

FORESTRY RIGHTS – SECONDHAND GOODS GST INPUT TAX DEDUCTION

PUBLIC RULING - BR Pub 01/08

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 98/5 which was published in TIB Volume Ten, No. 12, December 1998. BR Pub 98/5 applies up until 30 September 2001. This new ruling takes into account minor changes to the legislation since BR Pub 98/5 was issued, and the commentary has been expanded. Its period of application is from 1 October 2001 to 30 September 2006.

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 the section 2(1) definition of “secondhand goods”, section 3A(1)(c) definition of “input tax”, and section 20(3).

The Arrangement to which this Ruling applies

The Arrangement is the supply to a GST registered person of a “forestry right” (as defined in the Forestry Rights Registration Act 1983) by way of sale in the following circumstances:

- The sale is not a taxable supply; and
- The right is situated in New Zealand at the time of supply; and
- The right is acquired by the registered person for the principal purpose of making taxable supplies; and
- The right has been used by at least one prior owner for its intrinsic purpose.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- A forestry right is a secondhand good for which an input tax deduction is available within the section 2(1) definition of “secondhand goods”, section 3A(1)(c) definition of “input tax”, and section 20(3).

The period for which this Ruling applies

This Ruling will apply for the period 1 October 2001 to 30 September 2006.

This Ruling is signed by me on the 3rd day of September 2001.

Martin Smith

General Manager (Adjudication and Rulings)

COMMENTARY ON PUBLIC RULING BR Pub 01/08

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusion reached in public ruling BR Pub 01/08 (“the Ruling”).

The subject matter covered in the Ruling was previously dealt with in public ruling BR Pub 98/5 (*Tax Information Bulletin* Volume Ten, No. 12, December 1998 at page 43, under the heading “*Forestry Rights – secondhand goods GST input tax deduction*”). This Ruling extends that coverage to 30 September 2006.

Background

We had been asked to clarify whether a GST registered person who buys a forestry right by way of a non-taxable supply may make a secondhand goods input tax deduction. It had been unclear whether a forestry right can be a secondhand good.

Legislation

Section 2 of the Forestry Rights Registration Act 1983 (“FRRA”) defines “forestry right” (for the purposes of that Act):

Forestry right means a right created in accordance with this Act:

Section 2A of the FRRA deals with the creation of forestry rights. It states:

2A Creation of forestry rights

- (1) A forestry right may be created by the proprietor of land—
 - (a) By creating in accordance with subsection (3); or
 - (b) By granting to any other person; or
 - (c) By reserving to the proprietor on the sale of the land,—
the right to—
 - (d) Establish, maintain, and harvest; or
 - (e) Maintain and harvest,—
a crop of trees on that land.
- (2) The forestry right may also—
 - (a) Grant or reserve rights of access and rights of construction and use of tracks, culverts, bridges, buildings, and other works and facilities if those rights are ancillary to and necessary for the purposes of subsection (1):
 - (b) Provide for charges, payments, royalties, or division of the crop or the proceeds of the crop,—
whether or not such rights or provisions are coupled with an obligation.
- (3) Despite any enactment or rule of law, the proprietor may, in accordance with this section, create a forestry right for the proprietor.
- (4) No right created under this section is capable of conferring a right of exclusive possession of the land.

Section 3(1) of the FRRA states:

Notwithstanding any rule of law or equity to the contrary, every forestry right shall be deemed to be a *profit à prendre*.

Section 2(1) of the Goods and Services Tax Act 1985 defines “goods”:

“Goods” means all kinds of personal or real property; but does not include choses in action or money.

Section 3A(1)(c) defines “input tax” in relation to secondhand goods:

(1) Input tax, in relation to a registered person, means—

....

(c) an amount determined under subsection (3) after applying subsection (2).

Section 20(3) allows deductions from output tax, and states:

(3) Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period—

(a) In the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19 of this Act, the amount of input tax—

...

(ia) In relation to the supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:

...

(b) In the case of a registered person who is required to account for tax payable on a payments basis or a hybrid basis pursuant to section 19 of this Act, the amount of input tax—

(i) In relation to the supply of goods and services made to that registered person, being a supply of goods and services which is deemed to take place pursuant to section 9(1) or section 9(3)(a) or section 9(3)(aa) or section 9(6) of this Act, to the extent that a payment in respect of that supply has been made during the taxable period:

Application of the Legislation

Under sections 2(1), 3A, and 20(3), seven conditions must be met before the purchase of a forestry right by a GST registered person will permit a secondhand goods input tax deduction:

- Forestry rights must be “goods” as defined in section 2(1).
- The supply of a forestry right must be by way of sale.
- The supply of the forestry right must be a non-taxable supply.
- The sale must involve payment in the taxable period for which an input tax deduction is sought.
- The forestry right must be secondhand.
- The forestry right must be acquired for the principal purpose of making taxable supplies.

- The forestry right must be situated in New Zealand at the time of sale.

The following paragraphs consider some of these requirements.

“Goods”

The Commissioner considers that a forestry right (as defined in section 2 of the Forestry Rights Registration Act 1983) is a “good” for GST purposes. “Goods” means all real and personal property but does not include choses in action. Section 3(1) of the Forestry Rights Registration Act 1983 deems forestry rights to be *profits à prendre*. A *profit à prendre* is a right to take something off another person’s land. A *profit à prendre* is an interest in land. It is not a chose in action because the rights under a *profit à prendre* are of a possessory nature, whereas a chose in action can only be enforced by action. An example of a “chose in action” is the granting of a licence at a boat marina. The benefits arising from the licence cannot be obtained by taking possession of the licence, but by action against a licensor who refuses to honour the licence. On the other hand, a forestry right, which can be enforced by taking possession, is real property and a “good” for GST purposes.

“Sale”

A secondhand goods input tax deduction is only available if there is a supply by way of sale. Forestry rights are a form of transferable property right, like other *profits à prendre*, and may be sold. It will be a question of fact whether there has been a sale rather than a lease or sub-grant of a forestry right. Because of the definition of “input tax” in section 3A, a secondhand goods input tax deduction is available only where there is a sale (section 3A(2)).

The sale must be by way of a non-taxable supply for an input tax deduction to be available.

“Payment”

An input tax deduction is only available to the extent that there has been payment for the goods in the relevant taxable period. Therefore, if there is a sale by instalments, input tax deductions are available only in the taxable period in which each instalment is paid.

“Secondhand”

The forestry right must be “secondhand” before an input tax deduction is available. The Commissioner considers that land is a secondhand good. This is supported by case law, e.g. *Case NI3* (1991) 13 NZTC 3,105. The Court of Appeal decision in *Coveney v CIR* (1995) 17 NZTC 12,193 appears to have confirmed this view, notwithstanding earlier obiter dicta that land may not be a secondhand good in *L R McLean v CIR* (1994) 16 NZTC 11,211 (CA) and *King v Bennetts* (1994) 16 NZTC 11,370.

However, when a specific interest in land, like a forestry right, is newly created, it is a unique mix of rights distinct from the original land over which it was created. Accordingly, the original creation of a forestry right cannot be a sale of secondhand goods. The forestry right is a new item of property. Before a forestry right can be a secondhand good, at least one prior owner must have made use of the right for its intrinsic purpose, *L R McLean v CIR (CA)*, being some exercise of the rights conferred by the forestry right. A forestry right is a bundle of rights giving its owner the right to either:

- establish, maintain and harvest; or
- maintain and harvest,

a crop of trees on that land.

The forestry right will be considered a secondhand good so long as the prior owner has used the forestry right for its intrinsic purpose, namely has exercised some of the rights provided under that forestry right (for example the prior owner has established, maintained and/or harvested a crop of trees).

Examples

Example 1

Purchaser is a GST registered person who intends to enter the forestry industry in a small way. On 1 July 2000 she buys a forestry right from Supplier, who is not registered for GST. Supplier had bought the right 18 months earlier from a farmer who had decided not to diversify into forestry. Supplier had used the right on a small scale to remove a small amount of timber. The purchase price is \$20,000 payable in four quarterly instalments. The first payment is made on 1 August 2000. Purchaser is entitled to a secondhand goods input tax deduction because the forestry right was disposed of by sale, the seller was unregistered (non-taxable supply), the forestry right was secondhand, and Purchaser acquired the right for the principal purpose of making taxable supplies. In Purchaser's next GST return (for the two months ending 31 August 2000) she should deduct as input tax the tax fraction of the amount of the first instalment (\$5,000). Accordingly, she may deduct \$555.55.

Example 2

The same facts as example 1 above, but neither the Supplier nor any other previous owner has harvested any trees but the Supplier has used the existing forestry right to plant a crop of trees on the land. Once again a secondhand goods credit would be available as the Supplier has used the forestry right for one of its intrinsic purposes, being the right to establish a crop of trees.