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WEEKLY COMMENT: THURSDAY 2 APRIL 2015

1. This week I look at the High Court judgment given on 16 March 2015 in *ID Tours New Zealand Limited v Commissioner of Inland Revenue* [2015] NZHC 483. The case was an appeal of the Taxation Review Authority decision in *TRA 05/12* [2014] NZTRA 13.

Facts of the case

2. The case concerned whether GST applied to fees charged by ID Tours for advisory tourism services and "on the ground" services provided to cruise lines, incentive houses (who arrange employee reward travel packages) and to a UK travel agent.

3. The principal business activity involved providing logistics and activity planning advice to, and making bookings on behalf of, cruise ships that visit New Zealand. The process commenced with a Request for Proposal ("RFP"), which set out available tourist activities, port infrastructure, costs of recommended activities and the fee charged by ID Tours. Then cruise lines selected their preferred tourist programmes, requested an outline of how the excursions would work within their time frames, and offered the excursions to passengers.

4. The cruise lines asked ID Tours to make bookings based on sales to passengers. ID Tours charged its own fee based on all products sold by a ship. After the visit, the cruise line sent ID Tours a "self invoice" for checking, detailing the programmes purchased and ID Tours' fees. Once checked, the invoice was paid by the cruise line's head office and ID Tours then paid the New Zealand suppliers.

5. Similar types of arrangements were entered into with incentive houses. The process commenced with an RFP. Once accepted, ID Tours might be asked to make bookings, payments and contract with local suppliers. The arrangements were generally 85% pre-paid, with the remaining 15% paid if the incentive house was satisfied with the product or service. ID Tours facilitated the payments of the deposits to local suppliers and was invoiced for the remaining 15% by the suppliers (although the suppliers knew the remainder would be paid by the incentive houses). ID Tours charged a fee related to the value of each programme.

6. ID Tours also made bookings with New Zealand suppliers on behalf of a UK travel agent, typically for independent, individual travellers. The UK travel agent issued ID Tours with vouchers for payment. The invoices from the local suppliers were sent to ID Tours and the vouchers were used to make the payments to suppliers. Apparently local suppliers knew the invoices should be sent to ID Tours because that facilitated the payment of the account.

The issues in dispute

7. ID Tours maintained that it was entitled to zero-rate the supply of its services under s. 11A(1)(k) of the *Goods and Services Tax Act 1985* ("the GST Act"), under which services supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed must be zero-rated.

8. The High Court considered that this would certainly be the case if ID Tours was found to be acting as the agent of non-resident principals in relation to its "on the ground" activities. The TRA had also first considered whether there was an agency relationship and the High Court agreed that was the correct approach.

9. Section 60 of the GST Act deals with agents. The general rule is that where an agent makes a supply of goods and services for and on behalf of a principal of that agent, that supply is deemed to be made by that principal and not by that agent. The corollary is that where a registered person makes a taxable supply of goods and services to an agent who is acting on behalf of a principal for the purposes of that supply, that supply is deemed to be made to that principal and not to that agent.

10. However, an agent and a principal can agree in writing that s. 60(1B) applies so that there are two separate supplies: one to the agent and the other from the agent to the principal, and in such cases, the agent is treated as the principal for GST purposes.

11. In this case there was no written agency agreement. If there was an agency relationship, it was implied and had to be inferred from the facts and circumstances of the case. Therefore, the Court approached the question in terms of the principles that applied to infer legal arrangements where there was no written documentation.

12. If there was no agency relationship, and ID Tours acquired the "on the ground" activities in its own right, it was necessary to decide whether ID Tours should charge GST on its invoices to the non-resident recipients of ID Tours' services. In this case there would be two sets of contracts: one between ID Tours and the local supplier and one between ID Tours and overseas operator.

13. The GST Act contains a specific rule concerning the imposition of GST, in s. 8(2B), which is relevant in the circumstances and overrides s. 11A(1)(k). It states that to the extent to which a supply of services consists of the facilitation of inbound tour operations, the supply is chargeable with GST and s. 11A does not apply to that part of the supply.

14. Services consisting of the facilitation of inbound tour operations are defined in s. 8(2F) as meaning the services that a registered person provides in packaging 1 or more domestic tourism products and services in New Zealand and selling them outside New Zealand to a non-resident person. The tourism products and services may include accommodation, meals, transport, and other activities.

15. Therefore, if there was no agency relationship and the services supplied by ID Tours fell within the ambit of s. 8(2B), they could not be zero-rated under s. 11A(1)(k).

Whether ID Tours was an agent of the overseas operators

16. The High Court approached the question of whether there was an agency relationship by first setting out the principles determining what the Court should have regard to, and then deciding whether that amounted to a relationship of agency:

    (a) When construing the true nature of a transaction for GST purposes it is the legal arrangements actually entered into and the rights and duties created by those arrangements that are relevant: *Commissioner of Inland Revenue v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).

    (b) Where there is no written documentation or where it is ambiguous it is appropriate for the Court to have regard to the surrounding circumstances: *Masport Ltd v Morrison Industries Ltd* CA 392/92, 31 August 1993.

    (c) Where the parties have not specified the nature of their relationship, the courts will consider what a reasonable person would conclude based on the relevant facts: *XXX v Commissioner of Inland Revenue* [2014] NZTRA 13.

    (d) Where the question at issue involves more than one contractual arrangement between different parties, in assessing who supplies what to whom regard must be had to all the circumstances in which the transaction or combination of transactions takes place: *The Commissioners for Her Majesty's Revenue and Customs Commissioners v Aimia Coalition (formerly Loyalty Management UK Ltd)* [2013] UKSC 42.

17. The parties involved in a transaction in this case are the overseas operator, ID Tours and the local tourism supplier. In deciding whether ID Tours acted as the agent of the overseas operator, the Court referred to the definition of the concept of agency in Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, Lexis Nexis, Wellington, 2012) as follows:

    (a) The essential characteristic of an agent is that he is invested with a legal power to alter the principal's legal relations with third parties: the principal is under a correlative liability to have his legal relations altered.

    (b) Whether an agency relationship can be shown ultimately turns on the particular facts of the case.

    (c) The relationship of principal and agent produces effects of two quite different kinds:

        (i) First, it creates an obligation between the principal and the agent under which each acquires in regard to the other certain rights and liabilities;

        (ii) Secondly, when acted upon by the agent, it leads to the creation of privity of contract between the principal and the third party.

    (d) A contract made with a third party by the agent in the exercise of his or her authority is enforceable both by and against the principal.

18. The High Court noted at [67] that in this case:

    "… (ID Tours) offers to provide certain advisory and on the ground services to the overseas operator in exchange for a fee. That is the consideration between the overseas operator and (ID Tours). (ID Tours) then contacts the local tourism providers and offers them payment in exchange for provision of tourism products or services to the non-resident tourists. That is the consideration between (ID Tours) and the domestic tourism providers."

19. The High Court concluded that ID Tours is not the agent of the overseas operators for the following reasons:

    (a) The payment process suggested that ID Tours formed two separate contractual relationships: ID Tours was the supplier of its advisory and on the ground services to the overseas operator which the overseas operator paid ID Tours for, and ID Tours was recipient of the products and services of the local supplier which ID Tours paid for but only after receipt of the payment from the overseas operator.

    (b) It was irrelevant that ID Tours did not consume the products of the local suppliers – the only question was whether it acquired them.

    (c) When it calculated its fee ID Tours did not distinguish between its advisory and other services, which supported the finding that it acquired domestic tourism products in its own right and then sold them to the overseas operator.

    (d) If a local supplier was not paid, the question would be against whom the supplier would have a claim for breach of contract: ID Tours would probably pay the supplier out of its own pocket (apparently due to its desire to protect its own reputation), whereas an agent is not legally obliged to pay the debts of its principal.

    (e) The fact that ID Tours used the UK travel agent's vouchers to pay local suppliers did not mean that payment was being made by the UK travel agent: the voucher only represented the method of payment and the supplier could arguable bring a successful claim against ID Tours.

20. The High Court noted that while ID Tours may have believed that it acted on behalf of the overseas operators that was not necessarily the true legal position. It was noted that invoices from local suppliers or other evidence from the overseas operators could have potentially assisted in showing on whose behalf ID Tours contracts with local suppliers and against whom the supplier is likely to enforce its contractual rights if it is not paid for whatever reason. On the available evidence the conclusion was that ID Tours was not the agent of the overseas operators.

Whether the services were a facilitation of domestic tourism products and services

21. As noted in paragraph 14, under s. 8(2F) services that consist of the facilitation of inbound tour operations must contain three elements:

    (a) They must be provided by a registered person;

    (b) The services must be provided in packaging one or more domestic tourism products and services (which may include, but are not limited to, accommodation, meals, transport, and other activities) in New Zealand; and

    (c) The registered person must sell them outside New Zealand to a non-resident person.

22. The High Court considered the meaning of "packaging" as defined in the New Shorter Oxford English Dictionary, 4th Edition, as follows:

    (a) A package is a set of interdependent or related abstract entities; a group of related objects viewed as a unit; and

    (b) Packaging is the action, process or manner of making something up into a package.

23. The High Court found that ID Tours offered a package consisting of:

    (a) The provision of advice related to why New Zealand should be selected as a destination and what activities are available to the particular persons who are coming; and

    (b) "On the ground" services involving:

        (i) Purchasing domestic products and services by negotiating deals with local suppliers and making bookings and transport arrangements as required; and

        (ii) Paying for the domestic products and services by facilitating payment for all the products and services it purchased.

24. The High Court agreed with the TRA in finding that the advisory services were simply a marketing activity and, therefore, part of the package. They were provided purely for the purpose of obtaining the ability to purchase domestic tourism products and services. The package could only be sold when the overseas operator bought the advice of ID Tours. Therefore, advisory services and the "on the ground" services were "a group of related objects viewed as a unit".

25. The High Court concluded that ID Tours is an inbound tour operator for the purposes of s. 8(2B) of the GST Act and its advisory services were chargeable with GST.

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