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WEEKLY COMMENT: FRIDAY 14 JUNE 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, introduced the GST marketplace rules on supplies of listed services. This week I continue reviewing these rules by looking at the circumstances in which it is possible to opt-out of the marketplace rules, and how the rules operate when listed services are treated as two separate supplies.

Opting out of the marketplace rules

2. The marketplace rules will not apply if the electronic marketplace operator and the underlying supplier enter into an “opt-out” agreement, providing that the requirements to do so are met:
 - (a) Section 60C(2BF) states that if the underlying supplier of the listed services is not a natural person, and has an annual turnover of more than \$500,000 (i.e. is required to maintain a 2-month or 1-month taxable period for GST), the underlying supplier can choose to be liable for the payment of its own GST on the supply, and remain liable for its GST obligations, providing that the marketplace operator has been notified of the election; Inland Revenue notes that:
 - (i) Only non-natural persons are included because it is expected that only non-natural persons would make more than \$500,000 of supplies in a 12-month period;
 - (ii) Marketplace operators will not be required to verify that an underlying supplier meets this criterion - they will be able to rely on information they receive, by election, from the underlying supplier;
 - (b) Section 60C(2BB)(a)(i) states that an underlying supplier that meets the criteria to enter into an opt-out agreement, set out in a determination by the Commissioner under s 60C(2BC) (which will be based on factors set out in s 60C(2BD) including compliance costs of changing accounting systems and practices, and the size, scale and nature of services and activities undertaken by underlying suppliers), will be treated as having made the supply directly to the recipient (no determination has currently been issued) providing that:
 - (i) The documentation provided to the recipient identifies the supply as made by the underlying supplier and not the electronic marketplace; and
 - (ii) The underlying supplier and the operator of the electronic marketplace have agreed, recording their agreement in a document, that the underlying supplier is

liable for the payment of tax in relation to the supplies of listed services and will continue to remain responsible for their tax obligations under the GST Act;

(c) Section 60C(2BB)(a)(ii) allows an underlying supplier to enter into an opt-out agreement with an operator of an electronic marketplace if they have, or are part of a group of companies that has, or has a reasonable expectation of having, 2,000 nights' accommodation listed as available on 1 electronic marketplace in a 12-month period (Inland Revenue notes that it is not possible to aggregate accommodation nights across multiple electronic marketplaces), and:

(i) The documentation provided to the recipient identifies the supply as made by the underlying supplier and not the electronic marketplace; and

(ii) The underlying supplier and the operator of the electronic marketplace have agreed, recording their agreement in a document, that the underlying supplier is liable for the payment of tax in relation to the supplies of listed services and will continue to remain responsible for their tax obligations under the GST Act (Inland Revenue notes that marketplace operators are not required to monitor whether underlying suppliers list more than 2,000 nights of accommodation in a 12-month period).

3. Under s 85D, underlying suppliers were able to opt-out of the marketplace rules before they came into effect on 1 April 2024. The Commissioner also had the power, from 31 March 2023, to issue determinations setting out criteria a person must meet if they wished to opt-out of the marketplace rules but did not meet the statutory criteria.

Two separate supplies or three separate supplies

4. Section 60(1C) and s 60(1D) of the GST Act provide as follows:

(a) Section 60(1C) states that for the purposes of s 60C and s 60D, an operator of a marketplace or a supplier who makes supplies of goods or services to recipients through the marketplace may treat a supply as 2 separate supplies, being:

(i) A supply of goods and services from the underlying supplier to the operator of the marketplace, and s 11A(1)(j) provides that this supply is zero-rated; and

(ii) A supply of those goods and services from the operator of the marketplace to the recipient, treating the operator as if they were the underlying supplier of the goods and services;

(b) Section 60(1D) states that for the purposes of s 60C and s 60CB, when a listing intermediary is interposed between an operator of an electronic marketplace and an underlying supplier, the operator, supplier, and listing intermediary must treat the supply as 3 separate supplies, being:

(i) A supply from the underlying supplier to the listing intermediary, and s 11A(1)(jd) provides that this supply is zero-rated;

(ii) A supply from the listing intermediary to the operator, and s 11A(1)(jd) provides that this supply is also zero-rated; and

(iii) A supply from the operator to the recipient of the supply.

5. A “listing intermediary” is defined in s 60CB(8) as a registered person who:
- (a) Lists a supply of accommodation services in New Zealand (other than the exempt supply of accommodation in a dwelling) on an electronic marketplace on behalf of the underlying supplier who makes those supplies through the electronic marketplace; and
 - (b) Enters into an agreement with an operator of an electronic marketplace to list or advertise the listed services provided by the underlying supplier.

GST treatment when a supply of listed services is treated as 2 separate supplies

6. When there is no interposed listing intermediary, s 8C(3) states that a supply of listed services is treated as 2 separate supplies as described in s 60(1C) and for that purpose:
- (a) When the underlying supplier is a registered person, the supply of the services to the electronic marketplace is zero-rated under s 11A(1)(jc) (which zero-rates a supply from an underlying supplier to an operator of a marketplace, to which s 60(1C)(a) applies) and:
 - (i) No taxable supply information is required in relation to the supply; and
 - (ii) The operator of the electronic marketplace must account for tax on the supply that they are treated as making to the recipient; and
 - (b) When the underlying supplier is not a registered person, the supply of the services to the electronic marketplace is not subject to GST, and the operator of the electronic marketplace must:
 - (i) Account for output tax on the supply that they are treated as making to the recipient; and
 - (ii) Deduct an amount of input tax in relation to the supply under s 20(3)(de) (which authorises an operator of an electronic marketplace to deduct input tax equal to the flat-rate credit to be passed on to the underlying supplier) and pass on to the underlying supplier an amount equal to the input tax as a flat-rate credit; and
 - (iii) Calculate the input tax deduction equal to the flat-rate credit, under s 20(3N) as equal to 8.5% of the value of the supply of the listed services (and any price reduction by the marketplace operator under s 10(7D) is ignored for the purposes of this calculation);
 - (c) When the underlying supplier is a registered person who has not notified the operator of the electronic marketplace their status as a registered person, and the operator has deducted an amount of input tax in relation to the supply under s 20(3)(de) for a taxable period, the underlying supplier:
 - (i) Is required to account for output tax under s 20(3JD) and s 20(4E) for the flat-rate credit, by making an output tax adjustment in the taxable period in which the flat rate credit is received by them; and
 - (ii) Has a tax shortfall equal to the amount of the flat-rate credit received by them.
7. Inland Revenue comments in *Tax Information Bulletin* Vol. 35, No. 6, July 2023 (“the Platform Economy TIB Item”) that the flat-rate credit, currently prescribed in s 20(3N) at

8.5%, is meant to represent the average amount of GST that underlying unregistered suppliers, if they were registered, would be able to recover as input tax on goods and services they purchase and use to make supplies of listed services. The percentage was determined with reference to the average amount of input tax deducted by GST-registered taxi drivers and holiday homeowners.

8. In setting the rate, persons with greater expenses and purchases than sales were not considered, because it was assumed that in such circumstances, the underlying supplier would voluntarily register for GST. However, if such suppliers chose to register and deduct input tax for actual expenditure, they would need to consider the wider implications, including accounting for GST output tax when assets used to make taxable supplies are disposed of.
9. Section 20(3N) provides that for the purposes of calculation of the amount, the special valuation rule in s 10(7D) is ignored. In respect of listed services, this special valuation rule provides that where an operator of a marketplace makes a supply of listed services to a recipient who accepts an offer by the operator of a reduction in the price of the supply to the recipient, the supply is made for the reduced price – i.e. the reduced price is ignored for the purposes of calculating the flat-rate credit.
10. The flat-rate credit must be passed on to the underlying supplier. Inland Revenue notes that there is no explicit timing requirement, so as to allow the flat-rate credit to be passed on together with other funds due to the underlying supplier for the supply of the listed service.
11. Inland Revenue notes that the flat-rate credit is not available to:
 - (a) GST-registered underlying suppliers, who can deduct input tax on actual expenditure; and
 - (b) A person in their capacity as an employee, because an employee of a marketplace operator who performs listed services as part of their underlying duties is not an “underlying supplier”.
12. To allow marketplace operators to apply the flat-rate credit scheme, they need to know whether the underlying supplier is GST-registered. Section 60H(1) and (2) require underlying suppliers (or a person who has authority to act on behalf of an underlying supplier) to notify marketplace operators of their name, IRD number, and GST registration status, and also any changes in GST registration status as soon as practicable. Section 60H(4) allows marketplace operators to rely on that information and if a flat-rate credit is incorrectly claimed, the resulting lower output tax is treated as if it is the correct output tax for the period.
13. Section 20(3)(de) provides that, for a supply of listed services, where the underlying supplier has not notified the operator of the electronic marketplace that they are a registered person at the time of the supply, the flat-rate credit must be taken as an input tax deduction by the marketplace operator, and the flat-rate credit must be passed on to the underlying suppliers.
14. Example 15 in the Platform Economy TIB Item concerns the supply of accommodation at \$200 plus GST, where the underlying supplier is not GST-registered. The marketplace operator must charge the recipient GST of \$30 at 15%, and claim input tax of \$17 at 8.5%,

pay net GST to Inland Revenue of \$13, and pass on the flat-rate credit of \$17 to the underlying supplier.

15. Section 8C(6) provides that marketplace operators must notify, at least monthly, underlying suppliers of the total amount of the flat-rate credit that has been passed on. The statement should show the full flat-rate credit, which should not be reduced or offset by other fees or charges. Inland Revenue states that this is to ensure that GST-registered underlying suppliers who receive flat-rate credits they are not entitled to will know to include the flat-rate credit as GST output tax in their GST return in the taxable period in which they receive the flat-rate credit, as required by s 20(3D) and s 20(4E).
16. A GST-registered person who receives the flat-rate credit will also have a tax shortfall equal to the amount of the flat-rate credit they received, under s 8C(3)(c)(ii) (see paragraph 6(c)(ii) above), which means the person could be liable for shortfall penalties. Having a tax shortfall does not mean that penalties will be imposed automatically. Inland Revenue states that the Commissioner may consider making an assessment of shortfall penalties in cases where a person continuously misrepresents their GST registration status to claim amounts of the flat-rate credit that they are not entitled to.
17. Section 8C(5) provides that if the Commissioner notifies the operator of the electronic marketplace as to the registration status of an underlying supplier to enable the correct tax treatment for both the operator and the underlying supplier, the operator must act on the notification as soon as practicable. The Commissioner can disclose this information under clause 3B, Part A of Schedule 7 of the Tax Administration Act 1994. Inland Revenue intends to explore creating a GST verification service for these purposes.



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