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## WEEKLY COMMENT: FRIDAY 15 APRIL 2016

1. This week and next week I review the GST on online services amendments proposed in the version of the *Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill* as reported from the Finance and Expenditure Committee on 21 March 2016 (“the RLWT Bill as Reported”).
2. This week I look at the application date, the general rules imposing GST on the supply of remote services, the registration requirement and taxable periods, the rules to determine whether a supply of remote services is made in New Zealand, the exclusion for telecommunications services, remote services consisting of gambling or a prize competition, and remote services consisting of general insurance.
3. Next week I will look at zero rating and the reverse charge rule, tax invoice rules, rules for supplies made through marketplaces and the currency conversion rules.
4. All section references are to the *Goods and Services Tax Act 1985* unless otherwise stated.

### Application date

5. The new GST rules applying to remote services discussed in this week’s and next week’s *Weekly Comment* come into force on 1 October 2016, under cl. 2(6) of the RLWT Bill as Reported.
6. However, a concession in new s. 85B in cl. 68B of the RLWT Bill as Reported, applies to a contract for the supply of remote services:
  - (a) That is made for a fixed term that starts before 1 October 2016; and
  - (b) That involves periodic payments treated as successive supplies under s. 9(3)(a); and
  - (c) For which the consideration is set or reviewed for periods of 1 year and 1 month (i.e. 396 days) or less during the term of the contract.
7. Where the above conditions are met, the supplier may elect, in a return for the relevant taxable period, to ignore the successive supplies made from 1 October 2016 until the earlier of the date the contract ends and the date that is 1 year and 1 month (i.e. 396 days) after the date the contract was entered into. Officials have noted in the *Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill* (“the Officials’ Report”) that after that time (for example, contracts that are for a period of more than a year), s. 9(3) would apply and treat periodic payments as being successive supplies when the payments become due or are received, whichever is earlier.

## **Imposition of GST on the supply of remote services**

8. New s. 8(3)(c), contained in cl. 49 of the RLWT Bill as Reported, provides that goods and services are treated as being supplied in New Zealand if the supplier is a non-resident and the services are remote services supplied to a person resident in New Zealand, other than services that are physically performed in New Zealand by a person who is in New Zealand at the time the services are performed.
9. Section 8(4) states that a supply by a non-resident to a registered person for the purposes of carrying on the registered person's taxable activity will be treated as being supplied outside New Zealand unless the supplier and the recipient agree otherwise. Section 8(4) will not apply to goods and services treated as being supplied in New Zealand under s. 8(3)(c).
10. Instead, a new carve-out rule in s. 8(4D) will apply, which provides that if a non-resident supplier supplies remote services to which s. 8(3)(c) would apply to a registered person for the purposes of carrying on the registered person's taxable activity, the services are treated as being supplied outside New Zealand unless the supplier chooses to treat the supply as made in New Zealand. The agreement of the recipient is not required.
11. The reverse charge rule in s. 8(4B), which applies to imported services, will apply to imported remote services.
12. It is noted in the *Commentary on the Bill* ("the Commentary") that services that are already exempt (such as supplies of financial services) or zero-rated under a specific rule would retain that character under the new rules applying to a supply of remote services.
13. Under a new definition contained in cl. 47 to be inserted into s. 2, "remote services" means a service that, at the time of the performance of the service, has no necessary connection between:
  - (a) The place where the service is physically performed; and
  - (b) The location of the recipient of the services.
14. It is stated in the Commentary that whether a service is a "remote service" will depend on whether the nature of the service requires that the recipient is present when the service is physically performed. If a service is either actually or is capable of being supplied when the recipient is not present, the test will be satisfied, as there is no necessary connection between the physical location of the recipient and the place of physical performance. Examples provided are:
  - (a) Supplies of digital content such as e-books, movies, TV shows, music and online newspaper subscriptions;
  - (b) Online supplies of games, apps, software and software maintenance;
  - (c) Webinars or distance learning courses;
  - (d) Insurance services;
  - (e) Gambling services;
  - (f) Website design or publishing services; and
  - (g) Legal, accounting or consultancy services.

15. In response to a submission, officials accepted that there may be situations when a voucher is supplied or benefits under a loyalty scheme are redeemed for an “on-the-spot” service that will be physically performed outside New Zealand. However, they are of the view that amending the rules to address this issue may result in a misalignment with rules that apply in other countries resulting in double taxation and double non-taxation.
16. Officials have noted in the Officials’ Report that offshore suppliers will be subject to the same penalty and interest regime as domestic suppliers if they fail to meet their tax obligations. However, they have recognised that the obligations imposed on offshore suppliers under these proposals may be unfamiliar to some suppliers and will require systems changes to be implemented, which may result in mistakes being made or registration being delayed. These situations will be considered on a case-by-case basis and penalties and interest may be remitted under the Commissioner of Inland Revenue’s existing discretion, under sections 183A and 183D of the *Tax Administration Act 1994*, when it is appropriate.

### **Registration requirement and initial and subsequent taxable periods**

17. The non-resident supplier is required to register for GST in New Zealand and file GST returns if the supplier is liable to be registered under s. 51(1).
18. New s. 51(1C), in cl. 60B of the RLWT Bill as Reported, provides that if the person is a non-resident supplier of remote services to which s. 8(3)(c) applies, then in determining whether the person is liable to be registered (i.e. will exceed the registration threshold of \$60,000), the person may use a fair and reasonable method of converting foreign currency amounts into New Zealand currency amounts (see also paragraph 39 onwards in next week’s *Weekly Comment*). Officials have noted in the Officials’ Report that this would include converting amounts to New Zealand currency as at the time of supply, using the exchange rate at the time of testing the threshold, or using an average exchange rate over the period. Any of these methods would be regarded as fair and reasonable as long as they were used on a consistent basis.
19. Officials have noted in the Officials’ Report that in practice, as of 1 October 2016, the date the rules would apply from, the threshold will be forward-looking only for offshore suppliers of remote services and therefore an offshore supplier’s requirement to register will be based on its expected supplies over the following 12 months. This achieves a sensible outcome in practice because offshore suppliers cannot be expected to keep track of supplies to New Zealand residents before the introduction of these rules.
20. It is noted in the Commentary that the existing rules that allow non-resident businesses to register for GST, which are contained in section 54B of the GST Act, will continue to apply. These rules allow a non-resident business that has been charged GST on goods or services received in New Zealand, but that does not carry on a taxable activity in New Zealand, to register and claim back the GST paid, provided certain conditions are met.
21. The initial taxable period that applies from 1 October 2016 to supplies of remote services is a 6-month period, under cl. 54(1) of the RLWT Bill as Reported.
22. From 1 April 2017, under new s. 15(6) in cl. 54(2) of the RLWT Bill, the taxable period for a non-resident supplier whose only supplies are remote services becomes a 3-month period, based on a first quarter ending on 31 March.

23. Officials noted in the Officials' Report that quarterly filing is in keeping with offshore suppliers' filing obligations in other jurisdictions. Officials will monitor whether there is greater demand for alternative taxable periods and may recommend changes in the future if required.
24. Officials have stated that offshore suppliers will be subject to the ordinary rules for forming a GST group with no limitations to the existing provisions being proposed for offshore suppliers registering under the new rules.

**Rules to determine whether a supply is made in New Zealand under s. 8(3)(c)**

25. New s. 8B(2), inserted by cl. 50 of the RLWT Bill as Reported, provides that a supplier must treat the recipient of the supply as a person resident in New Zealand, for the purposes of sections 8(3)(c), 10(14B), 11A(1)(j) and 60C, if 2 of the following items are non-contradictory and support the conclusion that the person is resident in New Zealand:
- (a) The person's billing address;
  - (b) The internet protocol address of the device used by the person or another geolocation method;
  - (c) The person's bank details, including the account the person uses for payment or the billing address held by the bank;
  - (d) The mobile country code of the international mobile subscriber identity stored on the subscriber identity module card used by the person;
  - (e) The location of the person's fixed land line through which the service is supplied to them;
  - (f) Other commercially relevant information.
26. It is noted in the Officials' Report that the use of "other commercially relevant information" does not mean that only one item of evidence can be used to satisfy the test. A supplier must use two separate pieces of commercially relevant information or other evidence listed in s. 8B(2) to meet the requirement of having two non-conflicting pieces of evidence. Examples of "other commercially relevant information" provided in the Officials' Report are:
- (a) The customer's previous trading history, such as the historic IP address or billing address of the customer;
  - (b) The customer's selection of their country of residence, for example from a "drop-down" menu on a website;
  - (c) The customer's purchase of a product that is localised or locked to a particular region.
27. New s. 8B(3) allows the Commissioner to prescribe the use of another method to determine a recipient's residence, or to agree with the supplier on the use of another method, if a supplier is unable to establish a recipient's residence by 2 non-contradictory items from the list in s. 8B(2). In prescribing or agreeing to the use of an alternative method, the Commissioner may take into account the following:
- (a) The nature of the supply, including, for example:
    - (i) Whether the supply is made in a low-value high-volume digital context;

(ii) Whether the supply is a single instance or a supply made as part of a continuing relationship between the recipient and the supplier;

(b) The availability to the supplier of information about the recipient's residence.

28. New s. 8B(3) also provides a tiebreaker rule where residence in more than 1 country is supported by at least 2 non-contradictory items (for each country), in which case, the supplier must choose the evidence that is more reliable to determine a recipient's residence. It is noted in the Commentary that which items are more reliable will depend on the circumstances. For example, where the supplier applies the same price regardless of the country of the customer, the recipient's billing address could be a more reliable indicator than would otherwise be the case.

29. New s. 8B(5) provides that after a non-resident supplier has established the New Zealand residence of a recipient, the supplier must treat the recipient as not being a registered person such that the carve-out rule in s. 8(4D) will not apply, unless the recipient:

(a) Notifies the supplier that they are a registered person; or

(b) Provides their registration number or New Zealand business number.

30. New s. 8B(6) allows the Commissioner to prescribe the use of another method to determine whether the supply is made to a registered person, or agree with the supplier on the use of another method to determine whether the supply is made to a registered person. In prescribing or agreeing to the use of an alternative method the Commissioner may take into account:

(a) The nature of the supply, including, for example, whether the supply is of services that are purchased only by a registered person in the course or furtherance of their taxable activity, such as for example, as noted in the Officials' Report, certain advertising services are generally only purchased by registered businesses;

(b) The value of the supply, including, for example, whether the supply is of a value that would be expected to be received only by a registered person in the course or furtherance of their taxable activity, such as, for example, as noted in the Officials' Report, the provision of a high value software package that would only be associated with business use;

(c) The terms and conditions related to the provision of the services, including, for example, whether the supply is of services that may be licensed for use by a registered person, such as, for example, as noted in the Officials' Report, software that is licensed for enterprise use across a large number of networked computers.

31. New s. 143A(1)(g) of the TAA provides that a recipient of a supply of remote services from a non-resident supplier commits an offence if they knowingly provide altered, false, or misleading information relating to their residence in New Zealand or their status as a registered person for the purposes of avoiding the payment of goods and services tax. The penalty under s. 143A(7) of the TAA is a fine upon conviction, of \$25,000 for the first time, and \$50,000 on any subsequent occasion.

### **Exclusion for remote services consisting of telecommunications services**

32. It is noted in the Commentary that the new rules that apply to a supply of remote services are not intended to disturb the current tax settings for telecommunications services. Section 8(5)

of the GST Act is being amended so that it applies to s. 8(4D) so as to exclude telecommunications services from the application of the relevant provisions.

33. This means that telecommunications services, such as telephone calls or access to the internet via an internet service provider, will not be subject to the new rules that apply to a supply of remote services.

**Remote services consisting of gambling or a prize competition**

34. New s. 5(10B) in cl. 48 of the RLWT Bill as Reported provides that when a person who is resident in New Zealand pays money to participate in gambling or in a prize competition through a supply of remote services that are physically performed outside New Zealand, the payment is treated as a payment for a supply of services by the person who conducts the gambling or prize competition.

35. New s. 10(14B) provides that the consideration for the supply is calculated using the formula:

$$\text{Consideration} = [\text{Amounts received from residents}] - [\text{prizes paid to residents}].$$

36. The terms in the formula are defined in new s. 10(14C) as follows:

- (a) "Amounts received from residents" is the total amount in money received in relation to the supply by the non-resident person who conducts the gambling or the prize competition, from all persons resident in New Zealand;
- (b) "Prizes paid to residents" is the total amount of all prizes paid and payable in money to persons resident in New Zealand in relation to the supply.

37. New sections 10(14D), (14E) and (14F) allow a net negative consideration in a taxable period to be carried forward and deducted in future taxable periods until the negative consideration is extinguished.

**Remote services consisting of supplies of general insurance services**

38. It is noted in the Commentary that the new rules will:

- (a) Apply GST to general insurance services supplied by offshore insurers to New Zealand-resident consumers - a non-resident provider of insurance will be required to return GST on premiums charged to New Zealand-resident consumers (if its supplies to New Zealand residents exceed the registration threshold); and
- (b) Allow a non-resident insurer, if registered to be able to claim a deduction when making an insurance payment under a contract with a New Zealand-resident consumer (through existing s. 20(3)(d)), or on New Zealand GST costs incurred in paying for replacement goods or repair services.
- (c) Exclude insurance services supplied by offshore insurers to New Zealand GST-registered businesses from GST, unless the insurer and the recipient agree that these supplies will be zero-rated and:
  - (i) Regardless of whether or not the supplies are zero-rated, exclude entitlement to a deduction for the tax fraction of any payment made under the contract of insurance under new s. 20(3)(d)(vii); and

(ii) Relieve a GST-registered recipient of an insurance payment to return output tax on the payment under new s. 5(13)(d); and

(iii) The supplier may not choose to provide a tax invoice under new s. 24(5B) for the supply of a contract of insurance (see paragraph 16 in next week's *Weekly Comment* ).

39. Officials have stated in the Officials' Report that the proposed addition to section 20(3)(d) does not prohibit deductions for payments made to third party suppliers (for example, for a replacement good). Instead, the normal deduction provisions under s. 20 apply.

40. There is also provision for insurance services arranged through a market place and New Zealand coverholders acting on behalf of the marketplace – discussed in paragraphs 27 to 32 in next week's *Weekly Comment*.



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