Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTOTANGA WHAKATAU Ā-TURE> WHAKAWĀ

Whether portable units are exempt supplies of accommodation in a dwelling

Decision date | Te Rā o te Whakatau: 4 April 2022

Issue date | Te Rā Tuku: 22 July 2022

TDS 22/13

Subjects | Ngā kaupapa

GST: exempt supplies of accommodation in a dwelling

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

Commissioner or CIR	Commissioner of Inland Revenue
GST	Goods and services tax
GSTA	Goods and Services Tax Act 1985
PLA	Property Law Act 2007
RTA	Residential Tenancies Act 1986
TAA	Tax Administration Act 1994
TCO	Tax Counsel Office, Inland Revenue

Taxation laws | Ngā ture tāke

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

Facts | Ngā meka

1. The Taxpayer rents portable self-contained units to its customers under a hire agreement. The units are delivered to, and installed on, the customer's property.
2. Under the hire agreement, the customer agrees that the unit will not be moved once it is installed. The portable unit remains a relocatable chattel and does not constitute a fixture or improvement on the land. The Taxpayer has the right to terminate the hire agreement and remove a portable unit if the terms of the agreement are breached.

3. Hire fees are paid weekly in advance. The hire agreement serves as the basis for the weekly payments, but a systems-generated invoice is raised each week for accounting reference and issued to the client on request.

4. The portable units typically serve as an extension to the customer's existing property. The portable units may be used as residential accommodation or commercial (office) premises. Where the purpose of the hire is not residential, GST is charged on the hire.

5. The delivery and site installation is charged with GST. The Taxpayer did not dispute that the delivery and installation fees are subject to GST.

6. The Taxpayer filed a GST return for the disputed period, returning GST on the hire of units for residential use. However, the Taxpayer subsequently issued a Notice of Proposed Adjustment proposing that this supply should be exempt, and therefore, should be entitled to a refund.

Issues | Ngā take

7. The main issues considered in this dispute were:

   - whether the hire of the portable units was a single supply or multiple supplies; and
   - whether there was an exempt supply of residential accommodation.

Decisions | Ngā whakatau

8. The Tax Counsel Office (**TCO**) decided that:

   - The supply of portable units under the hire agreement consists of multiple separate supplies. These supplies include a series of successive supplies of the hire of the portable units, deemed to occur under s 9(3)(a), and a separate supply of delivery and installation of the portable units.
   - The series of successive supplies of the portable units are not exempt supplies of "accommodation in a dwelling" under s 14(1)(c). The Taxpayer is therefore liable for GST on the supplies.

Reasons for decisions | Ngā take mō ngā whakatau

Issue 1 | Take tuatahi: Single supply or multiple supplies

9. Before determining whether the supply of the portable units was exempt, it is important to establish the true nature of the supply.[1]

10. The GSTA generally imposes tax on a supply of goods and services (s 8(1)), but some supplies are exempt, and some are zero rated. Where a supply may contain multiple components, and one or more components may be either exempt or zero rated, it is important to establish whether the supply is a single supply or multiple supplies.

11. The Taxpayer did not make detailed arguments on whether the supply of the portable units and the delivery and installation services were a single supply or multiple supplies, but, in practice, it appeared the Taxpayer treated them as separate supplies.

12. Customer & Compliance Services, Inland Revenue argued that there was a single composite supply, following the principles in Interpretation Statement IS 18/04: Goods and Services Tax – Single Supply or Multiple Supplies (IS 18/04).[2]

13. TCO considered that there were two provisions in the GSTA that could potentially apply to determine the nature of the supply in this dispute – s 5(15)(a) or s 9(3)(a).

14. Section 5(15)(a) may apply if there was a supply of real property[3] and the supply of portable units was considered a supply of a principal place of residence. However, TCO considered that s 5(15)(a) did not apply in this dispute because there are no supplies of real property provided by the Taxpayer to its customers. (Whether the supply of portable units is a supply of a principal place of residence is addressed later in the summary.)

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[1] *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 at 705 to 706 provides that the true nature of a transaction can only be ascertained by consideration of the legal arrangements actually entered into and carried out: not on an assessment of the broad substance of the transaction measured by the results intended and achieved or of the overall economic consquences.

[2] IS 18/04 sets out the Commissioner's view on determining whether a supply is a single supply or multiple supplies based on the principles from the New Zealand leading case *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685. TCO considered that while IS 18/04 is not authoritative, it is correct and a useful summary of the law.

[3] Real property is "immovable property, such as land and anything erected on or attached to this" (Online ed, Oxford University Press, March 2022. OED 3rd Edition December 2008).

15. Section 9(3)(a) provides that where goods are supplied under an agreement to hire, the supply is deemed to be a series of successive supplies, with each successive supply being deemed to be made when a payment becomes due or is received, whichever is earlier.

16. In this case, the portable units are hired under a hire agreement that provides for the temporary use of the portable unit in exchange for weekly payments. Therefore, s 9(3)(a) deems the supply of the portable units to be a series of successive supplies. Each time a weekly payment is made (or becomes due), there is another supply. The GSTA determines that these are multiple successive supplies and must be considered separately in determining whether they are exempt supplies. No issue of whether they are a single supply arises as the GSTA treats them as separate supplies.

17. The delivery and installation of the units are a one-off service that is provided at the beginning of the hire period and is invoiced separately from the weekly payments made for the hire of the unit. TCO considered that there is sufficient distinction between the components of the supply that it is reasonable to treat the delivery and installation as a separate supply to the hire for these reasons:

    - Because s 9(3)(a) treats the ongoing hire as a series of successive supplies, the delivery and installation services could only be a composite supply with the first of the successive supplies of the hire of the portable unit. When viewed from this perspective, the components of the supply being considered are the delivery and installation and the first week's rental of the portable unit.
    - Applying the principles in *Auckland Institute of Studies Ltd*[4], it was considered that the focus should be on the true and substantial nature of the consideration given by the Taxpayer to its customers. This is with a view to determine whether it is reasonable to sever the parts of the supply from each other – whether the supply was integral to another, or whether it was merely ancillary. Where the component of the supply is sought as an aim in itself, it may still be reasonable to treat the components of the supply as separate supplies, even if it is integral to another component of the supply.[5] While delivery and installation is a means of better enjoying the ongoing rental of the portable unit, the customers of the Taxpayer likely view delivery and installation as an aim in itself (not simply incidental to the ongoing hire of the portable unit).

[4] *Auckland Institute of Studies Ltd* at [36] and [40].

[5] See also *CIR v Smiths City Group Ltd* (1992) 14 NZTC 9,14 (HC) where Tipping J noted that it is a matter of fact and degree whether there is sufficent distintion between the different parts to make it reasonable to sever them and apportion accordingly.

- The Taxpayer treated delivery and installation as a separate supply as reflected in the separate invoicing and consideration payable.

18. Consequently, the supplies being considered in the next issue are the series of successive supplies of the hire of the portable unit.

Issue 2 | Take tuarua: Exempt supply of accommodation in a dwelling

19. The Taxpayer contended that s 14(1)(c) applies to exempt the supply of the portable units. The specific supply in question is the series of successive supplies of the portable units.

20. As mentioned, s 8(1) imposes GST on the supply of goods and services, but not on exempt supplies.

21. Section 14(1)(c) provides that the supply of accommodation in any dwelling by way of hire or a service occupancy agreement or a licence to occupy is an exempt supply.

22. Therefore, for the supply of portable units to be exempt by s 14(1)(c), it must be a supply of:

    - accommodation
    - in a dwelling;
    - by way of hire.

23. Both parties accepted that the portable units are supplied by way of hire by the Taxpayer. So, the remaining issues to be considered by TCO were whether the supplies of portable units are supplies of "accommodation", and whether the portable units are "dwellings".

Accommodation

24. TCO concluded that the supply of the portable units was not a supply of accommodation in the context of s 14(1)(c) because:

- Accommodation is not defined in the GSTA. The ordinary meaning of "accommodation" is a "room and provision for the reception of people, esp. with regard to sleeping, seating, or entertainment; living premises, lodgings".[6]
- In considering the meaning of accommodation it is important to keep the context in mind. While "accommodation" can mean a room or building, the word "accommodation", in the context of s 14(1)(c), refers to the right to stay in living premises or lodgings – it does not describe the physical nature of the dwelling, but describes a service being provided by the supplier.
- This is evident when the phrase "the supply of accommodation in any dwelling" is considered together. The supply of accommodation must be in a dwelling. If accommodation meant the physical premises, the section would refer to the supply of physical premises in a dwelling. That does not make sense. Instead, the section is referring to the supply of a service of providing lodgings or the right to stay in a dwelling.
- The Taxpayer is not supplying the right to stay, rather is supplying a physical structure. This physical structure could conceivably be used to supply accommodation, but that is not what is being supplied in this dispute.
- This conclusion is consistent with the legislative purpose of the provision to exempt the supply of accommodation in a dwelling from GST. The provision was intended to apply to situations where there was a reasonable level of substitutability between renting and owning a home. This is to ensure that owner-occupiers of residential dwellings are not placed in an advantageous position compared with those who rent.[7]

25. On this basis, the hire of the portable units is not the supply of accommodation in a dwelling. However, TCO went on to consider whether the portable units are "dwellings".

Dwelling

26. As Issue 1 established, the supply of the portable units is a series of successive supplies, and the supply of the delivery and installation is a separate supply to the supply of the units. TCO considered the definition of dwelling as it applies to the

[6] OED Online, Oxford University Press, March 2022, www.oed.com/view/Entry/1134. OED 3rd edition, March 2011.

[7] See the *White paper: Proposals for the Administration of the Goods and Services Tax* (March 1985) and the *Commentary on the Taxation (GST and Remedial Matters) Bill* (August 2010).

successive supply of the portable units, and not the delivery and installation of the units.

27. In considering the meaning of "dwelling" in s 14(1)(c) in the context of the successive supplies of the portable units, there are three key requirements:[8]

- Whether the portable units are premises as defined in s 2 of the Residential Tenancies Act 1986 (**RTA**);
- Whether the portable units are, or could reasonably be foreseen to be, occupied as a principal place of residence; and
- Whether the Taxpayer's customers have quiet enjoyment, as that term is used in s 38 of the RTA.

28. The current definition of "dwelling" in s 2 was introduced in 2011 and explicitly refers to definitions from the RTA. The parties to the dispute referred to a number of cases that considered the definition of dwelling prior to its amendment in 2011.[9] TCO considered that while the cases are consistent with the conclusion reached on the meaning of accommodation above, the analysis focused on the current definition of "dwelling".

29. In order to meet the definition of dwelling, there must be a "premises" as defined in s 2 of the RTA. "Premises" generally means a building together with its surrounding land.[10] "Premises" is also defined to include mobile homes placed on land and intended for occupation.[11] However, case law establishes that its meaning in any particular situation likely depends on its context.[12] A consideration of the context and purpose of the use of the word "premises" is therefore important in ascertaining its meaning as it is used in the definition of "dwelling".

30. The context in which "premises" is used in the definition of "dwelling" includes the further concepts of "principal place of residence" and "quiet enjoyment". It also includes the purpose of s 14(1)(c) and what was intended to be exempt from GST, and the context of the RTA from which both "premises" and "quiet enjoyment" are

[8] Definition of "dwelling" in s 2.

[9] See *Case R17* (1994) 16 NZTC 6,091 (TRA); *Case T44* (1998) 18 NZTC 8,295; *Wairakei Court Limited v Commissioner of Inland Revenue* (1999) 19 NZTC 15,202; *Case L75* (1989) 11 NZTC 1,435 (TRA).

[10] Definition of "premises" in OED Online, Oxford University Press, March 2022, OED 3rd Edition March 2007; *Kahi v Lucas* Auckland HC HC 81/96, 23 September 1996; *Wong and Wong v Lady Di Cruises*, TT 259/97, 24 February 1997.

[11] Paragraph (c) of the definition of "premises" in s 2 of the RTA.

[12] *Molina v Zaknich* [2001] WASCA 337 at [41] to [47] and *McKenna v Porter Motors Ltd* [1955] NZLR 832.

expressly drawn. All of these sources of context have a common theme in that they refer to a landlord and tenant relationship:

- "Principal place of residence" is further defined in s 2 as a place that a person occupies as their main residence for the period to which the agreement for the supply of accommodation relates. The purpose of this requirement in the definition of "dwelling" is to ensure that the definition only applies to supplies of accommodation that are similar to living in your own home.[13]
- Section 38 of the RTA provides that a tenant is entitled to have quiet enjoyment of the premises without interruption by the landlord. A covenant of quiet enjoyment is not expressly provided in the hire agreement, nor could it be as there is no landlord and tenant relationship. According to s 281 of the Property Law Act 2007 (**PLA**), a covenant of quiet enjoyment can only be implied by statute. The only two statutes that imply a covenant of quiet enjoyment in relation to property are the PLA (applies to leases of land) and the RTA (applies to tenants under a tenancy agreement). Neither the PLA nor the RTA apply in this case to imply a covenant of quiet enjoyment, and therefore there cannot be quiet enjoyment as that term is used in s 38 of the RTA.
- As already noted, the purpose of s 14(1)(c) is to ensure that tenants are not charged GST on the rental they pay for accommodation, or to live in their home. The provision is aimed at landlords and tenants where the landlord is charging the tenant for the accommodation supplied by the landlord. Where the word "premises" can take different meanings, it must be given a meaning that is consistent with this purpose, and thus "premises" should mean something that is similar to what a tenant is supplied with or what a homeowner has.
- The RTA is an Act that governs all residential tenancies and defines the rights and obligations of landlords and tenants. "Premises" must therefore be capable of being the subject of a residential tenancy under the RTA.

31. Against this background, it needs to be determined whether the successive supplies of the portable units by the Taxpayer to its customers could be the supply of accommodation in a "dwelling" (although it has already been concluded that the supply is not one of accommodation).

[13] *Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* (Inland Revenue and the Treasury, October 2010).

32. The onus of proof in this case is on the Taxpayer.[14] The standard of proof is the balance of probabilities.[15] The Taxpayer needed to show that the portable units, once they are installed on a customer's land, are dwellings. This is because only the series of successive weekly supplies are being considered to determine whether they are exempt from GST (not the delivery and installation).

33. TCO considered that the portable units are not "dwellings", as defined in s 2 for these reasons:

- The portable units are not "premises" as defined in s 2 of the RTA, as this word applies to situations where a residential tenancy exists, and the hire agreement is inconsistent with a residential tenancy. Further, treating these units as premises and exempting them under s 14(1)(c) would not serve the purpose of ensuring consistency of treatment between homeowners and renters.
- The Taxpayer has not provided sufficient evidence to show that the portable units are, or could reasonably be foreseen to be, occupied as a "principal place of residence".
- The Taxpayer also does not provide quiet enjoyment to its customers. As already noted, there is not an express covenant of quiet enjoyment in the hire agreement, nor can a covenant of quiet enjoyment be implied under the RTA or the PLA.

Issue 2 conclusion

34. The series of successive supplies of the portable units were not a supply of "accommodation". While it was not necessary to definitively conclude on this point, it was also concluded that the series of successive supplies of the portable units were not supplies of "dwellings" for the purposes of the exemption in s 14(1)(c).

35. The Taxpayer was therefore liable for GST on the supplies.

[14] Section 149(2) of the Tax Administration Act 1994 (TAA) and *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA).

[15] Section 149(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 Y3* (2007) 23 NZTC 13,028, and *Case X16* (2005) 22 NZTC 12,216.