Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKAWĀ

GST – Zero-rating, input tax deductions, shortfall penalties

Decision date | Rā o te Whakatau: 23 January 2025

Issue date | Rā Tuku: 26 March 2025

TDS 25/07

Subjects | Kaupapa

GST: entitlement to charge GST at 0%, input tax deductions, shortfall penalties

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer, an individual, claimed they were involved in the taxable activity of freight-forwarding and acting as an agent for overseas customers.
2. The Taxpayer's activity was small, with few transactions and a lack of invoices provided as evidence of these transactions.
3. The Taxpayer was GST registered on a payments basis. The Taxpayer returned zero-rated sales and claimed input tax deductions in the periods in dispute.
4. Customer and Compliance Services (CCS) questioned the input tax deductions claimed and the existence of a taxable activity.

Issues | Take

5. This dispute concerned whether the Taxpayer was entitled to charge GST at 0% on supplies of goods or services or to input tax deductions claimed. Specifically, whether:
   - the Taxpayer was carrying on a taxable activity under s 6;
   - the Taxpayer was entitled to input tax deductions, if a taxable activity was carried on; and
   - the Taxpayer was liable for shortfall penalties for gross carelessness.
6. There was also a preliminary issue on the onus and standard of proof.

Decisions | Whakatau

7. The Tax Counsel Office (TCO) decided that the Taxpayer was not entitled to charge GST at 0% on supplies of goods or services, or input tax deductions. Specifically:

- the Taxpayer was not carrying on a taxable activity under s 6;
- even if the Taxpayer was found to be carrying on a taxable activity, the Taxpayer was not entitled to the input tax deductions claimed; and
- the Taxpayer was liable for shortfall penalties for gross carelessness.

Reasons for decisions | Pūnga o ngā whakatau

Preliminary issue | Take tōmua: Onus and standard of proof

8. Except for proceedings relating to evasion or similar act or obstruction, the onus of proof is on the taxpayer to show that an assessment is wrong, why it is wrong, and by how much it is wrong.[1] However, if the taxpayer proves, on the balance of probabilities, that the amount of an assessment is excessive by a specific amount, the taxpayer's assessment must be reduced by the specific amount.[2]

9. The standard of proof required is the balance of probabilities.[3]

10. It is appropriate that the same onus and standard of proof be applied in the disputes process as in challenge proceedings. TCO considered whether the Taxpayer has discharged the onus of proof in the context of the issues raised by the parties in the dispute, based on the documentary evidence put before it.

Issue 1 | Take tuatahi: Was the Taxpayer carrying on a taxable activity under s 6?

11. Establishing whether the Taxpayer was carrying on a taxable activity was necessary to determine whether the Taxpayer was entitled to zero-rate their sales[4] and claim input tax deductions.[5]

12. The Taxpayer claimed that they had been carrying on a taxable activity since they registered for GST. However, CCS argued there was insufficient evidence of the

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[1] Section 149A(2) of the TAA. See also *Case V17* (2002) 20 NZTC 10,192, *Accent Management Ltd v CIR* (2005) 22 NZTC 19,027 (HC), and *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

[2] Section 138P(1B) of the TAA.

[3] *Yew v CIR* (1984) 6 NZTC 61,710 (CA), *Case Y3* (2007) 23 NZTC 13,028, and *Case X16* (2005) 22 NZTC 12,216.

[4] Sections 11, 11A, 8.

[5] Section 20(3C).

Taxpayer carrying on a taxable activity, as such, the Taxpayer was not entitled to charge GST at 0% on any supplies of goods or services made or to the input tax deductions claimed.

13. Under s 6(1)(a), there are four requirements that must be satisfied to show there is a taxable activity:[6]

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

14. The Taxpayer had provided insufficient evidence of the consignment of goods overseas and a related service fee. Insufficient evidence was provided to substantiate the claim that other activities (eg, other sales and export of goods overseas and marketing) were carried on either continuously or regularly.

15. There was no evidence that the Taxpayer was invoicing on a regular basis and there were periods where the Taxpayer did not invoice for any supplies.

16. The Taxpayer provided no evidence that the service fee was paid or that any consideration was received in relation to the stated supplies.

17. TCO concluded that the Taxpayer had not demonstrated they were carrying on a taxable activity. There was insufficient evidence to support an argument that any activity was carried out continuously or regularly and involved the supply of goods or services to another person for a consideration. As the Taxpayer was not carrying on a taxable activity, they were not entitled to charge GST at 0% on any supplies made by them or to the input tax deductions claimed.

Issue 2 | Take tuarua: Was the Taxpayer entitled to input tax deductions if they carried on a taxable activity?

18. TCO considered that even if the conclusion that the Taxpayer was not carrying on a taxable activity was wrong, the Taxpayer was not entitled to the input tax deductions claimed.

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

19. The requirements for deductibility are:

    - The goods or services must have been acquired.[7]
    - The goods or services acquired must have been used for, or intended to be used in, making taxable supplies (s 20(3C)).
    - Tax invoice requirements must be met (s 24).

20. Where any registered person makes a taxable supply of goods and services to an agent who is acting on behalf of a principal, the supply is deemed to be made to the principal and not the agent.[8] The agent therefore does not "acquire" the goods or services.[9]

21. Whether the Taxpayer was an agent depended on the legal agreements between the Taxpayer and any potential principal. No evidence was provided of the relationship between the Taxpayer and their customers. TCO concluded that the Taxpayer had not satisfied the onus of establishing they acquired the relevant goods and services.

22. If it were shown the Taxpayer did in fact acquire the relevant goods and services, TCO considered the Taxpayer would only be entitled to the input tax deduction claimed for the GST component for one tax invoice (where a valid tax invoice had been provided). TCO considered the Taxpayer had failed to provide sufficient documentation to support their entitlement to the other input tax deductions.

23. TCO concluded the Taxpayer was not entitled to the input tax deductions claimed on the basis the Taxpayer had not satisfied the onus of proving that they acquired the relevant goods and services.

Issue 3 | Take tuatoru: Does the shortfall penalty apply?

24. In this issue, all legislative references are to the Tax Administration Act 1994 unless otherwise stated.

25. The Taxpayer took tax positions that they were entitled to input tax deductions. The Taxpayer's tax positions were not correct and there were tax shortfalls.

26. The issue was whether the Taxpayer was liable for a shortfall penalty for gross carelessness in terms of s 141C, or alternatively, for not taking reasonable care in terms of s 141A.

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[7] *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA) at 13,193.

[8] S 60(2).

[9] *Case T35* (1997) 18 NZTC 8,235.

27. Section 141C imposes a shortfall penalty for gross carelessness on a taxpayer if the following requirements are satisfied:[10]

- The taxpayer has taken a tax position.
- Taking the tax position has resulted in a tax shortfall.
- The taxpayer has been grossly careless in taking the taxpayer's tax position. Gross carelessness means doing or not doing something in a way that, in all the circumstances, suggests or implies a complete or high level of disregard for the consequences (s 141C(3)):
  - Gross carelessness is characterised by conduct which creates a high risk of a tax shortfall occurring where that risk and its consequences would have been foreseen by a reasonable person in the circumstances.[11]
- The test for gross carelessness is not whether the taxpayer actually foresaw the probability that their act or omission would cause a tax shortfall but whether a reasonable person would have foreseen that probability. Whether the taxpayer has acted intentionally is not a consideration.[12]
  - A person who takes reasonable care is not grossly careless.[13]

28. The penalty payable for gross carelessness is 40% of the resulting tax shortfall.

29. TCO concluded the Taxpayer was grossly careless when taking these positions:

- The Taxpayer was aware at the time of the record keeping requirements.
- A reasonable inference from the Taxpayer's conduct was that adequate records did not exist at the time the tax positions were taken.
- This created a high risk of tax shortfalls that was serious and obvious and would have been foreseen by a reasonable person in the circumstances.
- The Taxpayer had a complete or high level of disregard for the consequences by taking tax positions without records to support those positions.

30. TCO found that the Taxpayer had not shown their tax positions were acceptable tax positions.

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[10] The shortfall penalty for gross carelessness is considered in the Interpretation Statement: Shortfall Penalty for Gross Carelessness as published in *Tax Information Bulletin* Vol 16, No 8 (September 2004).

[11] *Case W4* (2003) 21 NZTC 11,034 at [44].

[12] *Case W4* at [60]; Case 9/2014 (2014) 26 NZTC 2-019 at [88].

[13] *Case W4; Re Carlaw and FCT* 95 ATC 2166 (AAT); *Re Sparks and FCT* [2000] AATA 28 and see also *Pech v Tilgals* [1994] ATC 4206.

31. A Taxpayer does not take an unacceptable tax position to the extent to which they have taken their position because they have relied on a Commissioner's official opinion (s 141B(1D)). The Taxpayer had not provided any objective evidence that they received or relied on a Commissioner's official opinion in taking the tax positions.

32. Section 141A imposes a shortfall penalty for not taking reasonable care on a taxpayer if the following requirements are satisfied:[14]

- The taxpayer has taken a tax position.
- Taking the tax position has resulted in a tax shortfall.
- The taxpayer has not taken reasonable care in taking the taxpayer's tax position:[15]
  - The test of "reasonable care" is whether a reasonable person in the taxpayer's circumstances would have foreseen a tax shortfall as a reasonable probability. It is not a question of whether the taxpayer actually foresaw the probability.
  - Taking reasonable care includes exercising reasonable diligence to determine the correctness of a return. It also includes keeping adequate books and records to properly substantiate a return and, generally, making a reasonable attempt to comply with the tax law.
  - The "reasonable care" test does not require the commitment of unlimited time and money or other resources. The effort required of the taxpayer is commensurate with the reasonable person in the taxpayer's circumstances.[16]

33. The penalty payable for not taking reasonable care is 20% of the resulting tax shortfall.

34. TCO found that the requirements for shortfall penalties for not taking reasonable care were also met. However, the shortfall penalty for gross carelessness applied because it is the higher penalty.[17]

35. Accordingly, TCO concluded that the Taxpayer was liable for the shortfall penalties for gross carelessness proposed by CCS.

[14] The shortfall penalty for not taking reasonable care is considered in the Interpretation Statement: Shortfall penalty for not taking reasonable care as published in *Tax Information Bulletin* Vol 17, No 9 (November 2005).

[15] *Case W4* (2003) 21 NZTC 11,034.

[16] See also *Case W3* (2003) 21 NZTC 11,014 and *TRA 007/12* [2014] NZTRA 08, (2014) 26 NZTC 2-018.

[17] Section 149(2) and (3) TAA 1994.