



WEEKLY COMMENT: FRIDAY 11 APRIL 2014

1. I have had occasion recently to consider the GST grouping rule in s. 55(8) of the *Goods and Services Tax Act 1985* ("the GST Act"), which applies when not all of the persons in the GST group are companies. This week and next week I will look at the ambit of this grouping rule.
2. The Commissioner can deem a group of registered persons to be members of a GST group, and the rules that apply to groups of companies in sections 55(2) to 55(7) will apply as if the group of registered persons is a group of companies, and as if references to companies are references to members of the group, if the Commissioner is satisfied in relation to 2 or more registered persons (not each being companies) that:
 - (a) One of them controls each of the others; or
 - (b) One person controls all of them; or
 - (c) Two or more persons carrying on a taxable activity in partnership control all of them.
3. This grouping rule has been considered, in chronological order, in a number of cases and two Inland Revenue statements:
 - (a) *Case K54* [1988] NZTRA 40, (1988) 10 NZTC 444;
 - (b) *Case L42* [19898] NZTRA 52, (1989) 11 NZTC 1,261;
 - (c) Inland Revenue TIB item GST Group Registration of Trusts, *Tax Information Bulletin* Vol. 16, No. 6, July 2004, pages 32 – 34;
 - (d) Inland Revenue QWBA QB 07/03 *Trustees in the context of the Goods and Services Tax Act 1985: does a separate trustee capacity and personal capacity exist and do separate trustee capacities exist for trustees of multiple trusts?* (June 2007);
 - (e) *Commissioner of Inland Revenue v Letica* [2012] NZHC 379, (2012) 25 NZTC 20-116; and
 - (f) *Case 11/2013* [2013] NZTRA 11, (2013) 26 NZTC 2-010.
4. QB 07/03 and *Case 11/2013* concerned whether trusts and companies respectively were associated persons, but they are both relevant due to the discussion on common control. I will consider the implications of this QB and this TRA case next week.

Case K54

5. This case consisted of 3 separate cases where the taxpayers had unsuccessfully applied to be group registered under s. 55(8). The cases were heard together by consent. The Commissioner submitted that for s. 55(8) to have applied there must have been legal control

by the taxpayers over all other members of the group. In each of these cases there had not been one person or entity who had legal control over all of the others.

6. The first case consisted of 3 partnerships (comprising a son and his wife and his parents) and a company (whose shareholders were the son and his parents) that had applied to be group registered. The partnerships consisted of the father, the son and his wife (partnership 1), the parents (partnership 2) and the son and his wife (partnership 3). The Commissioner declined the application for group registration on the ground there was no common control in those applying for group registration. The Commissioner contended that no member of either partnership had control over the others and no majority shareholder in the company had such control.
7. The second case involved 2 brothers in partnership, 2 companies and another partnership. One brother and his family trust owned one of the companies, and the other company was owned equally by the 2 brothers' family trusts. The partners in the other partnership were the brothers' family trusts. In this case, the Commissioner conceded that the partnership of the 2 brothers and the partnership of the 2 family trusts could be grouped under s. 55(8)(c): two or more persons carrying on a taxable activity in partnership control all of them. But the companies could not be grouped as well because not one of the entities controlled each other and not one person controlled all of them.
8. The third case involved a married couple in partnership and the husband in business on his own. The Commissioner declined group registration in this case because no one person held more than a 50% share in each separate entity to exercise control over it. Each partner had a 50% share in the voting powers and profit sharing arrangements of the partnership.
9. Bathgate DJ agreed with the Commissioner. In his view, there was no basis for contending that a legal ownership test applied to group companies, but a different type of test applied to group non-companies. He stated:

"In sec 55(8) "control" is not expressly restricted to de jure control rather than de facto control as in the case of all companies forming the group to be registered. However I think that would be a necessary requirement. ...

In the context of the *Goods and Services Tax Act*, and in particular sec 55 of the Act and having regard to the largely self-controlling nature of goods and services tax and compliance with the provisions of the Act, it would not be in accordance with the objects of the legislation for control in sec 55(8) to mean anything other than legal control. Nor would it be in accord with the objects and intent of the Act for control between persons when all of them are not companies to be of a different nature and character of the control that exists between companies as a group; that is legal control. I think it would be well nigh impossible on occasions to discern whether or not there was de facto control, in the sense of one person acting for another ...

I conclude that "control" or "controls" in the context of sec 55(8) means discernible, legal control. Anything less would be unlikely to have been intended having regard to the objects of the Act, the method of implementation of the *Goods and Services Tax Act* and in particular the method provided for the registration of companies as a group. When the group are not all companies the necessary controls between the members are of the same character as that which applies when the group are all companies, ... I do not consider that the question of control goes beyond a consideration of the legal rights and duties involved."

Case L42

10. The facts in this case paralleled those in the third situation in the previous case: a husband and wife partnership applied to be group registered with the husband alone. The judge agreed with the Commissioner that there was discernible legal control of one party over the other. Therefore group registration was not allowed.

GST group registration of trusts

11. The purpose of the TIB item *GST group registration of trusts* is stated to be “to provide an overview of the rules that relate to the GST group registration of trusts. The “General rule” is stated as follows:

“Each trust is different. Accordingly, the standard position is that no person controls the trustees, and a trust cannot be part of a GST group simply by virtue of it being under the trusteeship of the same person as another member of the group.”

12. A trust can have discernible legal control of another person:

- (a) The trustees will have discernible legal control over a company when the trust holds more than 50% of the voting power in respect of shareholder decision-making rights. It is stated in the TIB item that this assumes that the trustees have the power to hold shares and vote at company meetings, in terms of the relevant trust deed.
- (b) A trustee can have discernible legal control over a partnership under the terms of the partnership agreement. According to the TIB item, this will be generally be dictated by the level of voting power.
- (c) It is stated in the TIB item that in certain circumstances, a trustee is able to group with another trust under section 55(8). This includes situations involving trustees of subtrusts. Just as the trustee of the principal trust will have control of the trust because of the terms of the deed, where this power in respect of the subtrust is vested in the trustees of the principal trust then it may be considered to control the trustees of the subtrust. It is stated that careful analysis of the terms of the relevant deed will normally be required before Inland Revenue will accept this.

13. There are 3 examples provided in the TIB item:

- (a) Example 1 concerns 3 co-trustees of a family trust who also own 80% of a company between them. The trust and the company cannot be grouped because the trustees of the family trust are not acting on their own behalf could be removed. Inland Revenue does not consider that the same persons control both entities.
- (b) Example 2 concerns a trust that owns 60% of a company. The sole trustee has discernible legal control of the company because of the trust’s 60% shareholding, so the trust and the company can be grouped.
- (c) Example 3 concerns a trust and a sub-trust. The corporate trustee of the head trust formed the sub-trust and the trustee of the head trust has the power to deal with the sub-trust for the financial betterment of its beneficiaries and to appoint and remove the trustees of the sub-trust. The corporate trustee is the trustee of both trusts and trusts are “linked together beneficially in the principal deed” so the trusts can be grouped for GST purposes. Apparently, this reasoning will also apply where two or more independent trusts are governed by the same or similar trustees.

C of IR v Letica

14. In this case, the taxpayer controlled his company and was group registered with his company under s. 55(8) of the GST Act. The effect of that was that Mr Letica was the representative of the group and that he was personally liable for the group's GST liabilities.
15. The case is an example of the application of s. 55(8). However, it also provides a warning. The taxpayer argued that he had not been properly appraised of the consequences of group registration by Inland Revenue. However, associate judge Bell noted that:
"That is because he had a tax agent acting for him. The tax agent made the application for group registration on behalf of Mr Letica and his company. The Inland Revenue was entitled to assume that the tax agent who had arranged for group registration would have advised Mr Letica about the consequences."



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