APPENDIX B TO TIB NO 9, MARCH 1990
GST AND SHIPOWNERS' AGENTS

1. This item provides -

(a) A brief discussion of the implications of section 60 of the GST Act ("Agents and Auctioneers") for shipowners' agents, and

(b) An explanation of the GST treatment of fees charged to overseas shipowners by shipowners' agents in New Zealand.

2. In general there is an agent/principal relationship and therefore GST on purchases on behalf of the principal are likely to be available as a credit to the agent (section 60(2) and (6) of the GST Act). Recovery of the cost of such purchases from the principal is not a taxable supply. Agents fees are generally zero-rated, the exception being fees for arranging the provision of services to passengers or crew.

The Industry

3. IRD staff dealing with shipowners' agents should take care to familiarise themselves with the industry, and with the contractual arrangements entered into by the taxpayer with whom they are dealing. In particular care should be taken to distinguish contractual arrangements from practices of convenience. For example, although there may be particular contractual terms for billing and payment, the agent may circumvent these by simply deducting fees and commissions from amounts held on behalf of the principal - although not in accord with the terms of the contract this may be acceptable to both parties as a means of avoiding exchange transaction costs.

Disbursements

4. A brief explanation of the effect of section 60 in respect of New Zealand agents for shipowners outside New Zealand has been requested.

5. A shipowner's agent will be the recipient of supplies of goods and services in the agent's capacity as agent for the shipowner. Section 60(2) of the GST Act includes a proviso that allows an agent to request that GST invoices for those supplies be issued to and in the name of the agent in such circumstances.

6. In addition, if the non-resident shipowner is not a registered person and the supply in question -

(a) Is not zero-rated; and

(b) Is directly in connection with the export or import of goods, or arranging the export or import of goods, including the transport of those goods -

and the agent and the principal agree that section 60(6) of the GST Act is to apply, the GST Act is to be applied as if the supply were made to the agent rather than to the principal. For this purpose some evidence of the agreement is necessary. It is anticipated that shipowners' agents will be able to show this to be a part of the written terms of the agency contract.

7. Where section 60(2) and (6) of the GST Act apply, they should reflect in shipowners' agents' GST liability calculations as follows:

Output tax debits

For non-zero-rated supplies to the shipowner or operator

In respect of fees and commissions — normal rates (see paragraph 20 below re apportionment)

In respect of supplies secured acting as agent for the principal — no liability

Input tax credits

For supplies relating to the agency business — normal rates

For supplies secured acting as agent for the principal — normal rates (see paragraphs 16 & 17 above re statutory references).

Agents' Commissions and Fees

8. The fees dealt with in this item are the commissions and fees charged by agents for services performed for persons outside New Zealand in relation to -

(a) Transport vessels; and

(b) Non-transport (e.g. fishing) vessels -

in New Zealand.

9. In particular the services dealt with in this item are not -

(a) The transport of passengers or goods into, through, or out of New Zealand;

(b) International carriage of passengers by air;

(c) Ancillary transport of goods within New Zealand in relation to transport of goods or passengers into or out of New Zealand;

(d) Insuring or arranging the insurance or transport of goods or passengers being transported into, through, or out of New Zealand;

(e) Services supplied directly in connection with land outside New Zealand;

(f) Services supplied directly in connection with movable personal property situated outside New Zealand when the service is performed;

(g) Services physically performed outside New Zealand;

(h) Services relating to the protection of trade marks; or

(i) The acceptance of an obligation to refrain from doing outside New Zealand a thing that can only be done outside New Zealand -

but see paragraph 16(e) below.

10. It is clear that the services are not zero-rated unless -

(a) They are within section 11(2)(c)(ii) of the Goods and Services Act 1986 - i.e., they are supplied directly in connection with vessels that are goods referred to in either section 47(2) or section 181 of the Customs Act 1966; OR

(b) The services are within section 11(2)(e) of the Goods and Services Tax Act 1976 - i.e., they are supplied for and to a person who is not resident in New Zealand and is not in New Zealand when the service is performed and are not supplied directly in connection with

(i) Land in New Zealand; or

(ii) Movable personal property in New Zealand when the service is performed (other than goods referred to in either section 47(2) or section 181 of the Customs Act 1966)

except that there is no zero-rating for the acceptance of an obligation to refrain from carrying on a taxable activity in New Zealand.

11. Whether the vessels are goods referred to in either section 47(2) or section 181 of the Customs Act 1966 is a question of fact. Although there has been some discussion of whether vessels can be goods referred to in either section 47(2) or section 181 of the Customs Act 1966 it is clear that the intention of the legislature was that vessels passing through New Zealand in service should not give rise to a GST liability. This is achieved in section 12 of the Goods and Services Tax Act. Vessels passing through New Zealand are never imported within the meaning of section 12(1) of the Goods and Services Tax Act.

12. Whether such vessels are goods referred to in either section 47(2) or section 181 of the Customs Act 1966 is a different question. Section 47(2) of the Customs Act requires that the goods in question be capable of being removed from the ship or aircraft in which they arrived. Thus it cannot include the ship itself. Section 181 requires that the goods have been temporarily imported and by virtue of section 56(2) of the Customs Act vessels are within section 181 for the purposes of the Customs Act.

13. Although there is some doubt regarding the situation for GST purposes, the background to the GST legislation indicates that it was always intended that services supplied directly in connection with transporting ships and aircraft through New Zealand should be zero-rated. As a result it is the Department's intention to continue to interpret the GST Act as if -

(a) Vessels dealt with by temporary import entry are goods referred to in section 181 of the Customs Act 1966; and

(b) Vessels simply passing through New Zealand on voyage (including passenger and cargo vessels transporting passengers or cargo to New Zealand) are goods referred to in section 181 of the Customs Act 1966.

14. The question of the meaning of "directly in connection with" has apparently given rise to some doubt. The IRD's view is that -

(a) The meaning of this phrase depends upon the context in which it is used;

(b) The words "in connection with" require a relationship of more than remote degree;

(c) That relationship must be direct (i.e., in the case of services, directly with the goods and not with some other person or thing); and

(d) The following questions are useful in determining the matter in particular cases:

(i) What is the service supplied in connection with, if anything?

(ii) Is the connection direct - does anything interpose between service and object?

(iii) Is the service merely incidental to the object?

15. The words “for and to” in section 11(2)(e) of the Goods and Services Tax Act require some explanation. The word “for” requires that the goods or services be supplied for the benefit of the person to whom the goods or services are supplied.

16. Applying this to particular examples where the vessel is in New Zealand but is operated by a person (i.e., the owner or charterer) outside New Zealand, the view of the IRD is that -

(a) Services supplied to the owner or operator of a vessel in relation to the vessel and to the actions of other persons (suppliers, repairers, etc) **are not** supplied directly in connection with the vessel (e.g. arranging painting, arranging mechanical or hull repairs);

These services -

(i) Are zero-rated under section 11(2)(e) (whether the vessel is goods referred to in either section 47(2) or section 181 of the Customs Act 1966 or not) because they are supplied to and for the benefit of the owner or operator; and

(ii) Are not zero-rated under section 11(2)(c).

(b) Services supplied to the owner or operator of a vessel that are things done to the vessel *are* supplied directly in connection with the vessel (e.g. painting, mechanical or hull repairs);

These services are zero-rated under section 11(2)(c)(ii).

(c) Services supplied to the owner or operator of a vessel that amount to the satisfaction of the owner's or operator's liabilities as such are not supplied directly in connection with the vessel (e.g. arranging payment of statutory fees);

These services -

(i) Are zero-rated under section 11(2)(e) because they are supplied for and to the owner or operator; and

(ii) Are not zero-rated under section 11(2)(c).

(d) Services supplied to the owner or operator of a vessel that are the physical operation of the vessel are supplied directly in connection with the vessel (e.g. navigating the vessel);

These services are zero-rated under section 11(2)(c)(ii).

(e) Services supplied to passengers or crew of a vessel **are not** supplied directly in connection with the vessel (e.g. provision of internal transport, medical services); and

These services are -

(i) Not zero-rated under section 11(2)(c)(ii) as they are not supplied directly in connection with the vessel;

(ii) Not zero-rated under section 11(2)(e) as they are not supplied "for and to" a person outside New Zealand; and

(iii) Zero-rated under section 11(2)(a) if they comprise the transport of passengers of goods

(A) From a place outside New Zealand to another place outside New Zealand;

(B) From a place in New Zealand to a place outside New Zealand; or

(C) From a place outside New Zealand to a place in New Zealand -

and the services are not simply ancillary to the transport (such as loading, unloading or handling).

Note that arranging the transport of passengers or goods is not sufficient to qualify for zero-rating under section 11 (2)(a) - it is the service of transporting only that is zero-rated. However the service of arranging transport is zero-rated under section 11(2)(ac) where the transport is of the types referred to in section 11 (2)(a) to (ab). In

addition it is not sufficient that the goods or passengers be departing from an international voyage. If that is the case they have ceased that voyage and are embarking upon a new one. It is the new voyage that must be considered. Thus if a passenger on an international voyage for some reason leaves the voyage in New Zealand and transport home is arranged by the shipping agent, it is the transport home that must be considered in terms of section 11(2)(a). Similarly where a crew member departs an international voyage in New Zealand, the crew member's voyage home (at which stage the crew member is presumably a passenger) must be considered in terms of section 11(2)(a).

(f) Services supplied to the owner or operator of a vessel for the benefit of passengers or crew of a vessel are not supplied directly in connection with the vessel (e.g. provision of internal transport, medical fees);

These services are -

(i) Not zero-rated under section 11(2)(c)(ii) as they are not supplied directly in connection with the vessel; and

(ii) Not zero-rated under section 11(2)(e) as they are not supplied "for and to" a person outside New Zealand.

17. It should be noted that where the owner or operator of the vessel is in New Zealand (e.g. owner or charterer of a private yacht on voyage aboard the yacht in New Zealand) section 11(2)(e) cannot apply.

18. A further class of services that is understood to have been a matter of dispute is the supply of a berth for a vessel owned or operated by a person who is not resident in New Zealand and is not in New Zealand when the berth is supplied. This is the right for a vessel to occupy specified space at the wharf. As such it relates directly to the wharf space rather than to the vessel. The IRD view is that the supply of a berth

(a) Is not zero-rated under section 11(2)(c)(ii) as it is not supplied directly in connection with the vessel; and

(b) Is zero-rated under section 11(2)(e) as it is supplied for and to a person outside New Zealand and (not being supplied directly in connection with the vessel) does not fall within the exception in section 11(2)(e)(ii).

19. It should be noted that every case must be considered on its facts. The examples above should provide some guidance.

Basis of apportionment

20. The appropriate basis of apportionment for calculating output tax liabilities will be a question of fact in any particular case. However it is anticipated that

(a) In general it will be sufficient to apply the GST rate to the fees and commissions for non-zero-rated goods and services;

(b) Where a fixed fee is charged for availability of the agent there will be no apportionment; and

(c) Where commissions and fees are charged for a variety of services in a single block and there are no differential rates, apportionment on the basis of the following fraction will generally be acceptable:

$$\frac{\text{cost (excluding agents' commissions and fees) of non-zero-rated goods \& services for which the commission or fee is charged}}{\text{total cost (excluding agents' commissions and fees) of goods \& services for which the commission or fee is charged}}$$