TECHNICAL-DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTOTANGA WHAKATAU Ā-TURE> WHAKAWĀ

Non-resident supplier – application for GST registration

Decision date | Te Rā o te Whakatau: 17 December 2021

Issue date | Te Rā Tuku: 03 August 2022

TDS 22/16

Subjects | Ngā kaupapa

GST: Non-resident application; whether registered for overseas consumption tax or carrying on a taxable activity that if carried out in New Zealand would render the person liable to be registered for GST; whether making or intending to make taxable supplies in New Zealand; whether making or intending to make a supply in New Zealand.

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

CCS	Customer and Compliance Services, Inland Revenue
Commissioner	Commissioner of Inland Revenue
GSTA	Goods and Services Tax Act 1985
TCO	Tax Counsel Office, Inland Revenue

Taxation laws | Ngā ture take

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

Facts | Ngā meka

1. This Taxpayer lives outside New Zealand and is a non-resident for the purposes of the GSTA. The Taxpayer purchased two thoroughbred horses in New Zealand in January and April 2021.
2. The Taxpayer applied to be registered under s 54B of the GSTA from 1 January 2021.
3. The Taxpayer referred to two types of activities that are relevant to their application. First, buying and leasing horses in New Zealand and selling the horses offshore (**the New Zealand activities**). And second, bloodstock activities carried on overseas (**the overseas activities**).

4. Broadly, s 54B allows the Commissioner to register a non-resident who is not otherwise liable to be registered under s 51(1) if the Commissioner is satisfied that the non-resident:

    - is registered in respect of a consumption tax in the country of which they are a resident; or
    - carries on a taxable activity at a level that if carried on in New Zealand, would render the non-resident liable to be registered under s 51(1).

5. The Commissioner must also be satisfied that the non-resident meets various requirements which are set out in ss 54B(1)(b)-(e). Of particular relevance to the dispute are ss 54B(1)d)(i) and s 54B(1)(d)(ii). Those provisions provide, respectively, that the Commissioner must be satisfied that the non-resident is not making or intending to make:

    - a taxable supply in New Zealand; or
    - a supply in New Zealand to an unregistered person that would be a taxable supply if the non-resident was registered under s 51.

6. Customer and Compliance Services, Inland Revenue (**CCS**) declined the Taxpayer's application on the ground that they did not meet the requirements of s 54B. In support of their position, CCS said that information in letters provided in support of the application from the Taxpayer's overseas accountants showed that the Taxpayer was not registered for a consumption tax in their country of residence for the period in dispute. Further, the Taxpayer had not provided sufficient information to satisfy the Commissioner that they were carrying on a taxable activity overseas and information in the tax report showed that the Taxpayer's overseas activity would not render him liable to be registered in New Zealand if it was carried on in New Zealand.

7. CCS also stated that the Taxpayer may be excluded from registration under s 54(1)(d)(i) on the ground that they are making or intending to make taxable supplies in New Zealand. CCS said that the leasing of the horses and the eventual sale of the horses may constitute taxable supplies for the purposes of the GSTA. Similarly, CCS argued that the Taxpayer may be excluded from registration under s 54(1)(d)(ii) because they are making or intending to make a supply in New Zealand that would be a taxable supply if the Taxpayer was registered under s 51 and the supply was made to an unregistered person. In this regard, CCS stated that the supply of the horses by way of lease may come within s 54B(1)(d)(ii).

8. No agreement between the Taxpayer and CCS was achieved and the matter was referred to the Tax Counsel Office (**TCO**), Inland Revenue for adjudication.

Issues | Ngā take

9. The main issues considered in this dispute were:

   - Whether the Taxpayer was registered for a consumption tax in their country of residence (**Section 54B(1)(a)(i)**).
   - Whether the Taxpayer was carrying on a taxable activity in their country of residence and the level of that taxable activity would render them liable to be registered for GST if they were carrying out the taxable activity in New Zealand (**Section 54B(1)(a)(ii)**).
   - Whether the Taxpayer was making or intending to make a taxable supply in New Zealand (**Section 54B(1)(d)(i)**).
   - Whether the Taxpayer was making or intending to make a supply in New Zealand to a non-registered person that would be a taxable supply if the Taxpayer was registered under s 51 (**Section 54B(1)(d)(ii)**).

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

Decisions | Ngā whakatau

11. TCO decided the Taxpayer had not proved that:

   - The Taxpayer was registered for a consumption tax in their country of residence from 1 January 2021 to 31 August 2021.
   - The Taxpayer was carrying on a taxable activity in their country of residence and at a level that would render them liable to be registered for GST if they were carrying out the taxable activity in New Zealand.
   - The Taxpayer was not intending to make taxable supplies in New Zealand.
   - The Taxpayer was not making or intending to make a supply in New Zealand to an unregistered person that would be a taxable supply if the Taxpayer was registered under s 51.

Reasons for decisions | Ngā take mō ngā whakatau

Preliminary Issue | Take tōmua: Onus and standard of proof

12. The onus of proof in civil proceedings[1] is on the taxpayer, 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]

13. 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. Whether the Taxpayer discharged the onus of proof is considered in the other issues.

Issue 1 | Take tuatahi: Section 54B(1)(a)(i)

14. To meet the requirements of s 54B(1)(a)(i), the Taxpayer must prove that they are registered for a consumption tax in the country or territory of which they are a resident. The Taxpayer provided a registration certificate which shows that they became registered for a consumption tax on 1 September 2021. The Taxpayer also provided two letters from their overseas accountants. Information contained in the letters shows that the Taxpayer was not registered for the consumption tax before 1 September 2021. Therefore, the available evidence showed that the Taxpayer was not registered for a consumption tax from 1 January 2021 to 31 August 2021. Consequently, the taxpayer did not meet the requirements of s 54B(1)(a)(i) during that time.

Issue 2 | Take tuarua: Section 54B(1)(a)(ii)

15. To meet the requirements of s 54B(1)(a)(ii), the Taxpayer must prove that they are carrying on a taxable activity in a country or territory outside New Zealand at a level that would render the Taxpayer liable to register under s 51(1) if the taxable activity was carried on in New Zealand. In analysing this issue TCO discussed what

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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 (TAA).

[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.

constitutes a taxable activity and then considered separately the New Zealand activities, the overseas activities and the activities combined.

Taxable activity

16. GST is imposed on taxable supplies of goods and services made by a registered person in the course or furtherance of a taxable activity carried on by the registered person (s 8(1)). There are four requirements that must be satisfied to show there is a taxable activity (s 6(1)(a)):[5]

- There must be an activity.[6]
- The activity must be carried on continuously or regularly by a person.[7]
- The activity must involve, or be intended to involve, the supply of goods and services to another person.[8]
- The supply or intended supply of goods and services must be made for a consideration.[9]

17. Section 6(3)(a) excludes from the term taxable activity any activity carried on essentially as a private recreational pursuit or hobby while s 6(3)(d) excludes any activity to the extent to which the activity involves the making of exempt supplies.

The New Zealand activities

18. The Taxpayer argued that the New Zealand activities are a taxable activity. In the Commissioner's Notice of Response, CCS argued that the New Zealand activities are excluded from being a taxable activity by s 6(3)(a) and s 6(3)(d) because they are a private recreational pursuit or hobby and they involve the making of exempt

[5] *Case 14/2016* [2016] NZTRA 14, (2016) 27 NZTC 3-036 at [63]-[70].

[6] *Newman v CIR* (1994) 16 NZTC 11,229 (HC) at 11,233; *CIR v Bayly* (1998) 18 NZTC 14,073 (CA) at 14,078; *CIR v Newman* (1995) 17 NZTC 12,097 (CA) at [32]; *Case 14/2016* at [63].

[7] *Newman* (CA) at 12,100; *Smith v Anderson* (1880) 15 Ch D 247 at 277, 278; *Premier Automatic Ticket Issues Ltd v FCT* (1933) 50 CLR 268 (HCA) at 298; *Case 14/2016* at [67]-[68]; *Wakelin v CIR* (1997) 18 NZTC 13,182 (HC) at 13,185-13,186; *Case N27* (1991) 13 NZTC 3,229 at 3,238-3,239; *Allen Yacht Charters Ltd v CIR* (1994) 16 NZTC 11,270 (HC) at 11,274.

[8] Definition of "supply" in s 5(1); *Databank Systems Ltd v CIR* (1987) 9 NZTC 6,213 (HC) at 6,223; *Pacific Trawling Ltd v Chief Executive of the Ministry of Fisheries* (2005) 22 NZTC 19,204 (HC); *Case S77* (1996) 17 NZTC 7,483; *Case L67* (1989) 11 NZTC 1,391; *Case N27* at 3,238-3,239; *Case 14/2016* at [69].

[9] Definition of "consideration" in s 2(1); *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA) at 12,314.

supplies. TCO noted that if those arguments had been raised in the Commissioner's Statement of Position, they would not have been relevant to the issue of whether the New Zealand activities are a taxable activity because they are premised on the notion that the Taxpayer is syndicating the horses that they purchased. However, the available evidence indicated that the Taxpayer did not intend to syndicate the horses. Instead, the Taxpayer leased the horses to lessees who will syndicate them.

19. The Taxpayer cited *Case K40* in support of their position.[10] CCS contended that *Case K40* does not support the Taxpayer's position because there are factual differences between the situation in *Case K40* and the Taxpayer's situation. However, TCO decided this was not a sufficient basis upon which a conclusion might be drawn that the New Zealand activities were not a taxable activity.

20. CCS did not raise any other arguments concerning the issue of whether the New Zealand activities were a taxable activity. TCO proceeded on the assumption that the New Zealand activities were a taxable activity without necessarily reaching a final view on this question. This was because there was a degree of conflict in the Taxpayer's position concerning the New Zealand activities. The Taxpayer said that their horses will be leased to private syndicates for syndication purposes but at the same time they cited example 4 in QB 17/04 as reflecting the activities of their business. Example 4 describes a situation involving the syndication of racehorses by the owners of the horses. However, TCO concluded that when determining whether the Taxpayer was entitled to register under s 54B, it was not necessary to reach a final view on the question of whether the New Zealand activities were a taxable activity.

21. The evidence showed that the Taxpayer's horses were to be trained and raced in New Zealand during the terms of the leases. As such, the horses will be located in New Zealand during the time that they are supplied to the lessees. This indicated that the horses will also be in New Zealand when they are sold. Further, the Taxpayer did not argue that the horses would be located outside of New Zealand at that time and there was no evidence to suggest that this might be the case. These circumstances pointed to a conclusion that the supplies of the Taxpayer's horses by way of lease and by way of sale are, or will be, supplies made in New Zealand pursuant to s 8(3). Similarly, the Taxpayer did not argue they were leasing their horses to GST registered persons for the purposes of carrying on their taxable activities or that they intended to sell their horses to GST registered persons for the purposes of carrying on their taxable activities. These circumstances pointed to a

[10] *Case K40* (1988) NZTC 343.

conclusion that the supplies of the horses by way of lease and by way of sale will not be treated as supplies made outside New Zealand pursuant to s 8(4).

22. It followed that the New Zealand activities involved supplies made in New Zealand and could not, therefore, be a taxable activity carried on in a country or territory outside New Zealand that would render the Taxpayer liable to register under s 51(1) if it was carried on in New Zealand. Therefore, it is considered that the Taxpayer had not satisfied the onus of proving that the requirements of s 54B(1)(a)(ii) are met in relation to the New Zealand activities to the extent they could have been treated as activities carried out overseas.

The overseas activities

23. The evidence provided by the Taxpayer concerning the overseas activities was not sufficient to establish that the overseas activities were a taxable activity. There was no evidence of the volume, value and dates of the transactions that make up the Taxpayer's income from the overseas activities. Further, although the Taxpayer said that they acted as a bloodstock agent and syndicate manager overseas, no evidence was provided as to the nature and the scale of the activities that the Taxpayer carried on when earning their overseas income or of the resources that they employed when doing so. For these reasons, it was not possible to obtain an accurate picture of the nature, scope, and scale of the overseas activities.

24. The Taxpayer's accountants advised that the Taxpayer earned income from "bloodstock" in the 2020-2021 tax year equivalent to NZ $22,145 (that is, below the $60,000 New Zealand GST registration threshold). The Taxpayer did not dispute this calculation. Further, the Taxpayer did not establish their income from the overseas activities exceeded $60,000 in the 12 month period ending on the last day of the month they sought registration from (i.e., January 2021) or the last day of any subsequent month. This shows that the level of the Taxpayer's activity overseas would not have rendered them liable to register in New Zealand if the activity was a taxable activity and it was carried on in New Zealand. Section 51(1)(a) makes a person liable to register if the total value of the person's supplies in any month and the 11 preceding months exceeded $60,000. That did not apply here as the value of the Taxpayer's supplies over the 12 months in the 2021 tax year was $22,145 and the Taxpayer did not establish that their income from the overseas activities exceeded $60,000 in any other relevant 12 month period.

Section 51(1)(b) imposes an obligation on a person to register if at the commencement of any month there are reasonable grounds for believing that the total value of the person's supplies during the month and the following 11 months

will exceed $60,000. The requirements of s 51(1)(b) were not met in relation to the overseas activities as the $22,145 value of the Taxpayer's supplies in the 2021 tax year do not constitute reasonable grounds for believing that the Taxpayer's supplies would exceed $60,0000 in a subsequent 12-month period.

Composite activity

25. If the New Zealand activities and the overseas activities were treated as a single composite taxable activity, that activity would not meet the requirements of s 54B(1)(a)(ii). This is because the activity includes the New Zealand activities and the New Zealand activities involve the making of supplies in New Zealand. This means that the taxable activity would not meet the requirements of s 54B(1)(a)(ii) because s 54B(1)(a)(ii) can only apply in relation to a taxable activity that is not carried on in New Zealand and which would render the person who carries it on liable to register under s 51(1) if it was carried on in New Zealand.

Issue 3 | Take tuatoru: Section 54B(1)(d)(i)

26. To meet the requirements of s 54B(1)(d)(i) the Taxpayer had to prove that they were not making or intending to make a taxable supply in New Zealand.

27. CCS argued that the supply of the Taxpayer's horses by way of a lease may be taxable supplies even though the lease agreements provided by the Taxpayer did not mention any specific consideration. CCS argued that this may not preclude the supply of the horses under the leases being taxable supplies because the payment of a lessor's costs may constitute consideration moving from lessee to lessor.

Consideration

28. TCO noted that the definition of "taxable supply" in the GSTA does not contain an explicit requirement that a supply must be made for consideration in order for the supply to constitute a taxable supply. However, the definition does require that a supply be made in the course or furtherance of a taxable activity to constitute a taxable supply. The definition of the term "taxable activity" in s 6(1) provides that a taxable activity is an activity that, amongst other things, involves the making of supplies for a consideration.

29. The lease agreements provided by the Taxpayer did not make provision for cash payments from the lessees to the Taxpayer. They did, however, impose obligations on the lessees to pay various costs associated with the Taxpayer's horses including

the costs of training and caring for the horses. TCO considered that these obligations come within the definition of "consideration" in s 2 as they are reciprocal obligations that the lessees assume in exchange for the rights and interests that they obtain under the leases. Therefore, TCO considered that CCS's contention that the leasing of the Taxpayer's horses are supplies made for a consideration was correct. Support for this conclusion is found in *Case S72*.[11] In that case, the TRA held that a tenant's obligation to pay rates and insurance on land occupied by the tenant was consideration for the grant of the tenant's interest in the land.

Application

30. TCO noted the Taxpayer was not currently a registered person. Consequently, any supplies that the Taxpayer was making in the course of the New Zealand activities were not taxable supplies. This means that the Taxpayer was not currently making taxable supplies.

31. However, if the Taxpayer were to obtain registration under s 54B, any supplies that they made in the course of the New Zealand activities would be taxable supplies, provided the supplies were made in New Zealand. The available evidence supported a conclusion that the supply of the Taxpayer's horses by way of lease and by way of sale will occur in New Zealand. Therefore, the Taxpayer's intention was to register under s 54B and to make supplies that would be taxable supplies if they were to obtain registration under s 54B. This means that the Taxpayer was intending to make taxable supplies.

Issue 4 | Take tuawhā: Section 54B(1)(d)(ii)

32. To meet the requirements of s 54B(1)(d)(ii) the Taxpayer must prove that they were not making or intending to make a supply in New Zealand to an unregistered person that would be a taxable supply if the Taxpayer was registered under s 51. CCS argued that the Taxpayer had not met this requirement. In support of their position, CCS contended that the supplies of the Taxpayer's horses by way of lease and by way of sale may be made to unregistered persons. CCS also argued that their position was consistent with paragraphs 85 and 87-89 of the Commissioner's Interpretation Statement on s 54B.[12]

[11] *Case S72* (1996) 17 NZTC 7,446

[12] *IS 21/03 GST — Registration of non-residents under section 54B*.

33. If the Taxpayer was registered under s 51 any supply that the Taxpayer made in New Zealand to an unregistered person in the course of a taxable activity would be a taxable supply. Therefore, the Taxpayer would not meet the requirements of s 54B(1)(d)(ii) if they were intending to make a supply in New Zealand to an unregistered person in the course of the New Zealand activities.

34. The Taxpayer was making or intending to make supplies of their horses by way of lease and by way of sale. The available evidence supported a conclusion that those supplies are supplies that are made, or will be made, in New Zealand. Further, the Taxpayer did not argue that they were going to lease their horses to GST registered persons or that they intended to sell their horses to GST registered persons and there was no evidence to suggest that this was or would be the case.