

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKAWĀ

# GST – taxable activity

Decision date | Rā o te Whakatau: 10 August 2022

Issue date | Rā Tuku: 17 November 2022

TDS 22/20

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## Subjects | Kaupapa

GST: taxable activity.

## Abbreviations | Whakapotonga

The abbreviations used in this document include:

<b>CCS</b>	Customer & Compliance Services, Inland Revenue
<b>Commissioner or CIR</b>	Commissioner of Inland Revenue
<b>GST</b>	Goods and services tax
<b>GSTA</b>	Goods and Services Tax Act 1985
<b>TCO</b>	Tax Counsel Office, Inland Revenue

## Taxation laws | Ture tāke

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

## Facts | Meka

1. The Taxpayer is an individual who registered for GST because they were starting a new video production business. During the periods in dispute, the Taxpayer returned expenses relating to the cost of various electronic equipment and some accommodation costs and claimed input tax deductions, but did not return any income or output tax, resulting in a refund position.
2. Customer & Compliance Services, Inland Revenue (**CCS**) argued that the Taxpayer has not been carrying on a taxable activity. CCS considered any activity that was carried on by the Taxpayer was insufficiently continuous or regular to constitute a taxable activity and was merely commencement activity only, which does not itself amount to a taxable activity.

## Issues | Take

3. The main issue considered in this dispute was whether the Taxpayer has been carrying on a taxable activity.
4. There was also a preliminary issue on the onus and standard of proof.

## Decisions | Whakatau

5. The Tax Counsel Office (TCO) decided that the Taxpayer has taken steps towards establishing a taxable activity, but was not yet carrying on a taxable activity, having not yet moved beyond preparatory work.

## Reasons for decisions | Pūnga o ngā whakatau

### Preliminary issue | Take tōmua: Onus and standard of proof

6. The onus of proof in civil proceedings<sup>1</sup> is on the taxpayer, except for shortfall penalties for evasion or similar act, or obstruction.<sup>2</sup> The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.<sup>3</sup>
7. The standard of proof in civil proceedings is the balance of probabilities.<sup>4</sup> This standard is met if it is proved that a matter is “more likely than not”.<sup>5</sup> TCO applied a similar standard to considering the issue in this dispute, given the Taxpayer’s ability to challenge any subsequent assessments that are made in civil proceedings.

### Issue 1 | Take tuatahi: Taxable activity

8. The issue is whether the Taxpayer has been carrying on a taxable activity. If the Taxpayer has yet to commence a taxable activity, as CCS argued, the Taxpayer is not

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

<sup>2</sup> Section 149A(2) of the Tax Administration Act 1994 (TAA).

<sup>3</sup> *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA); *Beckham v CIR* (2008) 23 NZTC 22,066 (CA).

<sup>4</sup> 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.

<sup>5</sup> *Miller v Minister of Pensions* [1947] 2 All ER 372, 374.

entitled to the input tax deductions claimed and the Commissioner can cancel the Taxpayer's registration from the date of registration.

9. Section 20 provides for the deduction of input tax from output tax, but only to the extent the goods or services to which the input tax relates are used for, or are available for use in, making taxable supplies.
10. "Taxable supply" is defined in s 2 to mean a supply of goods and services in New Zealand that is charged with tax under s 8. Section 8 imposes GST on 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.<sup>6</sup> Therefore, to make taxable supplies, a person must be carrying on a taxable activity.
11. There are four requirements that must be satisfied to show there is a taxable activity under s 6(1)(a):
  - There must be an activity.<sup>7</sup>
  - The activity must be carried on continuously or regularly by a person.<sup>8</sup>
  - The activity must involve, or be intended to involve, the supply of goods and services to another person.<sup>9</sup>
  - The supply or intended supply must be made for a consideration.<sup>10</sup>

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<sup>6</sup> See *Case N27* (1991) 13 NZTC 3,229 at 3,235.

<sup>7</sup> *Newman v CIR* (1994) 16 NZTC 11,229 (HC) at 11,233, *CIR v Bayly* (1998) 18 NZTC 14,073 (CA) at 14,078, and *Case 14/2016* [2016] NZTRA 14, (2016) 27 NZTC 3-036 at [63].

<sup>8</sup> *CIR v Newman* (1995) 17 NZTC 12,097 (CA) at 12,100; *Smith v Anderson* (1880) 15 Ch D 277 at 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; *Case P20* (1992) 14 NZTC 4,136 at 4,147; *Tout & Anor v Cook* (1991) 13 NZTC 8,053 (HC).

<sup>9</sup> 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 3,239-3,238; *Case 14/2016* at [69].

<sup>10</sup> Definition of "consideration" in s 2(1); *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA) at 13,193; *Director-General of Social Welfare v De Morgan* (1996) 17 NZTC 12,636 (HC); *Suzuki New Zealand Ltd v CIR* (2001) 20 NZTC 17,096 (CA) at [61]; *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147 (HC) at 13,150; *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA) at [18] and [30]. *Trustee, Executors and Agency Company New Zealand Limited v CIR* (1997) 18 NZTC 13,076 (HC) at 13,086; *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032 (CA).

12. Section 6(2) provides that anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.
13. The case law on the relevance of a beginning of a taxable activity confirms that s 6(2) adds anything done in connection with the beginning of a taxable activity to the taxable activity but does not create one where one would otherwise not exist. Section 6(2) merely adds the commencement activity to the taxable activity. By itself, it cannot amount to a taxable activity.<sup>11</sup>
14. TCO concluded that the Taxpayer was not carrying on a taxable activity, and therefore, was not entitled to the input tax deductions claimed for these reasons:
  - The Taxpayer has undertaken activities that could constitute an activity for the purposes of the s 6 definition of “taxable activity”. However, it was clear that the Taxpayer has not been carrying on a taxable activity during the periods in dispute. While the Taxpayer has taken steps to establish their video production business, they have yet to achieve that enterprise. The steps taken by the Taxpayer, which included the purchase of set up equipment and producing sample work to demonstrate their skills, were preparatory and had not yet gone beyond the development work for a taxable activity.
  - While s 6(2) deems the inclusion of commencement (and termination) activity into the course of a taxable activity, the Taxpayer has not yet established any taxable activity. The case law is clear that commencement work can only be added to such an activity, and by itself, cannot amount to a taxable activity.
  - In terms of the definition in s 6(1), the Taxpayer’s preparatory work in itself was not an activity that involves, or intends to involve, the supply of goods and services to another person for a consideration. In any event, the activity of the Taxpayer has not commenced to the necessary degree to be either continuous or regular to comprise a taxable activity.
15. The Commissioner may cancel a person’s GST registration if the Commissioner is satisfied that the person is not carrying on a taxable activity (s 52(5)). The cancellation may be retrospective to the date the person was GST registered if the Commissioner is satisfied that the person did not carry on any taxable activity from that date (s 52(5A)). As the Taxpayer was not carrying on a taxable activity, the Commissioner is entitled to cancel the Taxpayer’s GST registration from the date of registration.

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<sup>11</sup> *Case 14/2016* at [72] and [96]; *Case P73* (1992) 14 NZTC 4,489 at 4,493 to 4,494. See also *Case 7/2012* (2012) 25 NZTC 1-019 and *Case S56* (1996) 17 NZTC 7,361.