

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKAWĀ

Omitted income and shortfall penalty

Decision date | Rā o te Whakatau: 16 May 2025

Issue date | Rā Tuku: 19 August 2025

TDS 25/21

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Subjects | Kaupapa

GST: omitted income; imposition of shortfall penalty.

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. This dispute concerned a general partnership (**Taxpayer**) that purchased a property (**Property**) to develop. Land Information New Zealand (**LINZ**) records showed that title to the Property was registered in the names of the two partners, as to a half share each.
2. The Taxpayer claimed the purchase price of the Property as an input tax deduction in its GST return.
3. LINZ records showed a half share of the Property was transferred to B Ltd (an associated person) the following year.
4. Customer and Compliance Services, Inland Revenue (**CCS**) conducted an audit and considered that:
 - a half share of the Property had been disposed of to B Ltd for less than market value;
 - the other half share had been disposed of to one of the Taxpayer's partners (an associated person) for less than market value;
 - GST output tax should have been returned on these supplies at market value; and
 - the Taxpayer had ended its taxable activity after disposing of the Property.
5. CCS issued a notice of proposed adjustment for the GST taxable period in which it considered the Property had been disposed of. CCS proposed:
 - output tax at the standard rate on the supply of the Property at market value; and
 - a shortfall penalty for gross carelessness or not taking reasonable care, which in either case would be reduced by 50% for previous behaviour.

6. CCS also proposed cancelling the Taxpayer's GST registration at the end of the following GST period.
7. The Taxpayer issued a notice of response rejecting CCS's proposed adjustments. A facilitated conference was held. However, the dispute continued unresolved. The parties exchanged statements of position and the dispute was referred to the Tax Counsel Office, Inland Revenue (**TCO**) for adjudication.

Issues | Take

8. The main issues considered in this dispute were:
 - whether the Taxpayer was liable for GST output tax at the standard rate on the supply of the Property at market value in the GST period in dispute;¹
 - whether the Taxpayer's GST registration should be cancelled at the end of the GST period immediately following the period in dispute;² and
 - whether the Taxpayer was liable for a shortfall penalty for gross carelessness or not taking reasonable care.³
9. There was also a preliminary issue on the onus and standard of proof.

Decisions | Whakataua

10. TCO decided:
 - the Taxpayer was liable for GST output tax at the standard rate on the supply of one half of the Property at market value in the GST period in dispute;
 - the Taxpayer's GST registration should not be cancelled at the end of the GST period immediately following the period in dispute; and
 - the Taxpayer was liable for a shortfall penalty for gross carelessness.

¹ Sections 8, 11(1)(mb) and 57.

² Section 52(5).

³ Sections 141C and 141A, respectively, and s 141FB of the Tax Administration Act 1994 (**TAA**).

Reasons for decisions | Pūnga o ngā whakatautau

Preliminary issue | Take tōmua: Onus and standard of proof

11. Except for proceedings relating to evasion or a similar act or obstruction, the onus is on the taxpayer to show that an assessment is wrong, why it is wrong and by how much it is wrong.⁴ 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.⁵
12. The standard of proof required is the balance of probabilities.⁶

Issue 1 | Take tuatahi: Liability for GST output tax

Taxable supplies

13. A taxable supply is a supply charged with GST under s 8 at the rate of 15% on the supply of goods and services by a registered person in the course or furtherance of carrying on a taxable activity.
14. Under s 11, a supply of land chargeable with tax under s 8 must be charged at the rate of 0% if the supply is to a GST-registered person intending to use the land to make taxable supplies.

Value of a supply

15. Generally, to the extent that the consideration for the supply of goods and services is consideration in money, the value of the supply is the amount of money.⁷ However, an "associated supply" made for a consideration less than its market value is treated as having been made at market value.⁸ An "associated supply" is a supply made between associated persons.⁹

⁴ 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).

⁵ Section 138P(1B) of the TAA.

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

⁷ Section 10(2).

⁸ Section 10(3).

⁹ Section 2A.

Taxable activity

16. Under s 6, a taxable activity is any activity carried on continuously or regularly by any person that involves or is intended to involve the supply of goods and services.
17. Anything done in connection with the ending of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.¹⁰
18. Assets disposed in the connection with the ending of a taxable activity may be subject to GST.

Application

Contractual arrangements

19. The provisions of the GST Act are directed to the contractual arrangements between the supplier and the recipient of the supply.¹¹ This is because GST is a transaction-based tax.
20. Therefore, TCO needed to consider the nature of the relevant contractual arrangements and then apply the law to those the arrangements.
21. Taking all the evidence into account, TCO considered that the nature of the relevant contractual arrangements was that the Taxpayer:
 - sold a half share of the Property to B Ltd in the GST period in dispute and sold the remaining half share to B Ltd in a later period that was not in dispute; and
 - continued after the first sale of a half share of the Property to B Ltd as the same GST registered partnership.

Liability for GST output tax

22. Applying the law to the contractual arrangements, TCO found as follows:
 - The Taxpayer made the first sale of a half share of the Property to B Ltd in the course or furtherance of carrying on its taxable activity.
 - The supply was not zero-rated because it was not made to a GST registered person. B Ltd was not GST registered, and the Taxpayer had not shown B Ltd was liable to be GST registered. Nor had the Taxpayer shown the supply was treated

¹⁰ Section 6(2).

¹¹ *Wilson & Horton Ltd v CIR* (1995) 17 NZTC 12,325 (CA) at 12,328

as zero-rated. It appeared the Taxpayer simply did not charge GST on the supply.

- The Taxpayer had the onus of proving that the supply was treated as zero-rated. As the Taxpayer had not shown it was, the relevant version of s 5(23) would not apply to treat B Ltd as having made the supply and liable for the GST output tax instead of the Taxpayer.
- The supply was made for less than market value based on the capital value of the Property for rating purposes. As the Taxpayer and B Ltd were associated, the supply was an associated supply treated as made for market value. The Taxpayer had not shown the market value of the supply was anything other than that determined by using the capital value of the Property for rating purposes.

23. Therefore, the Taxpayer was liable for GST output tax at 15% on the supply of a half of the Property at market value in the GST period in dispute.

Issue 2 | Take tuarua: Cancellation of GST registration

24. Where the Commissioner is satisfied a registered person's taxable activity has ended, the Commissioner may cancel that person's registration under s 52.

25. Cancellation of a person's GST registration takes effect from the last day of the taxable period in which the Commissioner was so satisfied or from any other date determined by the Commissioner.

26. Taking all the evidence into account, TCO considered that the nature of the relevant contractual arrangements was that:

- After the first sale of a half share of the Property to B Ltd, there was evidence the Taxpayer continued as the same GST registered partnership. It continued to file GST returns.
- The Taxpayer retained the other half share of the Property until at least nearly a year later, when it agreed to sell the remaining half share to B Ltd.

27. The sale of the remaining half share of the Property to B Ltd was something done in connection with the ending of the Taxpayer's activity and treated as being carried out in the course or furtherance of its taxable activity. It followed that the Taxpayer's GST registration should continue until after that sale. Therefore, TCO concluded that the Taxpayer's GST registration should not be cancelled as proposed by CCS. The GST period in which the remaining half share of the Property was sold to B Ltd was not in dispute.

Issue 3 | Take tuatoru: Shortfall penalty

Shortfall penalty for gross carelessness

28. Section 141C of the Tax Administration Act 1994 (**TAA**) imposes a shortfall penalty for gross carelessness on a taxpayer if the following requirements are satisfied:¹²

- 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 of the circumstances, suggests or implies a complete or high level of disregard for the consequences.¹³ In summary:
 - 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.¹⁴
 - 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.¹⁵
 - A person who takes reasonable care is not grossly careless.¹⁶

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

Application of the penalty

30. The Taxpayer took a tax position that resulted in a tax shortfall in the GST period in dispute. The Taxpayer was grossly careless when it took the tax position for these reasons:

¹² 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).

¹³ Section 141C(3) of the TAA.

¹⁴ *Case W4* (2003) 21 NZTC 11,034 at [44].

¹⁵ *Case W4* at [60]; *Case 9/2014* (2014) 26 NZTC 2-019 at [88].

¹⁶ *Case W4*; *Re Carlaw and FCT* 95 ATC 2166 (AAT); *Re Sparks and FCT* [2000] AATA 28. See also *Pech v Tilgals* [1994] ATC 4206.

- There was evidence that the Taxpayer's partners were experienced in business and knew the GST consequences of buying and selling property.
- The Taxpayer had claimed GST input tax on acquiring the Property and for other expenses incurred in respect of it.
- The Taxpayer's tax position was that it was not liable for GST output tax on the first sale of a half share of the Property to B Ltd. The Taxpayer argued that, when it took the tax position, it believed the supply was zero-rated. However, it did not record the supply as zero-rated in its GST return, nor did it provide any documentation showing it had treated the supply as zero-rated.
- A reasonable person in the Taxpayer's position would have foreseen that taking that tax position without corroborating documentary evidence created a high risk of a tax shortfall occurring. A reasonable person would also have foreseen they would be expected to keep and provide documents to support why they believed they were not liable for output tax on the first sale of a half share of the Property to B Ltd. For example, this could have included an agreement for sale and purchase, a record of B Ltd having advised the Taxpayer it was GST registered, or any other records showing the supply was treated as zero-rated.
- The Taxpayer had not shown it kept any records substantiating the tax position it took, suggesting a high level of disregard for the risk of a tax shortfall occurring.
- The Taxpayer had not shown it adequately informed and followed the advice of its tax agent. Nor was the Taxpayer's tax position an "acceptable tax position".¹⁷ Because B Ltd was not a GST registered person (and no evidence was provided supporting the position that the supply was treated as zero-rated), the Taxpayer's tax position, that the first sale of a half share of the Property was zero-rated, could not be argued on rational grounds to be right. The Taxpayer had also not shown that the supply was incorrectly zero-rated such that B Ltd as the purchaser should have been liable for GST.¹⁸

31. Therefore, TCO concluded that the Taxpayer was liable for a shortfall penalty for gross carelessness, reduced by 50% for previous behaviour.

¹⁷ A taxpayer who takes an "acceptable tax position" is also a taxpayer who has taken reasonable care in taking the taxpayer's tax position (s 141A(3) of the TAA).

¹⁸ Section 5(23).