TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTOTANGA WHAKATAU Ā-TURE> WHAKAWĀ

GST: Whether property sale is zero-rated. Time bar.

Decision date | Te Rā o te Whakatau: 24 November 2021

Issue date | Te Rā Tuku: 15 June 2022

TDS 22/10

Subjects | Ngā kaupapa

GST: Whether property sale was zero-rated. Whether proposed amendment to assessment was time-barred.

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

Agreement	Agreement for sale and purchase of the Property
CCS	Customer & Compliance Services, Inland Revenue
Commissioner	Commissioner of Inland Revenue
GST	Goods and services tax
GST Act	Goods and Services Tax Act 1985
Property	One of the properties in the Taxpayer's unit title subdivision
TAA	Tax Administration Act 1994

Taxation laws | Ngā ture tāke

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

Facts | Ngā meka

1. The Taxpayer is a company and is registered for GST on the invoice basis. The Taxpayer's taxable activity involved building residential properties for sale and carrying out renovations.
2. The Taxpayer purchased vacant land. It constructed two dwellings on the land for disposal as part of its taxable activity. Before the dwellings were sold the land was divided by way of a unit title subdivision. The dispute relates to the sale of one of the resulting properties (**Property**).

3. The Taxpayer and the purchaser entered into an agreement for the sale and purchase of the Property (**Agreement**). The Property was untenanted and was to be sold with vacant possession. The purchase price was stated to be "inclusive of GST (if any)". The Agreement was in the form of the ninth edition 2012 (3) of the REINZ/ADLS standard form agreement. Clause 15 of the Agreement (the "going concern" clause) had not been deleted.

4. In the GST Schedule to the Agreement, the purchaser answered "yes" to the question about whether the purchaser is registered under the GST Act and/or will be so registered at settlement. However, the purchaser did not answer the questions about whether it intended to use the property at settlement:

   - for making taxable supplies, or
   - as a principal place of residence by the purchaser or a person associated with the purchaser under section 2A(1)(c) of the GST Act (connected by blood relationship, marriage, civil union, de factor relationship or adoption).

5. Two days in advance of settlement, the Taxpayer issued a settlement statement and tax invoice to the purchaser, both of which recorded the sale of the Property as a zero-rated supply for GST purposes.

6. The Taxpayer and purchaser then settled the sale and purchase of the Property. As agreed the Property was vacant on settlement.

7. Several weeks later the Taxpayer's accountants emailed the purchaser's solicitors asking the purchaser to complete the GST Schedule to the Agreement, and to confirm whether the purchaser intended to use the Property for long-term or short-term accommodation.

8. The purchaser's solicitors responded with an amended GST Schedule signed by the purchaser. The Schedule confirmed that the purchaser was registered for GST at settlement. In addition, the purchaser now answered "yes" to the question about whether it intended at settlement to use the property for making taxable supplies and "no" to the question about whether it intended at settlement to use the property as a principal place of residence by the purchaser or a person associated with the purchaser. The purchaser did not comment on whether it intended to use the Property for long-term or short-term accommodation.

9. The Taxpayer treated the sale of the Property as a zero-rated supply in its GST return for the relevant period (GST disputed period).

10. The purchaser subsequently applied for holiday home registration for the Property. Holiday home registration entitles the owner to let the property for short-term

accommodation for up to 90 nights per rating year. However the purchaser never held a visitor accommodation consent in respect of the Property.

11. Customer & Compliance Services, Inland Revenue (**CCS**) audited the Taxpayer and initiated a dispute. CCS proposed to amend the assessment for the Taxpayer's GST return for the GST disputed period to include output tax on the supply of the Property.

12. The relevant assessment was time barred under s 108A(1) of the Tax Administration Act 1994 (TAA), subject to whether the exception in s 108A(3) applied.

Issues | Ngā take

13. The main issues considered in this dispute were:

- Was GST payable on the sale of the Property? This required consideration of the following sub-issues:
  - Whether the Taxpayer sold a going concern
  - Whether the sale was compulsorily zero-rated
- Was the Commissioner entitled to amend the assessment for the Taxpayer's GST return for the GST disputed period?

Decisions | Ngā whakatau

14. The Tax Counsel Office reached the following decisions on the issues:

- The supply made by the Taxpayer to the purchaser was not zero-rated either as the supply of a going concern or under the compulsory zero-rating provisions. The Taxpayer was therefore required to return output tax on the supply.
- However, CCS's position that the time bar exception in s 108A(3) of the TAA applied was not accepted. The proposed amendment to the assessment was time-barred.

Reasons for decisions | Ngā take mō ngā whakatau

Issue 1 | Take tuatahi: What is the onus and standard of proof?

15. The issue was who must prove a matter (the onus of proof) and to what standard the person must prove the matter (the standard of proof).

16. CCS argued the onus of proof was on the taxpayer to show the sale was zero-rated and that the Taxpayer had not provided sufficient evidence to support its position that the sale of the Property was zero-rated. The Taxpayer did not dispute that the onus of proof was on it to show the sale was zero-rated, but argued that it had provided sufficient evidence to support its position that the sale of the Property was zero-rated.

17. The Taxpayer disputed whether the onus of proof was on it to show that the Commissioner honestly held the opinion that the Taxpayer knowingly or fraudulently failed to provide to the Commissioner all material facts necessary for determining the amount of GST payable for the GST disputed period. The Taxpayer argued there was a threshold onus on the Commissioner. CCS argued that as the Commissioner had formed an opinion, the onus was on the Taxpayer to show:

    - the Commissioner did not honestly hold the opinion, or
    - the opinion was not open to the Commissioner on the available facts.

18. The onus of proof in civil proceedings is on the taxpayer,[1] except for shortfall penalties for evasion or similar act, or obstruction.[2] The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.[3]

19. The standard of proof in civil proceedings is the balance of probabilities.[4] This standard is met if it is proved that a matter is more probable than not.

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

[2] Section 149A(2) of the Tax Administration Act 1994.

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

[4] 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.

20. However, in some cases a taxpayer may be able to discharge the onus of proof by showing that the assessment is arbitrary or demonstrably unfair.[5]

21. Whether the Taxpayer had discharged the onus of proof is considered in the following issues.

Issue 2 | Take tuarua: Is GST payable on the sale of the Property?

22. The issue was whether GST was payable on the sale of the Property. This depended on whether:

- the Taxpayer sold a going concern under s 11(1)(m); or
- the Taxpayer had shown the sale was compulsorily zero-rated under s 11(1)(mb).

Going concern

23. CCS argued that the sale was not of a going concern under s 11(1)(m) because:

- The goods transferred did not amount to a going concern as the Taxpayer did not sell all or a part of its taxable activity – it simply sold an asset.
- The parties had not agreed in writing that the sale was a supply of a going concern (s 11(1)(m)(i)).
- The parties did not "intend" (at the time of supply) that the sale of the Property was to be a supply of part of a taxable activity capable of being carried on as a going concern by the recipient (s 11(1)(m)(ii)).

24. The Taxpayer argued that it sold a going concern under s 11(1)(m) because:

- The Taxpayer sold a part of its taxable activity that was capable of separate operation. Part of the Taxpayer's taxable activity was selling property. The sale of the Property was, therefore, a sale of a part of the Taxpayer's taxable activity, as the Taxpayer supplied everything the purchaser needed to carry on a taxable activity of selling property. The purchaser did in fact sell the Property, within a relatively short time.

[5] *Lowe v CIR* (1981) 5 NZTC 61,006 (CA); *CIR v Canterbury Frozen Meat Co Ltd* (1994) 16 NZTC 11,150 (CA); *Golden Bay Cement Company Ltd v CIR* (1996) 17 NZTC 12,580 (CA); *CIR v New Zealand Wool Board* (1999) 19 NZTC 15,476 (CA); *Dandelion Investments Ltd v CIR* (2003) 21 NZTC 18,010 (CA).

- The parties had recorded that the sale was of a going concern in clause 15 of the Agreement.
- The parties intended the sale was to be of a going concern - if the parties had not intended the sale to be of a going concern, they would have deleted clause 15.

25. The zero-rating of the supply of going concerns is provided for by s 11(1)(m). Section 11(1)(m) states:

> **11 Zero-rating of goods**
>
> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> …
>
> (m) the supply to a registered person of a taxable activity, or part of a taxable activity, that is a going concern at the time of the supply, if –
>
> (i) the supplier and the recipient agree that the supply is the supply of a going concern, and their agreement is recorded in a document; and
>
> (ii) the supplier and the recipient intend that the supply is of a taxable activity, or part of a taxable activity, that is capable of being carried on as a going concern by the recipient; or
>
> …

26. "Going concern" is defined in s 2 as:

> "**Going concern**", in relation to a supplier and a recipient, means the situation where–
>
> (a) there is a supply of a taxable activity, or of a part of a taxable activity where that part is capable of separate operation; and
>
> (b) all of the goods and services that are necessary for the continued operation of that taxable activity or that part of a taxable activity are supplied to the recipient; and
>
> (c) the supplier carries on, or is to carry on, that taxable activity or that part of a taxable activity up to the time of its transfer to the recipient.

27. The Tax Counsel Office considered the law referred to by the parties and provided the following summary of principles:

- To be a supply of a going concern, there must be a supply of a taxable activity, or of part of a taxable activity that is capable of separate operation, that is "going" or capable of "going" at the time it is supplied. All the assets and business

structures and processes must be supplied. The taxable activity supplied must be carried on up to the time of transfer.[6]

- The activity supplied must be a going concern at the time of supply, in this case being the earlier of the time an invoice is issued by the supplier, or the time at which any payment is received by the supplier.[7]
- The parties must record their agreement that a supply is to be the supply of a going concern in a document. The record must be in clear and unequivocal terms.[8]
- Clause 15 (or its equivalent) in the REINZ/ADLS standard form agreement meets the requirement for the agreement of the parties to be "recorded in a document" if there is a supply under the agreement to which section 11(1)(mb) (compulsory zero-rating) does not apply, but which comprises the supply of a taxable activity that is a going concern at the time of the supply.[9]
- The agreement for sale and purchase will usually be sufficient to show whether the parties had an intention to transfer a taxable activity that is capable of being carried on as a "going concern" by the recipient.[10]

28. The Tax Counsel Office considered that:

- The sale of the Property was simply the sale of an asset, without more, and did not amount to a supply of a part of the Taxpayer's taxable activity that was capable of separate operation. This was supported by the case law that shows a business process must accompany the sale of an asset for it to satisfy the "going concern" definition, even if most of the value in the business relates to the asset. This has been held to be the case in respect of the sale of key assets such as a charter yacht in a yacht chartering business (*Allen Yacht Charters*), an uncompleted property development in a property development business (*Case*

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6 *Case M98* (1990) 12 NZTC 2,599 at 2,609; *Case N17* (1991) 13 NZTC 3,148 at 3,155; *Case M89* (1990) 12 NZTC 2,556; *Allen Yacht Charters Limited v CIR* (1994) 16 NZTC 11,270; *Case S78* (1996) 17 NZTC 7,488; *Case 7/2011* (2011) 25 NZTC 15,076; *Case P75* (1992) 14 NZTC 4,504.

7 Section 9(1) of the GST Act.

8 *Fatac Limited (in liquidation) v CIR* (2002) 20 NZTC 17,902 (CA); *Case W56* (2004) 21 NZTC 11,525; *Case W57* (2004) 21 NZTC 11,539; *Starrenburg v Mortre Holdings Ltd* (2004) 21 NZTC 18,696 (CA).

9 *Fatac Limited (in liquidation) v CIR* (2002) 20 NZTC 17,902 (CA); *Starrenburg v Mortre Holdings Ltd* (2004) 21 NZTC 18,696 (CA).

10 *Greenmount Manufacturing Ltd v Southbourne Investments Ltd* (2007) 23 NZTC 21,096 (CA); *Cockburn & Ors v CS Development No 2 Ltd* (2010) 24 NZTC 24,431 (CA); *Cockburn & Ors v CS Development No 2 Ltd* (2011) 25 NZTC 20,007 (SC).

S78), and a truck in a freight business (*Case 7/2011*). "Business process" includes (or may include) contracts with suppliers and customers, knowhow, and goodwill.

- While an asset of the business was transferred, not all of the business structure relating to the "property selling" part of the activity was transferred. Further, and importantly, there was no transfer of business process. There was simply the transfer of an asset of the Taxpayer's business to the purchaser. The Property, on its own, was not "going" in the required sense of that term. It did not give the purchaser an ability to generate income on an ongoing basis. Therefore, not all of the goods and services necessary for the continued operation of that part of the taxable activity were transferred to the purchaser.

29. Accordingly, the Tax Counsel Office concluded that the supply of the Property was not the supply of a going concern under s 11(1)(m) because:

- The Property on its own was not a part of a taxable activity that was capable of separate operation. It was merely an asset of the Taxpayer's business.
- The Taxpayer did not supply the purchaser with all of the goods and services necessary for the continued operation of part of a taxable activity. Again, the Property was merely an asset of the Taxpayer's activity. Not all of the business structure, and none of the business process relating to part of a taxable activity, were supplied.

Compulsory zero-rating

30. CCS argued the sale was not compulsorily zero-rated under s 11(1)(mb) because:

- The vendor was required to assess at settlement whether the purchaser met the conditions for compulsory zero-rating and was entitled to rely on the information provided by the purchaser as at settlement in doing so.
- The evidence showed that at settlement, the information available to the Taxpayer did not give the Taxpayer a sufficient basis for zero-rating the supply.
- The Taxpayer had therefore failed to discharge the onus of proof in relation to the zero-rating of the supply under s 11(1)(mb).

31. CCS also argued that s 5(23) did not apply to shift the liability to pay GST to the purchaser.

32. The Taxpayer argued the sale was compulsorily zero-rated under s 11(1)(mb) because:

- The purchaser did not indicate in the GST Schedule to the Agreement, either on signing or by the settlement date, whether it intended to use the Property for

making taxable supplies. This left the Taxpayer in the position of having to make a judgment call.

- Based on the purchaser's confirmation that it was GST registered, the Taxpayer decided that the purchaser was intending to use the Property for making taxable supplies.
- The statements made by third parties should be disregarded.

33. The Taxpayer did not make any arguments in relation to s 5(23).

34. The compulsory zero-rating of land rules (CZR rules) were introduced on 1 April 2011 and treat certain business-to-business supplies involving land as zero-rated supplies. The key provision is s 11(1)(mb). Sections 5(23) and 78F are also relevant.

35. Section 11(1)(mb) states:

> **11 Zero-rating of goods**
>
> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> ...
>
> (mb) the supply wholly or partly consists of land, being a supply–
>
> (i) made by a registered person to another registered person **who acquires the goods with the intention of using them for making taxable supplies**; and
>
> (ii) that is not a supply of land intended to be used as a principal place of residence of the recipient of the supply or a person associated with them under section 2A(1)(c); or
>
> ... [Emphasis added]

36. A supply of goods is chargeable with tax under s 8 if made by a registered person in the course or furtherance of their taxable activity.

37. Therefore under ss 8 and 11(1)(mb), a vendor must zero-rate a supply if:

- the supply wholly or partly consists of land;
- the vendor is GST-registered (or either will be GST registered or will be treated as GST registered) at the time of settlement;
- the supply is being made by the vendor in the course or furtherance of their taxable activity;
- the purchaser is GST-registered (or will be GST registered or treated as GST registered) at the time of settlement;

- the purchaser acquires the goods (including the land) with the intention of using them (in whole or part) for making taxable supplies; and
- none of the land included in the supply is intended to be used as the purchaser's principal place of residence or the principal place of residence of a relative of the purchaser.

38. The time at which the application of s 11(1)(mb) is tested is at the time of settlement.[11]

39. Section 5(23) determines what happens if a supply has been incorrectly zero-rated under s 11(1)(mb). Under s 5(23), if, after a transaction is settled, it is found that the supply should have been standard-rated rather than zero-rated, the purchaser is treated as making, on the settlement date, a supply of the goods in question at the standard rate. The value of the supply under s 5(23) will be equal to the amount of the consideration for the original supply.

40. A vendor may rely on information provided by the purchaser to decide whether a supply must be zero-rated under s 11(1)(mb).[12] In addition, s 78F(2) requires the purchaser to notify the vendor of certain facts at or before settlement, as follows:[13]

- they are, or expect to be, a registered person
- they are acquiring the goods with the intention of using them for making taxable supplies
- they do not intend to use the land as a principal place of residence for them or a person associated with them under section 2A(1)(c).

41. Under s 78F(3), the supplier may rely on the information provided by the recipient as required by s 78F(2). Section 78F(2) requires the recipient to provide the information at or before settlement.

42. It is also noted that under s 15B TAA, a taxpayer is obliged to correctly determine the amount of tax payable by the taxpayer under the tax laws.

43. In the current dispute, both the Taxpayer and the purchaser are GST registered. Further, the parties are agreed that:

- the supply wholly or partly consisted of land;

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[11] Section 11(8B) states that whether a supply of goods is zero-rated under s 11(1)(mb) is determined at the time of settlement of the transaction relating to the supply.

[12] See s 78F(3).

[13] In this context "notify" means to give notice and, for a mode of communication, has the meaning set out in s 14C of the TAA – see s 2 GSTA. Section 14C of the TAA effectively requires the notice to be in writing, which can include email in certain circumstances.

- the supply was made by the vendor (the Taxpayer) in the course or furtherance of its taxable activity; and
- none of the land included in the supply was intended to be used as the purchaser's principal place of residence or the principal place of residence of a relative of the purchaser.

44. Therefore the issue to be determined was whether the purchaser acquired the Property with the intention of using it, in whole or part, for making taxable supplies. In this regard the Taxpayer argued the purchaser had acquired the Property with the intention of using it for making supplies of short-stay accommodation or in a property selling activity, or both.

45. The Tax Counsel Office considered that the Taxpayer had failed to show that (at the time of settlement) the purchaser had acquired the Property with the intention of using it for making taxable supplies.

46. The Tax Counsel Office concluded that there was insufficient evidence to suggest that at settlement the purchaser intended to carry on a taxable activity of supplying short-stay accommodation from the Property. Further, the Taxpayer had failed to prove, on the balance of probabilities, that at settlement the purchaser had intended to use the Property in a property selling activity (whether in the course or furtherance of its existing taxable activity, or by commencing a new taxable activity of selling property). The Taxpayer was unable to rely on s 78F(3) because the revised Schedule 2 to the Agreement had been received after settlement.

47. Therefore the Tax Counsel Office decided that the Taxpayer had failed to show that CCS's proposed adjustment was wrong, and by how much it was wrong.

48. As CCS had asserted that s 5(23) did not apply to shift the liability for output tax on the supply to the purchaser, and the Taxpayer had not disputed CCS's assertion, the output tax liability would remain with the Taxpayer in this case (subject to whether the proposed amendment to the assessment was time-barred).

Issue 3 | Take tuatoru: Did the time bar apply?

Time bar

49. All statutory references in this final part of the summary are to the TAA unless otherwise stated.

50. The issue was whether the time bar in s 108A applied on the facts.

51. CCS argued that s 108A(3) excluded the application of the time bar. This was on the basis that the Taxpayer had failed to show that:

- the Commissioner did not honestly hold the opinion that the Taxpayer knowingly or fraudulently failed to disclose to the Commissioner all of the material facts necessary for determining the amount of GST payable for the GST disputed period; or
- the opinion formed was one that was not reasonably open to the Commissioner on the information available to her.

52. The Taxpayer argued that:

- the Commissioner had not provided any evidence that s 108A(3) applied. Accordingly the Taxpayer disagreed that the burden of proof rested on the Taxpayer to show that the Commissioner did not honestly hold the opinion; and
- there was insufficient evidence for the Commissioner to form the view that it was "seriously arguable" that the Taxpayer knowingly or fraudulently failed to make full disclosure. The Taxpayer argued that there was in fact no evidence. The Taxpayer simply believed the sale was zero-rated and there was no material information to disclose.

53. Amending a GST assessment so as to increase the amount assessed is subject to the time bar provision in s 108A:

> **108A Time bar for amending GST assessment**
>
> (1) Subject to this section and section 108B, if a taxpayer provides a GST tax return for a GST return period and an assessment has been made, the Commissioner may not amend the assessment to increase the amount assessed if 4 years have passed from the end of the GST return period in which the tax return was provided.
>
> ...
>
> (4) This section overrides every other provision of this Act, and any other rule or law, that limits the Commissioner's right to amend GST assessments.

54. The GST time bar in s 108A(1) prevents the Commissioner from increasing an assessment if four years have passed from the end of the GST return period in which the taxpayer provided their GST return. This is subject to some exceptions including those in s 108A(3) and s 108B. If any of the exceptions apply the Commissioner may amend an otherwise time-barred assessment.

55. Section 108A(3) contains an exception to the time bar:

> (3) The Commissioner may, at any time, amend an assessment to increase the amount of the assessment **if the Commissioner considers that the person assessed has**

> **knowingly or fraudulently failed to disclose to the Commissioner all of the material facts** that are necessary for determining the amount of GST payable for a GST return period. [Emphasis added]

56. Therefore, if the Commissioner considers that a taxpayer has knowingly or fraudulently failed to disclose all of the material facts necessary for determining the amount of GST payable, she may increase a GST assessment at any time.

57. To determine whether the time bar exception in s 108A(3) applied, the Tax Counsel Office identified the following principles from the relevant case law:

- Based on a validly formed opinion made in good faith, the Commissioner must consider that the taxpayer has knowingly or fraudulently failed to disclose all of the material facts. The Commissioner has formed an "opinion" if she has reached a sufficiently concluded state of mind. It is not sufficient that the Commissioner reaches a conclusion that it is "seriously arguable" that the taxpayer has knowingly or fraudulently failed to disclose all of the material facts - the Commissioner must conclude that the taxpayer *has* knowingly or fraudulently failed to disclose all of the material facts.
- A challenge to the Commissioner's opinion can only succeed if the taxpayer shows:
  - the Commissioner did not honestly hold the opinion, or
  - the Commissioner misdirected herself as to the legal basis on which the opinion was to be formed, or
  - the opinion was one that was not reasonably open to the Commissioner on the information available to her.[14]
- "Knowingly" requires knowledge of the existence of facts where there is an element of wrongdoing in the failure to disclose.[15]
- "Fraudulently" requires that the person filing the return must have known that they were not disclosing all of the material facts and nevertheless dishonestly or deceitfully withheld the information. Or the person must have been recklessly careless in not disclosing all of the material facts.[16]

[14] *Vinelight Nominees Limited v CIR (No 2)* (2005) 22 NZTC 19,519 (HC) at [26]; *Case Q58* (1963) 15 NZTC 5,330 at 5,349; *Maxwell v CIR* [1962] NZLR 683 (CA); *Auckland Institute of Studies v CIR* (2002) 20 NZTC 17,685 (HC) at [102].

[15] *Meulen's Hair Stylists v CIR* [1963] NZLR 797 (NZSC) at 798–799.

[16] *R v Coombridge* [1976] 2 NZLR 382 (CA) at 387.

- Where a company is involved, knowledge and fraudulence are imputed via a responsible officer.[17]
- Disclosure is not limited to what is contained in the GST return. Regard is given to the whole of the information that the Commissioner may be expected to treat as made available, including information disclosed in other documents. However, the taxpayer must make a reasonably explicit or implicit indication as to where the other material may be found.[18]
- "All of the material facts" include all facts a person knows or is capable of knowing, which are material to determining the correct tax payable. A taxpayer cannot leave the Commissioner to speculate as to the facts. However, there will be no failure to disclose all material facts merely because:
  - o immaterial facts have not been disclosed, or
  - o the taxpayer incorrectly applied the law to the facts.[19]

58. In disputes involving s 108A(3), there is a threshold onus on the Commissioner to show that she has formed an opinion on the correct legal basis that is honestly held and based on the available evidence. To put it another way, the Taxpayer can discharge the onus of proof by showing that:
    - the Commissioner did not honestly hold the opinion
    - the Commissioner misdirected herself as to the legal basis on which the opinion was to be formed, or
    - the opinion was one not reasonably open to the Commissioner on the information available to her.

59. The Tax Counsel Office considered that the Commissioner had proved she had reached a sufficiently concluded state of mind to form an opinion the Taxpayer knowingly failed to disclose material facts to the Commissioner. The Tax Counsel Office agreed with CCS that the Commissioner must conclude that the Taxpayer had knowingly failed to disclose material facts, rather than that it was seriously arguable the Taxpayer had knowingly failed to disclose material facts.

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[17] *Meulen's Hair Stylists* at 799.

[18] *FB Duvall Limited v CIR (No 2)* (1998) 18 NZTC 13,943 at 13,952-13953; *Case U144* 87 ATC 836 at [23]; *Stamp v FCT* 88 ATC 4803 at 4,810; *Case 17/2006* [2006] AATA 1013; (2006) ATC 239.

[19] *Scottish Australian Mining Co Ltd v FCT* [1950] HCA 16, (1950) 81 CLR 188 at [11]; *Austin Distributors Pty. Limited v FCT* (1964) 13 ATD 429 (HCA) at 432–433; *Stapleton v FCT* 89 ATC 4818 (FCA); *W. Thomas & Co. Pty. Limited v FCT* (1965) 14 ATD 78 (HCA) at 89.

60. The Tax Counsel Office further considered the Taxpayer had not proved the Commissioner did not honestly hold the opinion.

61. The Tax Counsel Office noted the Taxpayer had not argued the Commissioner had misdirected herself as to the legal basis on which the opinion was to be formed.

62. However, the Tax Counsel Office concluded that the Taxpayer had shown the opinion was one which was not reasonably open to the Commissioner on the information available to her. This was because:

- The Taxpayer had provided the purchaser with a settlement statement and GST invoice prior to settlement showing the supply of the Property was zero-rated. The purchaser had not corrected either document.
- The purchaser's GST information in Schedule 2 to the Agreement was incomplete when the Agreement was signed and had not been amended by settlement, and the purchaser stated on taking possession of the Property they had not decided what to do with the Property.
- The Taxpayer had subsequently sought and received written confirmation from the purchaser of the GST information that had not been provided in Schedule 2 to the Agreement and had relied on that information in filing its return.

63. The Tax Counsel Office considered the Taxpayer had been justified in relying on a document received from the purchaser in determining the correct tax position, as was required of the Taxpayer by s 15B. The available evidence suggested the Taxpayer filed its GST return believing its position to be correct.

64. Accordingly, CCS's position that the time bar exception in s 108A(3) applied was not accepted. The proposed amendment to the assessment was time-barred.