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WEEKLY COMMENT: FRIDAY 12 APRIL 2024

1. The *Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023* ("the Platform Economy Amendment Act 2023"), with a date of assent of 31 March 2023, contains a number of amendments to the Goods and Services Tax Act 1985 ("the GST Act"). Over the next two weeks, I am going to look at a couple of remedial amendments, the new election for an activity not to be a taxable activity, and amendments to the GST apportionment rules. In later weeks, I will be looking at the new listed services rules that apply from 1 April 2024 onwards.

Associating members of a joint venture with the joint venture

2. Section 122 of the Platform Economy Amendment Act 2023 inserted a new paragraph (db) into s 2A(1) of the GST Act stating that "a joint venture and a member of the joint venture" are associated persons, effective from 30 August 2022 (when the original Bill was first introduced).

3. Inland Revenue stated in *Tax Information Bulletin* Vol. 35, No. 6, July 2023 ("the Platform Economy Act TIB") on page 142, that:

   "When a joint venture is used to carry on a taxable activity it will register for GST and become a registered person that is separate from its members under section 57 of the Goods and Services Tax Act 1985 (GST Act). To reflect their aligned economic interests, the amendment associates joint ventures and their members for GST purposes. This treatment is consistent with the rules that apply for other unincorporated bodies, such as partnerships and trusts."

4. The Commentary to the Bill introducing the Act stated that the amendment is consistent with the rules that apply for other incorporated bodies, such as partnerships and trusts and would have the following effects on transactions between a joint venture and a member of the joint venture:

   (a) A supply of goods and services between associated persons is subject to GST at open market value;

   (b) The value of a secondhand goods input tax deduction on a supply of goods acquired from an unregistered associated person is appropriately limited under s 3A(3) of the GST Act; and

   (c) The time of supply for goods and services supplied between associated persons is deemed to take place when the services are performed or when the goods are either removed or made available to the associated person.

5. A joint venture that is a company will be associated with a person other than a company who has a voting interest of 25% or more, under the existing rule in s 2A(1)(b).

Secondhand goods input tax for associated person supplies

6. Inland Revenue notes in the Platform Economy Act TIB on page 154 that:

   "An amendment has been made to ensure the rules that allow input tax deductions for supplies of secondhand goods to associated persons work as intended. The amendment ensures that an associated GST-registered taxpayer that repurchases an asset from an unregistered associated party is entitled to claim the appropriate secondhand goods input tax deduction for that supply."

7. If the supplier and recipient are associated persons, amendments in the *Taxation (Annual Rates for 2021–22, GST and Remedial Matters) Act 2022* allowed a secondhand goods input tax credit by reference to the last known supply from a non-associated person.

8. For a supply of secondhand goods made in a taxable period starting on or after 30 March 2022, the amendments to s 3A allowed an input tax credit for secondhand goods acquired from an associated person as follows:

   (a) If the associated supplier acquired the goods from a non-associated person, the tax fraction of that earlier purchase price from the non-associated person;

   (b) If the associated supplier acquired the goods from an associated person, the tax fraction of the purchase price for the most recent acquisition of the goods from a non-associated person.

9. A chain of associated person supply transactions is looked through to determine the first non- associated supply introduced to that chain.

10. The problem with this (earlier) amendment was that where a GST-registered vendor sold an asset to an unregistered associated person and later bought it back from that associated person, a secondhand goods input tax deduction could not be claimed, whereas, before the 30 March 2022 amendment, the GST-registered vendor repurchasing the asset would have been entitled to input tax equal to the tax charged on the previous sale to the unregistered associated person.

11. The newly amended s 3A(3)(a) now provides that, in associated persons' transactions, if GST has been charged by a GST-registered supplier on a supply to an unregistered associated person, and the unregistered associated person subsequently supplies the same goods (that is, land) to a registered associated person, then the amount of the secondhand goods input tax deduction that can be claimed is limited to the amount that was last accounted for as output tax on the supply by the registered person to the unregistered person.

12. If GST has not been charged on a supply between two associated persons, then the secondhand goods input tax deduction for a GST-registered recipient will be limited to the tax fraction of the purchase price when the goods were last acquired from a non-associated person (per the original amendment).

13. The latest amendment applies from the application date for the previous amendment, being to a supply of secondhand goods made:

(a) In a taxable period starting on or after 30 March 2022; or

(b) Under an agreement entered into after 8 September 2021 and paid for on or after the start of the first taxable period starting on or after 30 March 2022.

Election that an activity is not a taxable activity and separate supply of goods involved

14. Section 125 of the Platform Economy Amendment Act 2023 inserted a new paragraph (e) into s 6(3) of the GST Act, extending the exclusions from "taxable activity" to an activity involving the supply of goods by way of sale that a registered person has elected is not a taxable activity, provided that the four requirements discussed below are met.

15. This addition to the specified list of exclusions from "taxable activity" in s 6(3) applies retrospectively to supplies made on or after 1 April 2011, but not to supplies for which an assessment has been made prior to 30 August 2022.

16. The election is made by simply not charging GST at the time of sale, and by not accounting for the supply as a taxable supply in the relevant GST return. It is not necessary to disclose the election or notify the Commissioner that the election has been made.

17. Inland Revenue notes in the Platform Economy Act TIB that the rule is limited to goods (and not services) as it is intended to be used for tangible assets, such as land, dwellings or vehicles, which are likely to have minimal use in making taxable supplies, rather than intangibles, such as brands or intellectual property, which are likely to have a mainly taxable use when acquired by registered persons.

18. A transitional rule in s 91 of the GST Act applies for certain goods acquired before 1 April 2023 for which an output tax adjustment is made before 1 April 2025 for taxable use previously claimed (refer to paragraph 28 onwards below). There is a requirement to notify the Commissioner if this transitional rule is to be applied.

19. Inland Revenue notes that to qualify for this election, the goods must satisfy the following requirements outlined in s 6(3)(e).

20. The first requirement is that the person has not previously claimed a deduction under s 20(3) for the supply of goods before the goods are sold, meaning that:

    (a) No input tax deductions should have been claimed on acquisition, or subsequently under the GST apportionment rules;

    (b) No input tax deductions should have been claimed for other goods and services that became an integral part of the goods sold:

        (i) Integral part means the goods would be considered incomplete or unable to function without the item;

        (ii) Inputs that made a substantial capital improvement would be regarded as an integral part of goods sold;

        (iii) Overheads, repairs and maintenance or operating costs would not be regarded as an integral part of goods that are sold.

21. The second requirement is that the goods have not been acquired for the principal purpose of making taxable supplies. Inland Revenue has noted that:

    (a) Principal purpose is intended to have the same meaning as when "principal purpose" was previously used in the pre-2011 GST Act definition of "input tax";

    (b) Previous public guidance on the meaning of "principal purpose" has defined this as being the main, primary or fundamental purpose and that it does not necessarily equate with a more than 50 percent test.

22. The third requirement is that the goods have not been used for the principal purpose of making taxable supplies. Inland Revenue has stated this means the primary use of the goods, from the time the person acquired them until their disposal, must be a non- taxable use, that is, a private or exempt use – for example, a dwelling that is essentially an owner-occupied home.

23. The fourth requirement is that the goods were not acquired as zero-rated supplies under s 11(1)(m) or (mb). However, for taxable periods starting on or after 1 April 2023, this requirement is relaxed, by allowing a person to choose to return the nominal GST component as output tax under s 20(3J)(a)(iv), in which case the supply of such goods can be treated as not being a taxable activity. Inland Revenue notes that:

    (a) In most cases, a GST-registered purchaser will acquire goods zero-rated under s 11(1)(m) or 11 (1)(mb) to make taxable supplies, however, in some cases, the purchaser's taxable use of the goods, while sufficient for the supply of the goods to qualify as a zero-rated supply under s 11(1)(m) or (mb), may be minor and secondary to their non-taxable (exempt or private) use of the goods;

    (b) To accommodate these cases, the registered person can return an amount of output tax under s 20(3J)(a)(iv) equal to the full nominal GST amount as calculated by s 20(3J)(a)(i);

    (c) Although the person acquired the goods as a zero-rated supply, making the output tax adjustment puts them in the same position as a person who acquired standard-rated or secondhand goods and did not claim an input tax deduction on acquisition;

    (d) However, Example 56 provided by Inland Revenue (on page 69 of the Platform Economy TIB Item) makes it clear that if the output tax adjustment is for less than 100% of the nominal GST amount, the requirements of s 6(3)(e) would not be satisfied and GST must be charged on the disposal of the asset.

24. As noted in paragraph 15 above, s 6(3)(e) applies from 1 April 2011 which, Inland Revenue states, ratifies a past tax position taken by a person who has previously adopted the position permitted under s 6(3)(e) for example, by having treated their dwelling as not being part of their taxable activity even though it may have been partly used to make taxable supplies.

25. However, if a person has returned output tax and an assessment has been made before 30 August 2022, the supply will remain a taxable supply.

26. For goods sold between 30 August 2022 and 1 April 2023, where the sale has been treated as a taxable supply and a corresponding input tax adjustment on disposal has been made under section 21F, the tax position can be amended to apply s 6(3)(e). The deduction under

s 21F is not an input tax deduction before sale, so the conditions of s 6(3)(e) will not be breached.

27. As noted in paragraph 23 above, for taxable periods starting on or after 1 April 2023, a purchaser can make an output tax adjustment for the full nominal GST component of goods acquired as zero-rated supplies, thereby allowing s 6(3)(e) to apply.

28. The transitional rule in s 91 of the GST Act applies when:

    (a) An input tax deduction has been claimed or the goods have been acquired as zero-rated supplies; and

    (b) The goods were acquired before 1 April 2023; and

    (c) The goods were not acquired for the principal purpose of making taxable supplies; and

    (d) The goods were not used for the principal purpose of making taxable supplies.

29. A person can elect that a future disposal of the goods is not a taxable supply by:

    (a) Notifying the Commissioner before 1 April 2025 of the election, the election date, and other information required by the Commissioner; and

    (b) Returning as output tax the net input tax previously claimed, or the nominal GST component of a zero-rated purchase; and

    (c) Not claiming any further input tax deductions before disposing of the goods.

30. A consequential amendment to s 21(2) means that a registered person does not need to monitor their actual taxable use and make adjustments at the end of their adjustment period for any goods for which they apply the rules in s 6(3)(e) or s 91. Inland Revenue notes that this reflects the fact that to apply these new rules the person treats the goods as though they had no taxable use of the goods. No adjustments are necessary when a person has no taxable use of their goods.

31. New sections 5(15)(c) and 5(15)(d) provide for the treatment as separate supplies, respectively, of:

    (a) Goods to which the election under s 6(3)(e) applies; and

    (b) Goods to which the transitional rule in s 91 applies.

32. This means that when such goods are sold in a transaction that includes other goods, it will be necessary to separate out goods to which s 6(3)(e) and/or s 91 apply and treat them as separate supplies for GST purposes.

33. Inland Revenue notes that the goods will usually be a dwelling: the person's principal place of residence, a second house that is not any person's main home, a holiday house or a dwelling used to provide temporary worker accommodation.

34. Section 5(15)(c), relating to s 6(3)(e), has the same retrospective effective date as s 6(3)(e) itself. It has effect for supplies made on or after 1 April 2011 other than supplies for which an assessment has been made before 30 August 2022.

35. Section 5(15)(d), relating to s 91, has the same effective date as section 91, that is, 1 April 2023.

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