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WEEKLY COMMENT: FRIDAY 12 JULY 2013

1. I continue with GST this week, and look at *The GST treatment of immigration and other services – An officials' issues paper* (the "Immigration IP") issued in June of this year, and for which submissions closed on 5 July 2013. The problems discussed in the Immigration IP were apparently identified from submissions received in response to the draft interpretation statement, *GST on immigration services* (the "draft Immigration IS") released in April 2012. I reviewed the draft Immigration IS in *Weekly Comment* 9 May 2012.

The draft Immigration IS: zero-rating of visa application services

2. The draft Immigration IS concerned the circumstances in which visa application services provided to a non-resident can be zero-rated under section 11A(1)(k) of the *Goods and Services Tax Act 1985* ("the GST Act"). Under that section, services must be zero-rated when supplied to a non-resident who is outside New Zealand at the time the services are performed.

3. The main focus was on the meaning of the phrase "at the time the services are performed". If the entire supply cannot be zero-rated, the secondary questions are:

   (a) Whether the supply can be apportioned into standard-rated and zero-rated parts; and

   (b) The implications of the time of supply rule for periodic payments in section 9(3).

4. In reference to the draft Immigration IS, it is stated in paragraph 1.12 on page 2 of the Immigration IP that:

   "The statement concluded that immigration services may be zero-rated, provided the recipient of the supply is a non-resident and remains outside New Zealand at the time the services are performed. If the recipient comes to New Zealand over the period during which the services are performed, the entire supply of services must be standard-rated, unless it is possible to apportion the supply."

5. In *Weekly Comment* 9 May 2012, I suggested that the phrase "at the time the services are performed" could be interpreted as meaning the time of supply: the time at which the services can be billed. Inland Revenue disagrees with that approach to interpreting the phrase for the following reason stated in paragraph 2.10 on page 5 of the Immigration IP:

   "… there would be clear avoidance opportunities if the status of the recipient was determined at one particular point in time – that is, at the time of invoicing or payment for services. For example, in order to avoid the tax, the recipient could ensure he or she is outside New Zealand at the one point of time when the person's status was determined."

6. With respect, this concern appears to place too little emphasis on the underlying requirement that the recipient of the services be a non-resident in the first place. In other words, there is a prima facie entitlement to zero-rating, which can be displaced by the recipient being in New Zealand at the time the services are performed.

7. In *Weekly Comment* 9 May 2012, I referred to the case of *C of IR v White Heather Caravans Limited* (1992) 14 NZTC 9,113 (CA). That case concerned the time when goods were supplied under section 84 which deals with supplies before and after the introduction of the GST legislation. I noted that the arguments in the draft Immigration IS did not easily accord with the wording in s. 84.

The Immigration IP: GST treatment of immigration and other services

8. The Immigration IP casts the net wider than merely visa application services. It is recognised in paragraph 1.13 on page 2 that:

   "The issues raised in response to the draft interpretation statement and the solutions suggested in this paper have wider implications. Therefore, the problems and suggested solutions have been framed in general terms and are not specific to the immigration service industry."

9. In the Immigration IP, the phrases "the period between the time the services commence and the time the services are completed" and "the period of supply" appear to be used interchangeably and mean the same thing (refer to paragraphs 2.6 to 2.10 on pages 4-5). The stated "two main policy reasons why the rule looks at the period of supply" are:

   (a) It is consistent with the destination principle – i.e. GST is charged in the jurisdiction where the services are consumed; a practical way of looking at where services are consumed is to look at the person's residence and presences during the period the services are supplied; and

   (b) There would be avoidance opportunities if the status of the recipient was determined at one particular point of time (as already noted).

10. However, it is acknowledged that the rule requires the supplier to have knowledge of the recipient's physical location and the recipient's status during the period of service, and this can be difficult if the service is provided over an extended period of time.

11. The suggested solution is that services supplied to non-residents remain zero-rated even if the non-resident visits New Zealand, as long as the non-resident's presence in New Zealand is not in connection with the services performed.

12. Therefore, officials recommend an exemption along the lines of the exemption for non-resident companies and unincorporated bodies in s. 11A(3), but limited to the exemption for "a presence that is not effectively connected with the supply" and not including the exemption for "minor presence in New Zealand". The reason for this is that an individual's presence in New Zealand for a purpose related to the services being provided can be regarded as consuming the service in New Zealand.

13. In this regard, officials note that it may be unclear whether an individual's presence in New Zealand is in connection with the services. Therefore, officials suggest that a non-resident's presence in New Zealand would qualify for the exemption if the presence was not in "direct connection" with the service.

14. An example is provided of a non-resident individual visiting New Zealand for a job interview to comply with the visa requirement of having a job offer. If the interview was arranged by the immigration consultant, the conclusion is that the presence in New Zealand would be directly in connection with the services. However, if the individual had independently arranged the interview, the presence in New Zealand would not be in connection with the services. The distinction would depend on the facts in each case.

The Australian approach

15. The Australian approach is discussed in paragraphs 3.11 to 3.14 on pages 8-9. By contrast, the Australian legislation is clear: the requirement is that the non-resident "*is not in Australia when the thing supplied is done*". The reference is clearly to the period over which the supply is performed.

16. It is noted that in Australian Goods and Services Tax Ruling 2004/7, paragraph 184, "not in Australia" requires that the non-resident or other recipient is not in Australia in relation to the supply.

17. The approach recommended by officials is, therefore, stated to be aligned with the Australian approach. However, there is no reference to the difference in the legislation.

Switching off backdating of tax residence for the purposes of the GST test

18. It is recognised, in Chapter 4 of the Immigration IP, that a non-resident could retrospectively become resident during the period when services are being supplied through the retrospective application of the income tax "count test" of tax residence.

19. Officials' preferred solution is that the retrospective application of the tax residence rules be switched off in relation to the application of s. 11A(1)(k) of the GST Act.

20. What is suggested is that the recipient's status as a New Zealand resident would apply on a prospective basis (from day 183, as opposed to from day 1).

Apportionment

21. Officials are of the view, following submissions made in respect of the draft Immigration IS, that in some situations it may be possible to apportion the supply between the zero-rated and standard-rated portions.

22. It is noted that, following the decision in *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685 (HC), there is a general ability to apportion zero-rated parts of a supply under the GST Act where, on the facts, there is a true distinction between parts of a supply. This ability to apportion is restricted to circumstances when, as a matter of fact and degree, a sufficient distinction exists between the different parts of the transaction to make it reasonable to separate them.

23. Where supplies can be treated as a series of supplies under s. 9(3)(a), it will be necessary to determine the correct GST treatment for each successive supply.

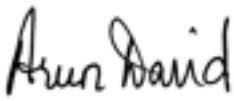
Reasonably foreseeable

24. Officials have considered whether a "reasonably foreseeable" test is required, similar to the test in s. 11A(2)(a) (which refers to the performance of services being received in New Zealand). While they believe this would bring greater certainty, they recognise the difficulty

in applying a subjective test, and they expect that "in the majority of situations a test of this nature may not be necessary".

Conclusion: a step in the right direction

25. The Immigration IP is a move in the right direction, given that Inland Revenue are unlikely to accept that the legislation warrants a "time of supply" type rule. I suspect that if the legislation were to be interpreted that way by a Court, Inland Revenue would push for the legislation to be changed.



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