



5 March 2010

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### **Exposure Draft INS0102**

The Society appreciates the opportunity to comment on the above draft interpretation statement *GST: Time of Supply – Payments of Deposits, Including to a Stakeholder* (the draft statement).

#### **Legal analysis**

The Society is in general agreement with the legal analysis contained in the draft statement, which extends the Commissioner's previous policy and clarifies the general application of the time of supply rules. The Society appreciates the Commissioner confirming that a supplier of goods or services can be a stakeholder in certain circumstances.

The Commissioner's further analysis of what it means for a contract to be conditional is helpful. However, the analysis is confined to deposits paid under conditional agreements where the conditions are not sufficient to prevent a contract coming into existence. This analysis suggests that the Commissioner considers no supply exists where the contract remains subject to conditions that may prevent the parties being bound. Therefore a deposit (including a non-refundable deposit) paid under such an agreement could not trigger the time of supply.

It would be helpful if the Commissioner expressly stated his position on this point. Past policy statements suggest the time of supply on a conditional agreement, being one containing conditions which may prevent the parties being bound, could be triggered by payment of a non-refundable deposit. We are aware of inconsistent practices in IRD where deposits have been paid on conditional agreements.

It would be useful if a view on some of the more common conditions was expressed, particularly those used in real estate agreements, and comment on which is considered to give rise to conditional agreements, as defined in the draft statement, (and could trigger a time of supply) and which do not.

The definition of conditional agreement in the draft statement may not coincide with the meaning of the term as it is used in property law and real estate practice. Often an agreement becomes unconditional when primary conditions that would prevent the parties being bound have been fulfilled, but there may well be conditions relating to performance still outstanding. The draft statement seems to suggest this type of agreement would be conditional as defined for the purposes of the draft statement, which could cause confusion.

## Form and Content

The Society makes the following suggestions:

### *Statement Wording*

- “No formal contract” is preferable to “no contract” when describing situations giving rise to a supply by way of a transaction involving reciprocal obligations between the parties.
- Paragraph 34 – “(the time of supply)” after using the UK terminology of “tax point” should be included in this paragraph as is done further on in the document.
- Paragraph 43 – In practice, it may not be rare for a deposit to be paid under a conditional contract as defined in the draft statement, i.e. where there is already a binding contract. Parties can and do sometimes choose to pay non-refundable deposits on contracts that contain conditions that must still be satisfied before there will even be a binding contract.
- Paragraph 51 – The phrase “regardless of whether the parties attempt to introduce a stakeholder relationship” in the second sentence seems inconsistent with the next sentence. Section 25 of the Goods and Services Tax Act 1985 (GST Act) would provide for a credit in this situation. This example is more complicated than stated. A better example should be used that does not give rise to such further issues.
- Paragraph 56 – Stakeholder obligations may not always be contained in a separate agreement. For example, the agreement giving rise to the supply itself may provide for the stakeholder relationship. We do not agree with the statement “the stakeholder is not accountable for his or her use of the money during the period the money is held”. Contractually this may not be the case (there may also be fiduciary obligations), and it may also contradict the comments already made in paragraph 52.
- Paragraph 57 – The first sentence could be better worded as “When a person is holding money as a stakeholder, in doing so they generally do not act as agent for either party”, because in some cases the stakeholder does act as an agent.
- Paragraph 58 – We do not consider this statement to be correct. The interest could also be held for the benefit of the person to whom the deposit is eventually released.
- Paragraphs 68 and 69 – We suggest referring to the GST definition or the focus of the GST legislation rather than the statutory definition and statutory focus.
- Paragraphs 72 to 74 – The practical relevance of this unusual case is not clear as this situation could be better explained by the requirement that a supply must actually exist and that a supply can exist where there is something less than a formal contract.

We raise a concern about the increased length and extent of legal analysis included in interpretation statements of this kind. We ask the IRD to continue focussing on the users of these documents which include not only tax practitioners, accountants, lawyers and legal executives who advise clients on these transactions, but also those taxpayers who prepare and file their own GST returns.

The wording should be kept as direct and concise as possible and using more practically focussed and relevant examples. While a certain amount of legalese and legal analysis is necessary to support the Commissioner’s views, the use of a plain English summary of what the case law means

in practice would be of assistance to taxpayers and practitioners who are using this draft statement to determine the correct GST position in their situation.

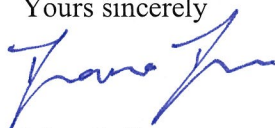
*Examples used in the draft statement*

- Example 2 should contain all the facts in the first paragraph so that the analysis in the second paragraph is not introducing or explaining further facts. In particular, the first paragraph should mention that the deposit is held by the stakeholder until the agreement becomes unconditional.
- Example 6 should be adjusted to deal with what happens in terms of triggering a time of supply when the \$500 fee to hold the date becomes a part payment towards the wedding function itself and, therefore, a payment in respect of the supply of the wedding function.

The earlier policy statement on this subject included an example relating to a payments-basis person and we think a similar example should be included in this section to explain how the time of supply rules fits with accounting basis. We appreciate the example may need to fall outside of the rule in section 19D of the GST Act.

The Society trusts these comments are helpful. If you require further assistance please do not hesitate to contact Diana Brown, the secretary of the Society's Taxation Committee, by phone (04) 463-2967 or email [diana.brown@lawsociety.org.nz](mailto:diana.brown@lawsociety.org.nz).

Yours sincerely

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Mary Jeffcoat  
**Vice President**