Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTOTANGA WHAKATAU Ā-TURE> WHAKAWĀ

GST: Eligibility to input tax deductions

Decision date | Te Rā o te Whakatau: 23 June 2021

Issue date | Te Rā Tuku: 19 October 2021

TDS 21/02

Subjects | Ngā kaupapa

GST: agency, cancellation of registration, input tax deductions, non-resident supplier; TAA: claimed procedural defects of assessment; onus and standard of proof.

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

CCS	Customer and Compliance Services, Inland Revenue
Commissioner	Commissioner of Inland Revenue or CIR
GST	Goods and services tax
GST Act	Goods and Services Tax Act 1985
TAA	Tax Administration Act 1994
TRA	Taxation Review Authority

Taxation laws | Ngā ture take

All legislative references are to the Goods and Services Tax Act 1985 (**GST Act**) unless otherwise specified.

Facts | Ngā meka

1. Company A is an overseas incorporated company and is registered as an overseas company under the New Zealand Companies Act 1993.
2. It is registered for GST in New Zealand with its taxable activity described as ticket selling for non-resident airlines.
3. Company A maintains it buys and sells airline flights in its own right and not as an agent of the airlines.
4. Company A's GST returns show zero-rated supplies of flights sold and input tax deductions for GST charged by the airlines on supply of flights and the supply of virtual office supplies.

Issues | Ngā take

5. The main issues considered in this dispute were:

- concerns about Customer and Compliance Services (**CCS**), Inland Revenue's handling of this dispute;
- whether Company A bought and sold airline flights in its own right;
- if Company A bought and sold the flights in its own right, whether its supply of the flights was zero-rated international carriage;
- whether Company A is entitled to the input tax deductions it claimed;
- whether Company A's GST registration should be cancelled;
- if Company A's GST registration should be cancelled, whether it could register for GST as a non-resident supplier.

6. There was also a preliminary issue on the onus and standard of proof.

Decisions | Ngā whakatau

7. The Tax Counsel Office decided that:

- the concerns that Company A raised about the handling of this dispute by CCS is not supported by the evidence. In any event, as stated by the High Court in *Dandelion Investments v CIR*, the proper course for challenging the assessments is not to attack the method by which the Commissioner made them but to provide the Taxation Review Authority (**TRA**) or court with the evidence and arguments necessary for it to deal with the matter in the manner the taxpayer contends;[1]
- company A did not buy and sell the flights in its own right. It sold the flights on behalf of the airlines as an agent;
- the conclusion that Company A did not buy and sell the flights in its own right makes it unnecessary to consider whether the supply of the flights was zero-rated international carriage;
- company A is not entitled to the input tax deductions it claimed;
- company A's GST registration should be cancelled from the date it was GST registered;
- company A has not shown that it is entitled to be GST registered as a non-resident supplier.

[1] *Dandelion Investments Ltd v CIR* (1996) 17 NZTC 12,689 (HC). This approach was expressly approved by the Court of Appeal in *Dandelion Investments Ltd v CIR* (2003) 21 NZTC 18,010 (CA) at [62].

Reasons for decisions | Ngā take mō ngā whakatau

Preliminary Issue | Take tōmua: Onus and standard of proof

8. The onus of proof in civil proceedings[2] is on the taxpayer, except for shortfall penalties for evasion or similar act, or obstruction.[3] The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.[4]

9. The standard of proof in civil proceedings is the balance of probabilities.[5] This standard is met if it is proved that a matter is more probable than not. Whether Company A has discharged the onus of proof is considered in the other issues.

Issue 1 | Take tuatahi: Concerns raised by Company A about CCS's handling of this dispute

10. Company A expressed concerns about delays and changes and apparent inconsistencies in views taken by CCS during the course of this dispute. Company A contended that CCS deliberately took action to prevent it from receiving GST refunds.

11. Changes in the Commissioner's view are understandably frustrating for taxpayers. However, the Commissioner:

    - must determine a taxpayer's tax liability according to law, and
    - is obliged to change her view if an earlier view is considered incorrect.[6]

12. Any procedural defects in an assessment can be addressed by the TRA or a court if a dispute proceeds to challenge stage.[7] They will consider the assessment again and can make any assessment the Commissioner can make. In reaching their own decision, the TRA or court can cure any defects in the Commissioner's assessment.

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[2] Challenge proceedings (ie, the proceedings that would follow if this dispute proceeds to the Taxation Review Authority or a court) are civil proceedings.

[3] Section 149A(2) of the TAA.

[4] *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA); *Beckham v CIR* (2008) 23 NZTC 22,066 (CA).

[5] Section 149A(1) of the TAA; *Yew v CIR* (1984) 6 NZTC 61,710 (CA); *Birkdale Service Station Ltd v CIR* (1999) 19 NZTC 15,493 (HC); *Case X16* (2005) 22 NZTC 12,216; *Case Y3* (2007) 23 NZTC 13,028.

[6] *CIR v Michael Hill Finance (NZ) Ltd* [2016] NZCA 276, (2016) 27 NZTC 22-056 at [29] and [43]; *Westpac v CIR* (2008) 23 NZTC 21,694 (CA) at [77]; *Case N19* (1991) 13 NZTC 3,158 at [49].

[7] *Tannadyce Investments Ltd v CIR* [2011] NZSC 158, (2011) 25 NZTC 20-103.

13. Therefore, as stated by the High Court in *Dandelion*, the proper course for challenging the assessment is not to attack the method by which the Commissioner made it but to provide the TRA or court with the evidence and arguments necessary for it to deal with the matter in the manner the taxpayer contends.

14. The evidence in this dispute does not show CCS was motivated by any improper purpose or otherwise acted deliberately to delay or prevent Company A from receiving GST refunds.

15. In addition, it seems reasonable for CCS to require Company A to provide evidence to show it was making zero-rated supplies. This is given that the Commissioner has a statutory duty to assess the correct amount of tax and that the onus is on Company A to show it was making zero-rated supplies.

16. It is also apparent from the evidence that deciding the correct application of the law has been made more difficult by the lack of documentation provided by Company A to show all relevant contractual arrangements it entered into and how the GST Act should apply. The lack of information may have contributed to the changes in view and delays.

17. In any event, the proper course for challenging CCS's proposed adjustments is for Company A to provide the evidence and arguments necessary for the issues to be resolved in the manner it contends.

Issue 2 | Take tuarua: Whether Company A bought and sold airline flights in its own right

18. The nature of a supply is determined from the contractual arrangements entered into and not by what is in broad substance being supplied:

    - Parties to a supply are determined by reference to the general principles of contract law.[8]
    - GST Act provisions are directed to the contractual arrangements between the supplier and the recipient of the supply.[9]

[8] *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC) at [50]. See also *CIR v Databank Systems Ltd* (1990) 12 NZTC 7,227 (PC).

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

- The true nature of a transaction is ascertained by a careful consideration of the legal arrangements actually entered into.[10]

19. Under provisions of the GST Act relating to agents, generally, and unless the agent and principal agree otherwise:

- supplies made by an agent for and on behalf of any other person who is their principal are deemed to be made by the principal and not the agent (s 60(1));
- supplies made to an agent acting on behalf of another person who is their principal is deemed to be made to the principal and not the agent (s 60(2)).

20. With effect from 1 October 2016 a principal and agent can agree that the agent and not the principal is treated as making the taxable supply (s 60(1AB)). A principal and agent can also agree that:

- a supply is treated as two supplies, one from the principal to the agent and one from the agent to the recipient (s 60(1B));
- with effect from 30 March 2017, a supply by a person is treated as being two supplies, one from the person to the agent and one from the agent to the principal (s 60(2B)).

21. The evidence for this dispute does not include any agreement with any airline other than Airline X to show the nature of the contractual relationship and transactions between Company A and the airlines. The agreement with Airline X shows that Company A sold flights on behalf of Airline X as an agent.

22. Further, the evidence does not include any document recording Company A and Airline X having agreed that:

- Company A and not Airline X would be treated as supplying flights;
- any supply of flights would be treated as two supplies, one from Airline X to Company A and one from Company A to the recipient.

23. Other evidence including invoices, e-Tickets and International Air Transport Association documentation is also consistent with Company A selling the flights on behalf of the airlines as agent.

24. The evidence does not include any agreements showing any contractual arrangements between Company A and overseas tour operators. Nor does the evidence include any

[10] *CIR v Gulf Harbour Development Ltd* (2004) 21 NZTC 18,915 (CA).

invoices showing the on-sale of the flights by Company A to overseas tour operators or any other persons or any other documentation supporting any such sales.

25. In summary, the evidence does not show that Company A purchased the flights outright from the airlines and on-sold them to overseas tour operators. Rather, the evidence suggests that Company A sold the flights on behalf of the airlines as an agent. In that case the airlines rather than Company A were supplying the flights.

Issue 3 | Take tuatoru: Whether Company A's supply of the flights was zero-rated international carriage

26. CCS argues that, if Company A bought and sold the flights in its own right, it has not shown that the flights were zero-rated as international carriage (s 11A(1)(b)). Company A argues that the flights were zero-rated as international carriage.

27. It has been decided that Company A did not buy and sell the flights in its own right. This decision makes it unnecessary to consider whether the supply of the flights was zero-rated as international carriage. Company A was not supplying any flights that could be zero-rated international carriage.

Issue 4 | Take tuawhā: Whether Company A is entitled to the input tax deductions it claimed

28. "Input tax" is tax charged under s 8(1) on a supply of goods or services acquired by a registered person (s 3A). Section 8 imposes GST on a supply in New Zealand of goods and services by a registered person in the course or furtherance of a taxable activity.

29. Input tax may be deducted under s 20 to the extent to which the goods or services to which it relates are used for, or are available for use in, making taxable supplies. A "taxable supply" is defined in s 2 to mean a supply of goods and services in New Zealand that is charged with GST under s 8.

30. The parties had proceeded on the basis that the relevant supplies were supplies of services. Relevantly, services are supplied in New Zealand if the supplier is:

    - resident in New Zealand (s 8(2)). A company is resident in New Zealand:

- if it is incorporated,[11] it has its head office,[12] its centre of management,[13] or its directors exercise control of it,[14] in New Zealand; or[15]
- to the extent it carries on in New Zealand a taxable activity or any other activity while having a fixed or permanent place in New Zealand relating to that taxable activity or other activity.[16] To be carrying on a taxable activity in New Zealand, a person must be making supplies in New Zealand for a consideration;[17] or

- non-resident and the services are physically performed in New Zealand by a person who is in New Zealand at the time the services are performed (s 8(3)).

31. Also, generally, to claim an input tax deduction the recipient of a supply must hold and retain a "tax invoice" relating to the supply (s 20(2)) (except in certain circumstances, such as a supply for a consideration of $50 or less (s 24(5)).[18]

32. Company A claimed input tax deductions relating to supplies of flights. It seems likely that Company A also claimed input tax deductions for "virtual office" services it purchased.

33. For Company A to be entitled to the input tax deductions claimed:

- it must have acquired the services to which the input tax relates;
- the services must have been used for, or available for use in, making taxable supplies; and
- it must have generally held tax invoices relating to the supplies.

34. Company A has not shown that it purchased the flights outright from the airlines. This means that Company A has not shown that it acquired the services to which the input

[11] Section 13 of the Companies Act 1993.

[12] Based on definitions of "office" and "home" in the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011), a company would be resident in New Zealand if it uses a room, rooms, or building in New Zealand as its chief or principal place of business for clerical, administrative, or similar work.

[13] *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455 (HL) and *New Zealand Forest Products Finance NV v CIR* (1995) 17 NZTC 12,073 (HC).

[14] *Case 11/2011* (2011) 25 NZTC ¶1-011; *Vinelight Nominees Ltd v CIR* (2012) 25 NZTC ¶20-155 (HC).

[15] The s 2(1) definition of "resident" refers to s YD 2 (residence of companies) of the Income Tax Act 2007.

[16] Proviso (a) of the s 2(1) definition of "resident".

[17] Section 6.

[18] *Case 1/2012* (2012) 25 NZTC 1-013; *Case 3/2016* (2016) 27 NZTC 3-025.

tax relates. Therefore, Company A was not entitled to the input tax deductions it claimed for the flights.

35. It seems more probable than not that Company A acquired virtual office services (including telephone answering, fax handling, mail services, and an address) for which it claimed input tax deductions. However, Company A has not shown that it supplied flights in its own right. This means that Company A cannot have used the virtual office services in making taxable supplies of the flights.

36. Company A may have made supplies of services when it arranged the sale of flights (**Arranging Services**). However, to be taxable supplies, any supplies of Arranging Services must have been made in New Zealand. Any such supplies of Arranging Services may have been made in New Zealand if they were performed in New Zealand by a person in New Zealand at the time the services were performed (s 8(3)), or Company A was resident in New Zealand (s 8(2)).

37. Company A had no staff or other persons in New Zealand performing Arranging Services such that s 8(3) would apply to treat the services as supplied in New Zealand.

38. Also, Company A was not resident in New Zealand such that s 8(2) would apply to treat the services as supplied in New Zealand. Firstly, although Company A was registered under the Companies Act 1993 as an overseas company, it was not incorporated in New Zealand. In addition, neither its director nor any of its staff were in New Zealand. This makes it unlikely that it had its head office or centre of management in New Zealand, or that its director exercised control of it in New Zealand.

39. Company A argued that its use of the internet meant that its director controlled it in New Zealand without being physically present in New Zealand. However, it remains the law that control of a company by a sole director is exercised in the country in which the director is physically located when they make their decisions.

40. Second, Company A has not shown that it was making supplies of the flights in New Zealand in its own right. Even if the Arranging Services comprised a taxable activity, Company A has not shown the taxable activity was carried on in New Zealand. Nor has Company A shown that it was carrying on any other activity in New Zealand. Therefore, Company A was not entitled to the input tax deductions it claimed for the Arranging Services.

41. This makes it unnecessary to decide whether Company A had a fixed or permanent place in New Zealand. Nevertheless, the virtual office services would not ordinarily be regarded as a space that could be occupied. And, even if they were a fixed or permanent place in New Zealand, the place must have related to a taxable activity or other activity carried on by Company A in New Zealand.

42. This also makes it unnecessary to decide whether Company A held tax invoices for the Arranging Services. However, Company A has not shown that it held tax invoices for all of the Arranging Services for which it claimed input tax deductions.

Issue 5 | Take tuarima: Whether Company A's GST registration should be cancelled

43. The Commissioner may cancel a person's GST registration if satisfied that the person is not carrying on a taxable activity. If the person is non-resident, the Commissioner must be satisfied that the person is not carrying on a taxable activity in New Zealand. The cancellation date may be retrospective to the date the person was GST registered if the Commissioner is satisfied the person was not carrying on a taxable activity or a taxable activity in New Zealand, as the case may be, from that date (ss 52(5), 52(5A), and 52(7)).

44. It has been concluded that Company A was not resident in New Zealand. Accordingly, to cancel Company A's GST registration, the Commissioner must be satisfied that Company A is not carrying on a taxable activity in New Zealand.

45. It has also been concluded that Company A was not carrying on a taxable activity in New Zealand. Therefore, the Commissioner may cancel Company A's GST registration and the cancellation date may be retrospective to the date Company A was GST registered.

Issue 6 | Take tuaono: Whether Company A could register for GST as a non-resident supplier

46. Section 54B allows non-residents to register for GST and claim input tax deductions subject to certain requirements. However, Company A does not argue, and has not provided any evidence to show, that it meets all of the s 54B requirements.

47. Even if Company A was GST registered under s 54B, registration would not entitle it to claim any input tax deductions on flights it sold on behalf of the airlines as an agent. This is because Company A does not acquire the flights outright. Based on the evidence, at most, Company A could only claim the modest amounts of input tax charged on virtual office services acquired by it.