Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA TŪMATAITI

Sale of intellectual property, shares and ongoing provision of services

Decision date | Rā o te Whakatau: 5 November 2024

Issue date | Rā Tuku: 25 July 2025

TDS 25/18

Subjects | Kaupapa

Residence, double tax agreements, income, expenditure, and zero-rating

Taxation laws | Ture tāke

All legislative references are to the Income Tax Act 2007 (ITA), the Goods and Services Tax Act 1985 (GSTA), and double tax agreements (DTA).

Summary of facts | Whakarāpopoto o Meka

1. NZ Co, a New Zealand company, had developed assets and marketed them overseas through Overseas Subsidiaries. The Arrangement involved Overseas Holdco acquiring all the assets and shares in the Overseas Subsidiaries as well as intellectual property (IP) rights (within the meaning in s 11A(1)(n)(i) of the GSTA). NZ Sub acquired all the assets located in New Zealand (eg, office equipment and leases).
2. NZ Sub also provided services to Overseas Holdco in exchange for payment of arms-length service fees but would not work on Overseas Holdco's infrastructure hardware that was located in New Zealand. The only amounts that NZ Sub derived under the Arrangement were the service fees.
3. Overseas Holdco was outside New Zealand at the time the services were performed by NZ Sub. It did not derive any income in or from New Zealand under the Arrangement, other than dividends paid to it by NZ Sub (if any).
4. Overseas Holdco owned the Overseas Subsidiaries and NZ Sub. Overseas Holdco, the Overseas Subsidiaries and NZ Sub were ultimately in the same group of companies.
5. Overseas Holdco and the Overseas Subsidiaries had similar characteristics as they:
    - were not in or incorporated in New Zealand,
    - had offshore directors or decision makers, and
    - did not carry on any activities in New Zealand while having a fixed or permanent place in New Zealand.

Issues | Take

6. The main issues considered in this ruling were:

- Whether NZ Sub, Overseas Holdco, and the Overseas Subsidiaries were resident in New Zealand for income tax and GST purposes, and where relevant under a DTA.
- Whether the sale of the IP to Overseas Holdco was zero-rated under the GSTA.
- Whether the services provided by NZ Sub to Overseas Holdco were zero-rated under the GSTA.
- Whether NZ Sub had income from the Arrangement (other than the service fees) under Part C of the ITA.
- Whether Overseas Holdco had any income from the Arrangement under Part C of the ITA, other than any dividends (if any) that NZ Sub declares and pays from time to time.
- Whether expenditure incurred by NZ Sub in the course of carrying on its business to derive service fees was deductible under s DA 1, and whether ss DA 2(2) to DA 2(6) of the ITA applied to deny a deduction.

Decisions | Whakatau

7. In respect of residence:
   - NZ Sub was a New Zealand resident under section YD 2 of the ITA, art 4(1) of the relevant DTA and "resident" under s 2 of the GSTA.
   - Overseas Holdco and the Overseas Subsidiaries were not New Zealand residents under s YD 2 of the ITA, under the relevant DTA, and not "resident" under s 2 of the GSTA.
8. The sale of the IP to Overseas Holdco was zero-rated under s 11A(1)(n) of the GSTA.
9. The service fees were zero-rated under either s 11A(1)(k) or s 11A(1)(n) of the GSTA.
10. NZ Sub had no income from the Arrangement under Part C of the ITA, other than the service fees.
11. Overseas Holdco had no income from the Arrangement under Part C of the ITA, other than dividends (if any) that NZ Co declared and paid from time to time.
12. Subject to s GB 33 and the other provisions of Part D of the ITA, expenditure incurred by NZ Sub to derive the services fees was deductible under s DA 1, and ss DA 2(2) to DA 2(6) did not apply to deny a deduction.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Residence of the companies

13. "New Zealand resident" is defined in s YA 1 of the ITA and includes a person resident in New Zealand under ss YD 1 to YD 3B of the ITA. Section YD 2(1) provides that a company is a New Zealand resident for the ITA if one of the following bases is satisfied:

    - It is incorporated in New Zealand.
    - Its head office is in New Zealand.[1]
    - Its centre of management is in New Zealand.
    - Its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision making also occurs outside of New Zealand.

14. For the purposes of the GSTA a person will be "resident" if they are resident under s YD 1 or YD 2 (excluding s YD 2(2)) of the ITA.[2] This is subject to three provisos ((a) to (c)) with (a) being the most relevant. A person is deemed to be a resident in New Zealand to the extent they carry on any taxable or other activity in New Zealand and have a fixed or permanent place in New Zealand related to that activity.

15. Under article 4(1) of the relevant DTA, whether a person is resident of a contracting state includes consideration of their place of management, place of incorporation or other similar criterion, and does not include a person who is only liable for tax in that state in respect of income sourced in that state or is resident under the domestic law of either country.

Residence of NZ Sub

16. TCO concluded that NZ Sub was a resident of New Zealand under s YD 2(1) of the ITA having been incorporated in New Zealand.

17. As NZ Sub was a resident of New Zealand under s YD 2(1), TCO concluded that it was "resident" under s 2 of the GSTA.

[1] For this and the following two bullet points see IS 16/03: Tax residence (20 September 2016), *Tax Information Bulletin* Vol 25, No 10 (October 2016).

[2] Definition of "resident" in s 2 of the GSTA.

18. TCO concluded that NZ Sub was resident in New Zealand under s 4(1) of the relevant DTA having been incorporated in New Zealand and liable for New Zealand tax on its worldwide income.

Residence of Overseas Holdco and Overseas Subsidiaries

19. TCO considered the description of the Arrangement (see para [5]) and concluded that Overseas Holdco and the Overseas Subsidiaries were not New Zealand resident under s YD 2 of the ITA because none of the four bases were satisfied:
    - They were not incorporated in New Zealand.
    - Their head office was not in New Zealand.
    - Their centre of management was not in New Zealand.
    - The directors or decision makers did not exercise any control in New Zealand.
20. As Overseas Holdco and the Overseas Subsidiaries were not New Zealand resident under s YD 2 of the ITA, TCO concluded that they were not a resident of New Zealand under art 4(1) of the relevant DTA.
21. Whether Overseas Holdco and the Overseas Subsidiaries were resident in respect of the GSTA relied on them being resident in New Zealand under s YD 2 (ITA) or carrying on a taxable or other activity to the extent that they had a fixed or permanent place in New Zealand. TCO concluded that they were not New Zealand resident under the GSTA as:
    - They were not resident under s YD 2 of the ITA.
    - They did not carry on any activities in New Zealand while having a fixed or permanent place in New Zealand.

Issues 2 and 3| Take tuarua and tuatoru: Zero-rating the IP and service fees

22. Legislative references in this part are to the GSTA unless otherwise stated.
23. Section 11A specifies that a supply of services that is chargeable with tax under s 8 must be charged with 0% in certain situations, including the transfer of intellectual property rights (s 11A(1)(n)). Section 11A(1)(n) only applies to the extent that:
    - the rights are for use outside of New Zealand (s 11A(4)(a)); or

- the services are supplied to a non-resident who is outside of New Zealand at the time they are performed (s 11A(4)(b)).

24. Section 11A(1)(k) zero-rates the supply of services if both of the following requirements are met:[3]

- The services are supplied to a non-resident who is outside of New Zealand at the time the services are performed.
- The services are not supplied in connection with land, moveable personal property in New Zealand or are the acceptance of an obligation to refrain from carrying on a taxable activity.

25. Section 11A(1)(k) is subject to s 11A(2) which deals with situations where services are provided to non-residents but persons in New Zealand receive the performance of those services. If s 11A(2) applies the services cannot be zero-rated. TCO concluded that s 11A(2) did not apply.

26. The issues were whether the sale of the IP to Overseas Holdco and the services provided by NZ Sub to Overseas Holdco were zero-rated.

27. TCO considered the description of the Arrangement (at para [1] and para [3]) and the conclusion at [21] that Overseas Holdco was not "resident" in New Zealand under s 2 and concluded that the sale of the IP was zero-rated under s 11A(1)(n). This was because what was supplied was intellectual property rights within the meaning in s 11A(1)(n)(i) and to a non-resident who was outside of New Zealand.

28. TCO considered the description of the Arrangement (at para [1] and para [3]) and concluded that the services provided by NZ Co to Overseas Holdco could be zero-rated under s11A(1)(k) or (n). This was because the services:

- were supplied to Overseas Holdco who was non-resident (para [21]) and outside New Zealand when the services were performed, and
- were not supplied in connection with land, moveable personal property in New Zealand, or
- were not the acceptance of an obligation to refrain from carrying on a taxable activity within New Zealand.

[3] TCO were satisfied that the services provided by NZ Sub under the arrangement were "services" as defined in s 2.

Issue 4 | Take tuawhā: Income of NZ Sub

29. TCO considered the description of the Arrangement (para [2]) and concluded that NZ Sub had no income from the Arrangement under Part C of the ITA, other than the service fees. The Arrangement, described in the documents supplied to TCO, only allowed for the provision of certain services by NZ Sub to Overseas Holdco and receiving only the service fees in respect of that supply.

Issue 5 | Take tuarima: Income of Overseas Holdco

30. TCO considered the description of the Arrangement (para [3]) and concluded that Overseas Holdco had no income from the Arrangement under Part C of the ITA, other than any dividends (if any) that NZ Co declared and paid from time to time. The description of the Arrangement (para [3]) included a statement that Overseas Holdco would not derive any income in or from the Arrangement other than any dividends that NZ Sub might pay from time to time (if any).

Issue 6 | Take tuaono: Deductibility of expenditure incurred by NZ Sub

31. The issue was whether expenditure NZ Sub incurred that had the required nexus with its business to derive the services fees:

- was deductible under s DA 1; and
- the limitations in ss DA 2(2) to (6) did not apply.

The general permission

32. Section DA 1(1)(b) of the ITA provides for the deductibility of expenditure incurred in the course of carrying on a business for the purpose of deriving assessable income (or excluded income, or a combination thereof). Section DA 1(3) provides that s GB 33 may apply to override the general permission.

33. It is a matter of degree, and so a question of fact, to determine whether there is a sufficient relationship between the expenditure and the derivation of income, or the carrying on of a business for the purpose of deriving income. The phrase "the occasion of the loss or outgoing should be found in whatever is productive of the assessable income" is a helpful way both of characterising the factual inquiry that the application

of the statutory language requires and of describing the nexus that is the focus of that inquiry.[4]

34. TCO was not asked to rule on the nexus test. TCO concluded that subject to the application of s GB 33 and the other provisions of Part D, expenditure incurred by NZ Sub in the course of carrying on its business to derive service fees was deductible under s DA 1 (effectively a restatement of the test in s DA 1(1)(b)).

The general limitation

35. If an amount of expenditure or loss satisfies the general permission, to be deductible it must also not be subject to any of the general limitations in s DA 2 of the ITA (which override the general permission).

36. TCO was not asked to rule on s DA 2(1) (capital limitation). TCO concluded that none of the limitations in ss DA 2(2) to (6) of the ITA applied as:

- The private limitation did not apply to companies (DA 2(2)).
- The exempt income limitation did not apply as the expenditure was incurred in deriving assessable income (the service fees) (s DA 2(3)).
- The employment income limitation did not apply as the service fees were not employment income (s DA 2(4)).
- The withholding tax limitation did not apply as the expenditure was not incurred in deriving non-resident passive income (s DA 2(5)).
- The non-residents' foreign-sourced income limitation did not apply as the expenditure was not incurred in deriving non-residents' foreign-sourced income (s DA 2(6)).

[4] *CIR v Banks* (1978) 3 NZTC 61,236 (CA*), Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA)), *NRS Media Holdings Ltd v Commissioner of Inland Revenue* [2018] NZCA 472, and *Ronpibon Tin NL v FCT* (1949) 78 CLR 47