horton* for the purposes of section 11(2)(e). In this context, "for and to" is a composite phrase. "For" simply emphasises "to" and does not connote any requirement that services must be provided for the exclusive benefit of the recipient of the supply. If services are supplied pursuant to a contract with a non-resident and are for that non-resident, section 11(2)(e) will apply to zero-rate the supply regardless of any other benefits also arising to a New Zealand resident (provided that the other requirements of the section are satisfied).

The Court of Appeal's interpretation of "for and to" is not restricted to the supply of advertising space in a newspaper. It also applies to the supply of advertising space in all forms of publication and to the supply of advertising time on radio or television (or other broadcasting service).

This Ruling discusses the application of section 11(2)(e) to the supply of advertising space in publications, such as newspapers and magazines. The Ruling also covers the supply of advertising time on radio and television, or by way of any other

broadcasting service, e.g. the internet. For the purposes of the Ruling, the supply of advertising space or advertising time means the service of communicating an advertising message, and includes all steps involved in providing this service by the supplier of the advertising space or time.

"Directly in connection with"

A supply of services to a non-resident will not be zero-rated under section 11(2)(e) if the services are supplied "directly in connection with" any land (or improvement to the land) or moveable personal property (other than choses in action and goods which are referred to in section 11(2)(ca)) situated in New Zealand at the time the services are performed. The Court of Appeal in *Wilson & Horton* did not discuss the meaning of "directly in connection with" in section 11(2)(e), nor resolve whether advertising space is supplied directly in connection with the newspapers in which advertisements are placed.

Case law

The determination of whether or not services are supplied "directly in connection with" land or moveable personal property depends on the circumstances in which the services are supplied. In *Case E84* (1982) 5 NZTC 59,441, Bathgate DJ considered the meaning of the phrase "in connection with" (it is to be noted that the word "directly" was not used) in the context of section 165 of the Income Tax Act 1976 (section DJ 5 of the Income Tax Act 1994) and noted (at 59,444 and 59,446):

> It may be that only an empirical and common sense approach to the interpretation of the words can be applied in each particular case to determine where, if at all, the line should be drawn to allow or not allow expenditure 'in connection with' an assessment. However I believe that a narrow interpretation of the words '… any expenditure … in connection with … the assessment …' is the correct interpretation …
>
> …
>
> 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.

In the context of GST, the meaning of "directly in connection with" for the purposes of section 11(2)(a), prior to its amendment in 1988, has been judicially considered by the High Court in *Auckland Regional Authority v CIR* (1994) 16 NZTC 11,080 and the Taxation Review Authority (TRA) in *Case P78* (1992) 14 NZTC 4,532. Before amendment, section 11(2)(a) provided for zero-rating of services supplied "directly in connection with" transportation. The High Court and TRA cases concerned the application of section 11(2)(a) to various charges (landing dues, international terminal charges, and rubbish disposal charges) levied on overseas airlines.

The High Court and the TRA adopted similar interpretations of the words "directly in connection with" under section 11(2)(a). The *Auckland Regional Authority* case summarises the reasoning of the TRA in *Case P78* (at 11,084):

There, the Taxation Review Authority, Judge Barber, held that "airport dues" were zero-rated for GST because passengers cannot realistically be transported to New Zealand by air unless a plane lands and parks on the tarmac; that charges for those services can be regarded as provided for international passengers who are in a sense "outside New Zealand" until they pass through customs. The services are fundamental to and directly connected with the transportation of passengers;

The High Court and the TRA focus on whether a supply of services is fundamental or integral to transportation to determine whether the "directly in connection with" test in section 11(2)(a) is satisfied. This reasoning is not strictly relevant for the purposes of interpreting "directly in connection with" in section 11(2)(e). This is because the focus of section 11(2)(a) was on services directly connected with transportation services, and the identification of a direct connection between a service and another service, and a service and an item of property, involves different considerations.

However, the TRA has recently applied the proviso to section 11(2)(e) and considered the words "directly in connection with" in *Case S88* (1996) 17 NZTC 7,551. The objector in *Case S88* purchased motor vehicles from its non-resident parent company and then sold the vehicles to independent dealers, who on-sold them to the public. The parent company provided a contractual warranty to the objector. The objector agreed with the dealers that if a vehicle was repaired under warranty the objector would reimburse the dealer. The objector would then register a claim with the parent company under the warranty and receive payment pursuant to that claim.

The TRA was required to consider whether the repair services provided by the objector pursuant to its contract with the non-resident parent were zero-rated under section 11(2)(e). The TRA concluded that section 11(2)(e) could not apply to zero-rate this supply as the services were supplied "directly in connection with" moveable personal property (the vehicles) situated in New Zealand at the time the services were provided. Although, the TRA did not examine the meaning of "directly in connection with" in great detail, it did state (at 7,558):

The moveable personal property in question is the repaired vehicle. 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) must apply to the facts of this case and prevent the objectors from relying on the zero-rating provisions of s 11(2)(e). The repair service could not be performed but for the existence of the vehicle.

[Please note that *Case S88* is currently under appeal by the taxpayer.]

The High Court in *Malololailai Interval Holidays New Zealand Ltd v CIR* (1997) 18 NZTC 13,137 also considered the words "directly in connection with" in the context of section 11(2)(b).

In *Case T54* (1998) 18 NZTC 8,410, the TRA considered whether the supply of video services for Japanese honeymoon couples to a Japanese company was zero-rated under section 11(2)(e).

The decisions in both of these cases are consistent with the cases mentioned above.

Therefore, the case law discussing "in connection with" and "directly in connection with" indicates that the interpretation of the test will be dictated by the particular context involved. The Commissioner considers that the "directly in connection with" proviso in section 11(2)(e) should be interpreted narrowly (Judge Bathgate's words from *Case E84* quoted above support this), and that there must be a clear and direct relationship with moveable personal property or land in New Zealand before a supply will be standard-rated. This is consistent with the approach of the TRA in *Case S88* in identifying on the facts of that particular case a "direct relationship or connection" between the repair services and the vehicles under repair.

Advertising space and advertising time

The supply of advertising space in a publication is the supply of the service of communicating an advertising message, involving all the steps required to achieve communication of the advertisement. This service is not supplied directly in connection with the **subject matter of the advertisement**. In the words of the High Court in *Wilson & Horton v CIR* (1994) 16 NZTC 11,221 (at 11,224):

> The supply of space and 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.

The Commissioner agrees with this view. There is no direct relationship or connection between the provision of advertising space and the subject matter of the advertisement. The same reasoning also applies to the supply of advertising space in all types of publication as well as advertising time on radio or television (or other broadcasting service). The supply of advertising space or time in these media cannot be described as "directly in connection with" the advertised commodity.

Similarly, when advertising space is supplied in a publication, the services are not supplied directly in connection with the **publication** in which the advertisements are published. The High Court judgment in *Wilson & Horton* concluded that the provision of advertising space was supplied directly in connection with (if anything) the advertising itself. The advertised goods were considered to be at least one step removed from the services. The Commissioner considers the same logic applies in respect of a newspaper or other publication. The service of communicating an advertising message is directly connected with that message and not the publication. The publication is at least one step removed from the service and is merely the medium in which the advertising message is publicised. Accordingly, the service is not supplied directly in connection with the publication produced by the publishers.

Consequently, the supply of advertising space in either a publication or by way of broadcast will be treated in the same way for GST purposes. The supply will qualify for zero-rating, provided that the services are supplied for and to a non-resident who is outside New Zealand at the time the services are performed.

Supplies through agents

The application of section 60(2) may also need to be considered to determine whether a supply is zero-rated under section 11(2)(e). Section 60(2) deems a taxable supply of goods and services made by a registered person to an agent who is acting on behalf of a principal to be a supply made to the principal.

Therefore, if a supply of advertising space or time is made to a New Zealand resident person who is acting as an agent for a non-resident principal, section 60(2) deems the supply to be made to the non-resident principal and not the resident agent. Section 11(2)(e) will apply to zero-rate the supply of services, provided that all the other requirements of section 11(2)(e) are satisfied. A common example of this is where a resident advertising agency acts as an agent for a non-resident person in purchasing advertising space or time in New Zealand.

Conversely, if a supply is made to a non-resident person who is acting as an agent for a New Zealand resident in relation to the supply, section 11(2)(e) will not apply to zero-rate the supply even if the criteria in section 11(2)(e) are otherwise satisfied. The supply will be deemed to be made to the resident principal and it will not be for and to a non-resident person.

Section 11(2A)

Section 11(2A) was introduced to deal with situations where services are provided to non-residents and persons in New Zealand receive the performance of these services. An example is where New Zealand educational institutions contract with non-residents to provide education for the non-resident's children in New Zealand. The section operates to ensure supplies of this type are standard rated for GST purposes.

Section 11(2A) will not affect the provision of advertising services to non-residents in the circumstances covered by the arrangement described in this Ruling. The performance of these services is **not** received in New Zealand by other persons.

Examples

For the purposes of these examples, it is assumed that:

- A person referred to as a resident is a "resident" as defined in section 2 of the Goods and Services Tax Act 1985. The converse applies to non-residents; and

- If the services are supplied to a non-resident, the non-resident is outside New Zealand at the time of performance of the services.

Example 1

A UK resident manufacturing company contacts a New Zealand magazine publisher and books advertising space for a newly developed product. The UK company has a GST registered subsidiary in New Zealand that sells the advertised product.

The supply of advertising space by the magazine publisher to the UK manufacturer is zero-rated under section 11(2)(e). This is because:

- The publisher supplies the services contractually for and to a non-resident. The fact that the New Zealand resident subsidiary potentially may benefit from the supply through increased sales does not preclude zero-rating.

- The services are not supplied directly in connection with either the products for sale in New Zealand or the magazines in which the advertisements are shown.

Example 2

A US resident distributor of soft drinks contracts for the supply of radio time on a national radio station in New Zealand. The soft drinks are available from all chains of supermarkets throughout New Zealand.

The supply of radio time by the New Zealand radio station to the US distributor is zero-rated under section 11(2)(e). This is because:

- The radio station supplies its services contractually for and to a non-resident. The fact that New Zealand resident retailers throughout New Zealand may potentially benefit from the supply through increased sales does not preclude zero-rating.

- The services are not supplied directly in connection with the products for sale in New Zealand.

Example 3

An Australian computer distributor plans to advertise its product range in New Zealand. The computers will be available through all major computer distributors in New Zealand. The Australian company contacts a New Zealand resident advertising agency to arrange an advertising campaign. The agency, acting in the capacity as agent for the Australian company, purchases air time on a New Zealand resident television channel.

The supply of air time by the television station to the Australian company is zero-rated under section 11(2)(e). This is because:

- The television channel supplies the air time services contractually for and to a non-resident. Section 60(2) deems the supply to be made to the Australian company, as principal. The New Zealand resident advertising agency receives the supply as agent only.

- The fact that New Zealand resident distributors may potentially benefit from the supply through increased sales does not preclude zero-rating.

The services are not supplied directly in connection with the products for sale in New Zealand.